

December 7, 2016

Eighth Circuit Considers Materiality Under the FCA Following the Supreme Court's *Escobar* Decision

On October 19, 2016, the Eighth Circuit issued one of the first post-*Escobar* opinions addressing materiality under the False Claims Act (“FCA”). In *United States ex rel. Miller v. Weston Educational, Inc.*, No. 14-1760, 2016 WL 6091099 (8th Cir., October 19, 2016), the Eighth Circuit considered a fraud in the inducement claim arising from a college’s allegedly false promise to maintain accurate records bearing on student eligibility for federal funding. The court found that the recordkeeping requirement was material because, among other things, it was expressly established as a condition of payment and there was evidence that the government actually relied on the records in assessing payment eligibility.

Attorneys
[John P. Bueker](#)
[Kirsten Mayer](#)

Background

Defendant Heritage College is a for-profit college. In order to receive federal financial assistance under the Higher Education Act of 1965, Heritage entered into an agreement with the Department of Education (“DOE”), which included a requirement to maintain accurate student records related to student eligibility for federal funds.

Relators—two former Heritage employees—filed a False Claims Act *qui tam* action against Heritage alleging it falsely induced the government to enter into the agreement by promising to comply with the recordkeeping provision. Relators alleged that Heritage had a practice of altering grades and attendance records without instructor knowledge or consent to give the false appearance that students were eligible for federal assistance. Relators also alleged under the FCA and state law that they were retaliated against after raising their concerns with Heritage. The government declined to intervene.

The district court granted summary judgment to Heritage College on all counts. On appeal, the Eighth Circuit reversed in part, finding that the recordkeeping requirement was material and that there was a triable question of fact as to whether Heritage intended not to keep accurate records at the time of entering into its agreement with DOE. *United States ex rel. Miller v. Weston Educ., Inc.*, 784 F.3d 1198 (8th Cir. 2015). The Supreme Court granted cert and vacated the Eighth Circuit decision, with instructions to revisit the decision in light of *Escobar*, which had been decided after the Eighth Circuit rendered its initial decision. *Weston Educ., Inc. v. United States ex rel. Miller*, 136 S. Ct. 2505 (2016).

The Eighth Circuit's Decision

On remand, the Eighth Circuit again reversed the grant of summary judgment, finding that Heritage’s promise to maintain student records was material to DOE’s funding decision and that there was sufficient evidence that Heritage knew its promise was false when made to warrant a trial.

As to materiality, the court reviewed *Escobar* and concluded that a false statement is material if (1) a reasonable person would likely attach importance to it, or (2) the defendant knew or should have known that the government would attach importance to it. With respect to Heritage, the court found that materiality “depends on whether Heritage’s promise to maintain accurate grade and attendance records influenced the government’s decision to enter into its relationship with Heritage.” *Id.* at 12.

Applying this standard, the court found that Heritage's promise was material. The court noted that the recordkeeping requirement was established as a condition of payment in no less than three sources of law: statute, regulation, and the agreement signed by Heritage. The court noted that, under *Escobar*, although the government designating a provision as a condition of payment is not dispositive of materiality, it is nevertheless relevant to materiality analysis. In addition, the court found that a reasonable person would attach significant importance to a promise to keep records that are "necessary to ensure funds go where they are supposed to go." *Id.* at 13. The court also noted that the government actually relies on the records to monitor regulatory compliance and terminates institutions for falsifying student records.

Although the government did not intervene, it did submit an amicus brief on materiality. The government argued that *Escobar* did not adopt a heightened materiality standard. Instead, the government characterized *Escobar* as requiring a holistic assessment of many factors relevant to materiality, including whether the requirement was a condition of payment, whether the requirement went to the "essence of the bargain," whether the violation was minor or insubstantial, and whether the government took action when it had actual knowledge of similar violations. It is not clear what impact, if any, the government's brief had on the court's decision, although the court mentions certain of the factors noted in the government's brief.

As to Heritage's knowledge of falsity, the court found that there was sufficient evidence that the promise was false when made to survive summary judgment. The court noted that in order to prove knowledge of falsity, relators were required to show that Heritage intended not to maintain the records in question at the time that it signed the agreement with DOE. The court found that relators had offered sufficient evidence to meet this burden by pointing to significant evidence of record falsification after the signing of the agreement and some evidence of falsification before. Heritage argued that none of the supposedly altered records actually impacted Title IV disbursements or refunds. But the appellate court found that this argument goes to the weight of the evidence rather than whether there was a genuine issue of material fact on knowing falsity.

Implications of the Court's Decision

It is difficult to read too much into the court's decision. Although the Supreme Court's intervening decision in *Escobar*, which requires a "rigorous" materiality analysis, did not alter the outcome of the Eighth Circuit's prior decision, the evidence offered in this case strongly suggested that the false statements in question were relevant to the government's decision to enter into the contract at issue. FCA defendants will need to await further guidance from the Eighth Circuit and other Courts of Appeal in the wake of *Escobar* to evaluate how other aspects of *Escobar's* materiality discussion – not addressed in this decision – impact the analysis in other cases and contexts.

If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our [False Claims Act](#) practice.