Counsel's Advisory

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Court Orders Government to Produce Materiality-Related Discovery in False Claims Act Suit

by Tirzah S. Lollar[1]

On July 8, 2020, a federal district court judge ordered the government to produce discovery regarding its treatment of other Medicare providers in the so-called "mine run" of cases under *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016), when materiality is a disputed element. *United States ex rel. Goodman v. Arriva Medical, LLC, et al.*, 2020 WL 3840446 (M.D. Tenn. July 8, 2020).

Defendant Arriva Medical, LLC (Arriva) sold diabetes supplies to Medicare beneficiaries. The government intervened in a False Claims Act case filed by an Arriva employee and alleged that the defendants submitted false claims: (1) when the defendants had waived Medicare copayments and deductibles in violation of the Anti-Kickback Statute (AKS); (2) for services provided to deceased individuals; and (3) for glucose meters in violation of the "five-year rule" because Medicare had already paid for a meter for that patient in the last five years. The defendants propounded broad discovery requests to the government, seeking that it identify and provide a significant amount of information about all diabetes-testing supply providers that have offered free supplies or products to Medicare patients. The government resisted, arguing that the discovery sought was irrelevant and disproportionate to the needs of the case, and constituted an extraordinary hardship that would essentially require the government to undertake a complex and expensive investigation of every diabetes testing supplier. The magistrate judge issued an order mostly in the defendants' favor. The judge, however, limited the defendants' requests to 25 Medicare suppliers. The government subsequently filed a motion for review of the order.

The district court first determined that after the 2010 amendment to the AKS under the Affordable Care Act, "there is no contestable issue of materiality with regard to the government's AKS-based claims" and reversed the portion of the magistrate's ruling that required the government to produce discovery of treatment of Medicare providers alleged to have waived copays and deductibles. It also did not require the government to produce discovery on treatment of claims for services provided to deceased individuals, reasoning that those claims are facially false. But when it came to the claims that allegedly violated the five-year rule, the court held that discovery was appropriate. It reasoned that *Escobar* had made clear that the federal program at issue's treatment of the regulation in question is as important as the language of the relevant provisions defendants are alleged to have violated. As the court here put it, "under *Escobar*, materiality is better demonstrated in both the government's words and its deeds, rather than through its words alone."

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Because the five-year rule fit "fairly neatly into the *Escobar* mold," discovery into Medicare's actual enforcement of the rule was permissible, so long as other factors did not outweigh the relevance of the information sought. Of particular interest, the court rejected the government's argument that the materiality of the five-year rule claim was undisputed. The government argued that three Arriva executives had testified during the government's pre-intervention investigation that they understood that Medicare does not pay claims filed in violation of the rule. The government also presented Medicare claims data indicating that Arriva's claims were frequently denied on that basis. While the court found that both facts were relevant to materiality, it reasoned that they alone were insufficient to remove the issue from "the realm of dispute." Even if the cited evidence suggested that the five-year rule was being treated as relevant to *Arriva*'s claims, it did not automatically follow that Medicare behaved the same with regard to *other billers*' claims. The court pointed out that "[i]t would significantly undermine the holding of *Escobar* if the government could manufacture an illusion of indisputable materiality simply by being extra strict ahead of time with whichever company the government wished to sue."

Having found that the government would need to produce discovery on the five-year rule claims, the court directed the parties to craft a discovery plan in light of its ruling. It noted that the initial discovery requests, even absent the government's hardship concerns, were overbroad, "essentially call[ing] on the government to conduct an industry-wide audit of companies providing diabetes testing supplies to Medicare patients." The court reminded defendants that nothing in *Escobar* negated the importance of weighing relevance of materiality evidence against hardship, and simultaneously warned the government that, given its lengthy pre-suit investigation of the defendants, it bore a "heavy burden" in its attempt to argue that, when "the defendants have a turn, the government's means are too scant to cooperate."

All in all, this is a helpful decision for FCA defendants. It confirms that the government does, in fact, have to produce discovery regarding its conduct in the so-called "mine run" of cases, while also providing some insight into how this particular court viewed requests targeting such information.

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