

Sixth Circuit: Technical Physician Signature Deficiencies not "Material" to Reimbursement Claims

IN SHORT

The Decision: The United States District Court for the Middle District of Tennessee held that the timing requirements under 42 C.F.R. § 424.22(a)(2) for a physician's certification of the necessity of home health services were not "material" to Medicare's reimbursement decision, and thus the defendants' alleged misrepresentations regarding compliance with the certification-timing requirement were not actionable under the False Claims Act.

The Reasoning: The court found that although the certification-timing requirement was a "condition of payment," the relator failed to identify any examples of Medicare actually denying payment based on a violation of the certification-timing requirement, and that the certification-timing requirement did not go to the "essence of the bargain" between Medicare and the provider.

The Implications: In evaluating technical violations, such as the certification-timing requirement in *Brookdale Senior Living*, the historical actions of government payors is perhaps the most significant *Escobar* factor in determining materiality for purposes of FCA liability.

The District Court for the Middle District of Tennessee held on June 22, 2017, that the timing requirements related to a physician's certification of need for home health services were not "material" to the Centers for Medicare and Medicaid Service's ("CMS") decision to reimburse claims and, therefore, a company's alleged misrepresentations related to the certification-timing requirement were not actionable under the False Claims Act ("FCA").

Background

In 2012, the relator, Marjorie Prather, who served as a utilization review nurse at one of the defendants' companies from September 2011 until November 2012, filed a *qui tam* FCA complaint against the defendants, Brookdale Senior Living, Inc., Brookdale Living Communities, Inc., and Innovative Senior Home Health of Nashville, LLC d/b/a/ Innovative Senior Care Home Health (together, "defendants"), providers of home health care services. The relator alleged that the defendants had submitted false claims to Medicare, made false statements material to the submission of those claims, and failed to return the overpayments allegedly resulting from the false claims.

The issue before the District Court was whether the allegations in the relator's Third Amended Complaint established that the certification-timing requirement in the applicable regulations was material to CMS's payment decision.

Following remand from the Sixth Circuit, the relator filed her Third Amended Complaint ("TAC") and reasserted two of her allegations: the presentation of false claims and the failure to return overpayments, both in violation of 31 U.S.C. § 3729(a)(1). To support her TAC, the relator relied upon the defendants' alleged failure to comply with the certification-timing regulations that require physician signatures on certifications at the time the physician establishes the plan of care "or as soon thereafter as possible" ("certification-timing requirement").

In their motion to dismiss, the defendants argued that the TAC failed to plead materiality under *Escobar* because: (i) the certification-timing provisions were not conditions of payment; (ii) the TAC did not allege the government denied claims based on violations of the timing requirements; (iii) the allegations failed to establish materiality; and (iv) a violation of the certification-timing requirement did not go to the "essence of the bargain" between CMS and the defendants. The District Court evaluated the relator's TAC under an implied-false-certification theory, "upon which a [provider] may be liable for 'knowingly falsely certify[ing] that it has complied with a statute or regulation the compliance with which is a condition for Government payment.'"

The Issue

The precise issue before the District Court was whether the allegations in the relator's TAC established that the certification-timing requirement in the applicable regulations set forth at 42 C.F.R. § 424.22(a)(2) was material to CMS's payment decision.

The Outcome

The District Court held that the defendants' alleged misrepresentations regarding compliance with the Section 424.22(a)(2) certification-timing requirement were not material to CMS's payment decision and, therefore, not actionable under the FCA. The court weighed the four factors argued by the defendants against the *Escobar* materiality factors to determine if the certification-timing requirement was material.

The District Court rejected the defendants' argument that the certification-timing requirement was not an express "condition" of Medicare reimbursement, i.e., a "condition of payment." By reading the subparts of the physician-certification regulation *in pari materia* with 42 C.F.R. § 409.21 (which provides that the certification requirements of § 424.22 must be satisfied for home health services to qualify for payment under Medicare), the District Court found that compliance with the certification-timing requirement was a condition of payment "weigh[ing] somewhat in favor of a finding in favor of the relator[.]"

The District Court balanced this finding against the relator's failure to identify any examples where the government denied a claim based on a violation of the certification-timing requirement. In a Statement of Interest filed by the United States, the government argued that CMS's failure to act was relevant only where CMS approves payment with actual knowledge of the alleged misrepresentation. The United States pointed to the fact that there were no allegations in the TAC establishing that CMS was aware of the alleged violations. The District Court dismissed the government's arguments finding that the sheer volume of claims and the number of years the certification-timing requirement had been in place made "the relator's inability to point to a single instance where Medicare denied payment based on violation of § 424.22(a)(2), or to a single other case considering this precise issue," a factor "weighing strongly in favor of a conclusion that the timing requirement [was] not material."

Interestingly and although not a materiality factor considered by the Supreme Court in *Escobar*, the District Court considered the defendants' argument that the certification-timing requirement did not go to the "essence of the bargain" between the defendant home health care companies and Medicare. Although the court acknowledged that the certification of need was a "critical" part of the bargain, it found that the timing of the certification was not. Relying on "numerous CMS publications," the court found that "CMS appeared to require only that the certification be obtained prior to the submission of the claim for reimbursement at the end of the episode[.]" The plaintiffs have appealed the District Court's decision.

FOUR KEY TAKEAWAYS

1. In keeping with the *Escobar* materiality considerations, whether a regulation is a condition of payment is not automatically determinative of the regulation's materiality to Medicare's payment decision for purposes of False Claims Act liability.
2. The historical practices of CMS, including the longevity of a regulation without Medicare denials, are a factor weighing strongly in favor of finding that the particular regulation is not material to CMS's payment decision.
3. Conversely, a change in CMS's denial practices, including through post-payment denials, could weigh heavily in favor of finding the particular regulation is material to CMS's payment decision.
4. Providers should watch for changes in Medicare denial practices, particularly for technical violations such as the timing of physician signatures on certifications of need, because those changes could trigger liability under the False Claims Act.

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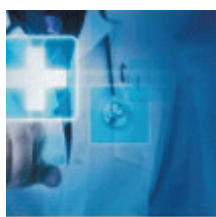
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