February 13, 2020

Tenth Circuit Affirms Demanding False Claims Act Materiality Standard

On February 7, 2020, the Tenth Circuit affirmed summary judgment for the defendant in *United States ex rel Janssen v Lawrence Memorial Hospital*, __ F.3d __ (2020). In holding that the relator had not shown that she could prove defendant's material noncompliance with the legal requirements at issue, the Court affirmed important limits on the use of the False Claims Act ("FCA") established by the Supreme Court in its 2016 *Escobar* decision.

Background

In *Janssen*, the relator alleged that Lawrence Memorial Hospital (LMH) engaged in two schemes that violated the FCA. First, she alleged that LMH falsified patient arrival times in medical records to increase reimbursement. Under CMS's Inpatient Quality Reporting program (IQR), Outpatient Quality Reporting program (OQR) and Hospital Value Based Purchasing program (HVBP), the hospital was required to report data, including arrival time data, to CMS. Hospitals that failed to submit accurate data under the IQR or OQR programs could see a reduction in their Medicare reimbursements. In addition, a hospital's performance on certain IQR measures could affect its performance score under the HVBP program, which in turn could impact its reimbursement rate. Second, she alleged that LMH falsely certified its compliance with certain Deficit Reduction Act training requirements, and that compliance was required to receive Medicare reimbursement. The District Court granted summary judgement to LMH, holding the relator had not shown she could carry her burden to prove any false LMH statements were material to the government's payment decision. Relator's appeal followed.

Escobar materiality looks at the likely effect on the recipient of the false statement

As a threshold issue, the Tenth Circuit addressed whether materiality under the FCA considers the perspective of the government recipient of the misrepresentation. In a number of cases since *Escobar*, relators have argued that it does not – that materiality is determined by considering either what a "reasonable" person would do, or what the defendant knew or had reason to know.[1] In *Janssen*, the relator took this position, arguing that *Escobar* had held that common law materiality standards applied under the FCA.

The Tenth Circuit rejected this reading of *Escobar*, specifically finding that the Supreme Court did not adopt common law materiality. Instead, *Escobar* cited the common law formulations only to provide support for the Court's statement that "under any understanding of the concept, materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar*, 136 S. Ct at 2002. Under *Janssen*, the focus of the materiality inquiry is squarely on the likely reaction of the government recipient.

Government inaction once allegations are made known is highly probative

After resolving whether the government's likely or actual response to learning of the noncompliance is highly relevant, the Court turned to the next key issue. In a number of cases since *Escobar*, relators have argued that the government's reaction to noncompliance is not relevant to materiality unless the defendant can show the government had knowledge of *actual* noncompliance – knowledge of *alleged* noncompliance is not enough. Relators have gained some traction with this argument in some recent cases.

[1] *See e.g.*, Brief of Amicus Curiae Taxpayers Against Fraud Education Fund in *US ex rel Ruckh v. Salus Rehabilitation, LLC et al*, Case No. 18-10500 (11th Cir.)

In *Janssen*, however, the Court held that at summary judgment at least, inaction in the face of detailed allegations of misconduct was sufficient. Here, CMS was made aware of relator's allegations at the outset. In the ensuing six years, CMS did nothing in response and continued to pay LMH's Medicare claims. While CMS may not have independently verified LMH's noncompliance – and thus may not have obtained knowledge of actual infractions – this inaction suggests immateriality.

Administrative procedures designed to address noncompliance are highly probative

In addition to the likely impact on the government recipient, *Escobar* considered whether compliance with the legal requirement at issue goes to the "essence of the bargain" for payment. If it does, that is evidence of materiality. In *Janssen*, the relator argued that accurate data reporting is of central importance to the effective operation of the quality and value based programs at issue.

The Tenth Circuit did not disagree, specifically noting that the need for accurate reporting is at least arguably embedded in the requirements for the program. But, rather than end the inquiry there, the Court went on to say that showing that the requirement is an important part of the program is not enough to show that compliance with the requirement goes to the "essence of the bargain" for payment. In reaching that conclusion, the Court acknowledged the context – a highly complex reporting and reimbursement environment – and noted that under such circumstances, a broad appeal to the importance of accurate reporting is not enough. The court then observed that under these programs, the government may avail itself of administrative procedures that are designed both to ensure hospitals remain in compliance and to bring them back into compliance with when they fall short. The availability of these administrative procedures was highly probative. The Court held that substantive FCA liability under these circumstances would not only undermine the administrative enforcement framework, but would turn the FCA into the kind of general purpose anti-fraud statue that the Supreme Court had rejected.

Boilerplate compliance certifications are not a trap for the unwary

Finally, Relator argued that general representations about data accuracy that LMH had made in Medicare claim forms and other signed data completeness acknowledgements constituted material false statements that gave rise to FCA liability. In rejecting this argument as well, the Court emphasized both the complexity of the Medicare reporting and reimbursement environment, and the boilerplate nature of the representations.

Key takeaways

Given the Supreme Court's apparent reluctance to take up FCA materiality again in the near term,[2] the lower courts will continue to be where the key decisions as to how FCA materiality – and thus the scope of what can be enforced using the FCA -- will be made. As cases interpreting and applying *Escobar* make their way through the courts, we will continue to monitor them carefully and watch for any consensus that may emerge on these and other key issues.

[2] The Court has denied cert on every petition seeking further clarification of the FCA materiality standard since Escobar.