The Supreme Court Is Presented With Another Split Decision And A Widening Circuit Split On Materiality Post-Escobar

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On November 20, 2018, Brookdale Senior Living Communities, Inc. filed a petition for writ of certiorari, asking the Supreme Court to resolve circuit splits that have arisen *post-Escobar*[1] regarding both the materiality and the scienter requirements in the False Claims Act (FCA). *Escobar* effectively shifted the focus in FCA cases from questions of falsity to questions of materiality – and the effects of the alleged falsity on the government's decision to pay the claims. Since *Escobar* was decided in June 2016, however, courts have been increasingly divided over how to implement the Supreme Court's cryptic guidance regarding materiality in determining whether alleged false claims violated the FCA.

Brookdale filed its petition for certiorari after the Sixth Circuit declined to reconsider *en banc* a divided panel's decision reviving, for the second time, an FCA case originally filed in 2012. Prather, who was employed by Brookdale to help address a backlog of Medicare claims, alleged that required physician certifications for home health care were obtained long after the patients had begun receiving care. These late certifications, she alleged, violated 42 C.F.R. § 424.22(a)(2), which provides that "the certification of need for home health services must be obtained at the time the plan of care is established or as soon thereafter as possible and must be signed and dated by the physician who establishes the plan," and rendered the claims for the services false under an implied certification theory.

The district court dismissed the relator's first complaint for failure to plead with particularity and failure to allege false claims. The Sixth Circuit, in a 2-1 decision, reversed in part, holding that the relator had pled two of her theories of falsity with particularity and had sufficiently alleged the submission of false claims in connection with these alleged schemes.[2] On remand, the district court allowed Prather to amend her complaint in light of *Escobar*. Brookdale again moved to dismiss on the grounds that she had failed to plead sufficiently the elements of materiality and scienter. The district court agreed and dismissed the amended complaint on materiality grounds.[3]

On June 11, 2018, over a strongly-worded dissent, the Sixth Circuit again reversed the district court's decision and reinstated the complaint.[4] As to materiality, the circuit court found that (1) §424.22(a)(2) was an express condition of payment; (2) that, without actual knowledge of the alleged noncompliance with the regulation, the government's response to the claims has no bearing on the materiality analysis; and (3) that the timing requirement is a mechanism for preventing fraud and, thus, goes "to the very essence of the bargain."[5] As to scienter, although the district court had not reached the issue, the Court of Appeals concluded that Prather had alleged facts sufficient to support the reasonable inference that Brookdale acted with "reckless disregard," engaging in only a cursory review of the records, and failing to follow up on concerns expressed regarding the process. The dissent, however, argued that the relator should have been required to explain with particularity whether or how the alleged violation would have influenced the government's payment decision, and, similarly, to allege that Brookdale knew or recklessly disregarded the possibility that the late certifications would have influenced the government's payment decisions.

1 *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016).
2 *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, (Prather I) 838 F.3d 750, 775 (6th Cir. 2016).
3 *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 265 F. Supp. 3d 782 (M.D. Tenn. 2017).
4 *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, (Prather II), 892 F.3d 822 (6th Cir. 2018).
5 *Id.* at 831-37 (citing Escobar, 136 S.Ct. at 2003 and n.5).

Brookdale argues that the majority's decision conflicts with *Escobar* and deepens the existing circuit splits over how to apply *Escobar*. The petition identifies two questions, both concerned with sufficiency in pleading an FCA case:

1. Whether the failure to plead facts relating to past government practices in an FCA action can weigh against a finding of materiality.

2. Whether an FCA allegation fails when the pleadings make no reference to the defendant's knowledge that the alleged violation was material to the government's payment decision.

With respect to the first question, Brookdale argues that the Sixth Circuit's opinion, effectively disregarding the effects of the alleged falsity on the payment decision, conflicts with First, Third, and Fourth Circuit decisions that the government's actual behavior is critical to the materiality analysis, and goes beyond the Ninth Circuit's rulings that even where the government knew of the violations and still paid the claims, the alleged falsity could still meet the standard for materiality.

As to the second question, Brookdale argues that, in not requiring allegations establishing the defendant's knowledge of materiality, the Sixth Circuit joins the D.C. and Eleventh Circuits in a split with the Fifth, Seventh, Eighth, Ninth, and Tenth Circuits, all of which require relators to plead some degree of knowledge that the falsity was material.

The Court currently has petitions for certiorari pending in two cases, in which the courts of appeals reached different results on the issue of materiality, where the government knew of the alleged falsity, but continued to pay the underlying claims. In *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890, 901 (9th Cir. 2017), the Ninth Circuit rejected Gilead's argument that the government's payments for the drug products at issue, even though the government knew that FDA requirements had been violated, established the presumption that the alleged false representations were not material. In *United States ex rel. Harman v. Trinity Industries, Inc*., 872 F.3d 645 (5th Cir. 2017), however, the Fifth Circuit reversed a $663 million verdict against Trinity Industries for defrauding the Federal Highway Administration, finding a lack of materiality where the government paid the claims even after knowing that the design for the guardrails at issue had been changed.

Moreover, in another closely-watched case, *United States ex rel. Rose v. Stephens Institute*, 901 F.3d 1124 (9th Cir. 2018), a divided Ninth Circuit panel viewed Escobar "as creating a gloss' on the analysis of materiality," without having overruled an earlier, *pre-Escobar*, opinion that "the question is merely whether the false certification . . . was relevant to the government's decision to confer a benefit." On Monday, November 26, 2018, the Ninth Circuit declined to take the case *en banc.*

With three petitions pending, all focused on the role of the government's behavior in determining the materiality of alleged regulatory violations, it has become increasingly clear that further guidance on the issue is required from the Supreme Court. Whether the Court takes up one or all three of the cases, or waits upon another presentation of these issues, the question of materiality will remain at the heart of FCA litigation for the foreseeable future.

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