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U.S. v. AseraCare and the Standard of Falsity Under the False Claims Act

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Prosecutors, defense attorneys and health care providers alike have been closely watching the *U.S. v. AseraCare* (No. 2:12-cv-00245) matter pending in the Northern District of Alabama. The *AseraCare* case relates to hospice patient eligibility and whether the government must show more than a mere difference in opinion between physicians regarding a patient's eligibility for the hospice benefit to establish the falsity element under the False Claims Act (FCA). There have been a number of significant rulings in the case.

First, the trial court granted the government's pre-trial motion and allowed the use of sampling to establish falsity and ultimately to calculate damages in the case. Then, after denying *AseraCare*'s motion for summary judgment, the court granted *AseraCare*'s pre-trial motion to bifurcate the trial into two phases. The first phase ("Phase I") required the government to prove the claim was objectively false before the trial would proceed to the second phase, in which the government would be allowed to present "pattern and practice" evidence of general corporate practices. On October 15, 2015, after an almost two-month trial on Phase I, the jury largely sided with the government and issued a verdict finding that 104 of the 121 submitted claims were "objectively" false.

But the court then announced a week later that it "committed major reversible error in the jury instructions" by failing to instruct the jury that an "objective falsehood"—and not a mere difference of opinion among physicians—is required to establish falsity under the FCA. On that same day, the court granted *AseraCare*'s oral motion for a new trial. In an opinion dated November 2, 2015, the court formally vacated the jury's verdict, granted *AseraCare*'s motion for a new trial and reopened summary judgment arguments. In the opinion, the court explained that it should have instructed the jury that a false certification does not rest on claims related to a company's corporate practice or the bad behaviors of a few employees (e.g., forged doctor signatures, billing for unperformed services or submitting claims for fictitious patients). Instead, the court should have instructed the jury that in order to prove a false certification, the government must show that the underlying medical record did not support physician certification/eligibility. The court's order reaffirms the standard that a mere difference in clinical judgment or a dispute between experts is not enough to establish falsity.¹ If the parties do in fact retry the case, they are faced with the question of whether all 121 hospice claims were objectively false—a question that originally took almost two months to try.

¹ See *U.S. ex rel. Wall v. Vista Hospice Care, Inc.*, 778 F. Supp. 2d 709, 718 (N.D. Tex. 2011) "[A] physician must use his clinical judgment to determine hospice eligibility, and an FCA complaint about the exercise of that judgment must be predicated on the presence of an objectively verifiable fact at odds with the exercise of that judgment, not a matter of subjective clinical analysis."

The court also said it will reconsider AseraCare's motion for summary judgment, but would provide the government an opportunity to "point to objective evidence in the Phase One record that the court may have overlooked that shows a particular claim was false" other than the testimony of the government's expert. By reopening summary judgment sua sponte, the court may avoid the parties' retrial of all 121 hospice claims for objective falsity.

So what at first looked like a significant trial win for the government now appears to be a victory for what many providers have long argued—you cannot demonstrate a claim is false merely because two competing experts disagree with a post hoc review of the medical records. The government has stated that the only evidence it has to demonstrate falsity are the medical records and the review of those records by its expert. The court stated that in review of the admissible evidence in Phase I, it could find "nothing more than a difference in opinion among physicians, which is insufficient to support a finding that a claim is false." The court then questioned "whether the Government, under the correct legal standard, has sufficient admissible evidence of more than just a difference of opinion to show that the claims at issue are objectively false as a matter of law."

This is a huge issue that continues to play itself out. There are lessons being learned—in real time—for both sides. The first: medical records are important and a jury, weighing the evidence from both the defendant's and the government's experts, sided strongly with the government's expert. So providers need to not view *AseraCare* as standing for the proposition that they can lay off the constant struggle to improve documentation regarding medical necessity. The second: as FCA cases have come to look more like supercharged administrative law hearings, the government should pick cases that show actual fraud, which is more than just a disagreement between experts on the contents of medical records.

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