Whistleblower Defense Alert: Florida Court Overturns $350 Million Judgment on *Escobar*

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In February 2017, a jury in the Middle District of Florida found for a relator in an upcoding case against a nursing home operator, resulting in a total judgment of approximately $350 million. Yesterday, the presiding judge overturned this judgment, concluding that the "defendants argue persuasively that the relator failed to offer evidence of materiality, defined unambiguously and required emphatically by *Universal Health Services, Inc. v. Escobar*, 136 S. Ct. 1989 (2016)." *See United States ex rel. Ruckh v. Rehabilitation*, M.D.Fla. No. 8:11-cv-1303-T-23TBM, 2018 U.S. Dist. LEXIS 5148 (Jan. 11, 2018). The court explained that **the fact that the federal and state government continued to pay the defendants' claims after learning of the relator's allegations was fatal to the relator's case**:

[T]he relator offered no meaningful and competent proof that the federal or the state government, if either or both had known of the disputed practices (assuming that either or both did not know), would have regarded the disputed practices as material to each government's decision to pay the defendants and, consequently, that each government would have refused to pay the defendants. Not only did the relator fail to prove that the governments regarded the disputed practices as material and would have refused to pay, but the relator failed to prove that the defendants submitted claims for payment despite the defendants' knowing that the governments would refuse to pay the claims if either or both governments had known about the disputed practices. In fact, both governments were — and are — aware of the defendants' disputed practices, aware of this action, aware of the allegations, aware of the evidence, and aware of the judgments for the relator — but neither government has ceased to pay or even threatened to stop paying the defendants for the services provided to patients throughout Florida continuously since long before this action began in 2011. For these and for each of the other reasons argued by the defendants, the judgments cannot stand.

This case continues a trend of courts taking the materiality requirements of *Escobar* seriously by looking at what the government did after it learned of the allegations underlying the alleged fraud. Last

year, in *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017), the Third Circuit stated that the fact that "the Department of Justice has taken no action against Genentech and declined to intervene in this suit" was evidence that the alleged fraud was not material. Under this same logic, in *United States v. Triple Canopy, Inc.*, 857 F.3d 174, 179 (4th Cir.2017), the Fourth Circuit found that the government showed materiality where it "did not renew its contract for base security with Triple Canopy and immediately intervened in the litigation. In *United States ex rel. Harman v. Trinity Indus.,Inc.*, 872 F.3d 645 (5th Cir. 2017), the Fifth Circuit overturned a $660 million judgment concerning allegedly defective guardrails, holding that in light of the government's *"unwavering position that the [the guardrail system] was and remains eligible for federal reimbursement, Trinity's alleged misstatements were not material to its payment decisions."*

At the time of *Escobar*, defense counsel (including this firm) argued that the materiality standard articulated by the Court would be a significant barrier to recovery in a large number of FCA cases, while the government and relator's counsel celebrated that the decision recognized implied certification as viable theory and downplayed any change to the way courts would analyze materiality. Since the decision, defense counsel have been winning the argument. At some point, relator's counsel and the Department of Justice are likely to petition Congress to amend the law to relax the materiality standard. For now, however, the government and relators are being held to a real, genuine materiality standard, and it's a glorious thing.