

US v. AseraCare: Eleventh Circuit Holds That Contradictory Clinical Judgments Alone Cannot Trigger FCA Liability

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Introduction In a long-awaited [decision](#), the Eleventh Circuit concurred with the lower court’s standard for determining falsity under the False Claims Act (FCA) — reasonable disagreement between medical experts alone is not enough to prove the falsity of a clinical assessment of terminal illness warranting hospice benefits under Medicare.

Despite overturning a grant of summary judgment for hospice chain AseraCare Inc., the opinion preserved the lower court’s decision to grant a new trial to the hospice based on faulty jury instructions. The opinion also clarified the FCA falsity standard. To prove falsity, FCA plaintiffs must show something more than the “mere difference of reasonable opinion concerning the prognosis of a patient’s likely longevity.”

Background

The AseraCare litigation originated in 2008, with an FCA suit filed by former AseraCare employees. Among the allegations were claims that AseraCare had knowingly submitted false claims to Medicare for patients who were not terminally ill. In 2012, the Department of Justice (DOJ) announced its intervention.

In 2015, the U.S. District Court for the Northern District of Alabama split the trial into two phases: one to focus specifically on the falsity requirement under the FCA, and one to focus on all other remaining issues. As part of the first phase, a jury examined medical records of about 120 patients and found that AseraCare submitted false or unsupported claims for just over 100 of them.

The trial’s second phase never took place. Instead, the court granted a new trial to AseraCare based

on improper jury instructions. Specifically, the court failed to instruct that claims cannot be false when reasonable people can disagree over whether hospice care was properly billed.

The court then granted summary judgment in favor of AseraCare, noting that “when hospice certifying physicians and medical experts look at the very same medical records and disagree about whether the medical records support hospice eligibility, the opinion of one medical expert alone cannot prove falsity without further evidence of an objective falsehood.” The DOJ appealed.

Eleventh Circuit’s Decision

The Eleventh Circuit set out to answer the question: “When can a physician’s clinical judgment regarding a patient’s prognosis be deemed ‘false’?”

1. *Objective Falsehood*

After reviewing the statutory and regulatory framework, the lower court’s record, and case law from its sister courts, the Eleventh Circuit determined that a claim cannot trigger FCA liability if the claim includes a certification, based on a physician’s reasonable clinical judgment, that the patient is terminally ill, provided that clinical judgment does not reflect an “objective falsehood.”

An objective falsehood requires “a flaw that can be demonstrated through verifiable facts,” such as:

- i. A certifying physician fails to review a patient’s medical records or otherwise become familiar with the patient’s condition before asserting that the patient is terminal;
- ii. A physician did not, in fact, subjectively believe that the patient was terminally ill at the time of certification (e.g., basing a clinical judgment on information that the physician knew, or had reason to know, was incorrect); or
- iii. When expert evidence proves that no reasonable physician could have concluded that a patient was terminally ill given the relevant medical records.

2. *Link to Specific Claims*

In remanding the case to the lower court, the Eleventh Circuit acknowledged that the government may have evidence regarding AseraCare’s practices to suggest that its certification procedures were flawed. Crucially, however, the court specified that even if questions are raised regarding a hospice’s certification process at large, the FCA plaintiff must “link this evidence of improper certification practices to the specific ... claims at issue in its case,” which is necessary to demonstrate both falsehood and knowledge. In other words, an FCA plaintiff cannot prove that an actual false claim was filed based only on a showing of general practices untethered to that claim.

Conclusion

Overall, hospices can take comfort in the court’s statement that “the FCA is an inappropriate instrument to serve as the Government’s primary line of defense against questionable claims for reimbursement of hospice benefits.” FCA plaintiffs attempting to prove falsity cannot rely on contradictory opinions based on the same medical records, but rather they must identify facts surrounding a hospice’s certification of a terminal illness that are inconsistent with the proper exercise of a physician’s clinical judgment and then link those facts to actual submitted claims.

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