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AseraCare Is Now A Key Case For FCA Defendants

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An Alabama federal judge, after a two-month trial and jury verdict, concluded that her jury instructions on the element of falsity were flawed and declared a mistrial. The high-profile intervened fraud case alleges that AseraCare Inc., a for-profit hospice provider, improperly billed Medicare for hospice benefits provided to individuals who were not properly certified as terminally ill. This unexpected and unusual ruling signals a key victory for FCA defendants. It also represents a complete about-face by Judge Karen O. Bowdre on this critical issue.

At the summary judgment stage, Judge Bowdre found that the difference of opinion between AseraCare's medical director and the government's expert provided a sufficient basis for the government's claim to proceed to trial on the element of falsity, declining to follow case law to the contrary. With the court's Oct. 23, 2015, declaration of a mistrial and Nov. 3, 2015, order providing that it will reconsider summary judgment, AseraCare is now a key case for defendants: Health care providers can use AseraCare to argue successfully that a differing expert opinion as to medical necessity is insufficient to plead or prove a false claim.

Court's Decision on Jury Instructions Is the Latest in a Series of Unprecedented Rulings

Judge Bowdre's highly unusual sua sponte ruling is only the latest unexpected turn of events in this closely watched FCA case. First, in denying the parties' cross-motions for summary judgment, Judge Bowdre authorized the government's use of sampling to prove liability, ruling against AseraCare's motion for partial summary judgment on the claims outside the sample reviewed by the government's expert. United States v. AseraCare Inc., 2014 WL 6879254, at *10 (N.D. Ala. Dec. 4, 2014). The use of sampling and extrapolation to establish both FCA liability and damages is a novel approach that has only recently been allowed by a handful of courts.[1] It also appears contrary to the statutory language of the FCA and the Fourth Circuit Court of Appeals recently granted an interlocutory appeal to rule on whether FCA plaintiffs can use sampling to shortcut their burden to satisfy the essential elements on a claim-by-claim basis. See Agape Senior Community Inc. v. United States ex rel. Michaels, 15-239, (4th Cir. Sept. 29, 2015), ECF 14.

Second, after ruling against AseraCare on the sampling issue, Judge Bowdre ruled for AseraCare on its motion to bifurcate the trial between falsity and the other elements of the FCA claim and all other claims.[2] Thus, the government could not present "pattern and practice" evidence of general corporate practices before the jury determined whether any of the specific claims sampled were false.[3] The court issued this unprecedented ruling over the government's vigorous opposition, rejecting the government's position with respect to the interwoven nature of the falsity and knowledge elements as part of an overall FCA scheme.[4] The court emphasized that the government was required to show that each individual claim within the sample was false, and that falsity could not be inferred by referencing general corporate practices unrelated to specific patients or claims.[5]

Accordingly, the court required the government to put on its case in two phases. The first phase, addressing falsity, began with jury selection on Aug. 3. The two-month trial involved the government introducing over 200 exhibits and soliciting the testimony of the government's expert and numerous former AseraCare employees.

The court issued the following jury instructions relating to the definition of falsity:

- "A claim is 'false' if it is an assertion that is untrue when made or used."[6]

- "Claims to Medicare may be false if the provider seeks payment, or reimbursement, for health care that is not reimbursable."[7]

Notably, the court rejected AseraCare's requested instruction that a difference in opinion regarding whether the patient was terminally ill cannot rise to an objective falsehood.[8]

Objective Falsity in Medical Necessity Cases Requires More Than a Difference of Opinion

On Oct. 19, 2015, following nine days of deliberations, the jury found that claims for 104 patients out of the 121 patient samples were objectively false. But on Oc. 23, 2015, the court sua sponte held a hearing and revisited the instructions provided to the jury. The judge concluded she had made two errors in her instructions: First, she expressed concern that she failed to instruct the jury about objective falsity or objective evidence of falsity.[9] Second, the judge stated the "bigger error I think I made was in overruling the defendant's request for an instruction that said … opinion is not enough or difference of opinion is not enough."[10] AseraCare moved for a new trial, and the judge granted the motion. The government quickly filed a motion for reconsideration, which the court promptly denied.[11] In a further twist, on Nov. 3, 2015, the court, sua sponte, issued an order stating that it will reconsider summary judgment before setting a new trial date given potential deficiencies in the government's evidence at trial.

Judge Bowdre's surprising mistrial ruling is that much more remarkable in light of her earlier decision declining to adopt such a legal standard on summary judgment. In her order denying AseraCare's summary judgment motion, Judge Bowdre considered and explicitly rejected the reasoning of United States ex rel. Geschrey v. Generations Healthcare LLC, where the district court for the Northern District of Illinois dismissed relator's complaint because it relied on a difference of clinical opinion.[12] Judge Bowdre noted that the court in Geschrey found that a difference of opinion between physicians was insufficient to support a FCA violation and acknowledged that she found the standard "appealing and logical."[13] However, the court held that the standard in Geschrey has not yet been adopted by the Eleventh Circuit and ruled that a difference of opinion between AseraCare's medical director certifying hospice eligibility and the government's export was a sufficient basis for falsity.[14]

The court concluded that the government need not provide evidence that the medical record did not or could not believe, based on his clinical judgment, that the certification of eligibility was appropriate. AseraCare moved for interlocutory appeal, seeking review of the standard for determining falsity under the FCA.[15] The court certified the

issue for interlocutory appeal, but the Eleventh Circuit declined to hear the appeal.[16]

Difference of Opinion Implications

With Judge Bowdre's declaration of a mistrial and reconsideration of summary judgment, AseraCare is now a key case for FCA defendants trying to fend off FCA claims based on an expert conducting a post hoc review of a provider's medical judgment. Given the high number of Medicare fraud cases filed in the Eleventh Circuit, the court's ruling may well have a significant limiting effect on the number of cases that are filed or allowed to proceed based on a simple difference of medical opinion or even other differences of opinion that can be important in health care FCA cases (e.g., differences of opinion regarding fair market value compensation in Stark or kickback cases).

The court's ruling, which is in accordance with Geschrey (Seventh Circuit) and district court case law from the Fifth and Ninth Circuits,[17] properly recognizes that the FCA should not expand into a "federal malpractice statute"[18] where any question regarding a health care provider's judgment constitutes a viable FCA claim. The court's ruling recognizes an important principle: Neither the U.S. Department of Justice nor a qui tam relator can satisfy his or her burden of proof by establishing that some paid expert physician conducting a post hoc review of the patient's medical records simply expresses disagreement with the treating physician's decisions.

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[1] Fourth Circuit May Address Use of Statistical Sampling in False Claims Act Actions, Latham & Watkins Client Alert Commentary, No. 1858, July 21, 2015, available at https://www.lw.com/thoughtLeadership/lw-statistical-sampling-false-claims-act.

[2] Order Granting Motion to Bifurcate, United States v. AseraCare Inc., 2:12-CV-245-KOB (N.D. Ala., May 20, 2015), ECF 298, at 1.

[3] Id. at 2–4.

[4] Id.

[5] Id. at 3.

[6] Court's Instructions to the Jury, United States v. AseraCare Inc., 2:12-CV-245-KOB (N.D. Ala., Sept. 30, 2015), ECF 440, at 11.

[7] Id.

[8] Motion for Reconsideration of Order to Grant A New Trial, United States v. AseraCare Inc., 2:12-CV-245-KOB (N.D. Ala., Oct. 26, 2015), ECF 479, at 10 (citing Trial Tr. at 6365–66 (Proposed Jury Instruction #35)).

[9] Id. at 12 (citing Trial Tr. at 7305).

[10] Id. at 12, 13–14 (citing Trial Tr. at 7305, 7307) (further elaborating that although "a difference of opinion by physicians would often be the starting point … I still think that … the government would have to have more than just the difference of opinions expressed by an expert who is, in essence, second-guessing the decision of doctors at the time").

[11] Motion for Reconsideration of Order to Grant A New Trial, United States v. AseraCare Inc., 2:12-CV-245-KOB (N.D. Ala., Oct. 26, 2015), ECF 479; Minute Entry For Proceedings Before Chief Judge Karon O. Bowdre, Denying Motion for Reconsideration, United States v. AseraCare Inc., 2:12-CV-245-KOB (N.D. Ala., Oct. 26, 2015).

[12] United States ex rel. Geschrey v. Generations Healthcare, LLC, 922 F. Supp. 2d 695, 703 (N.D. Ill. 2012) (dismissing False Claims Act claim where relator failed to allege facts "demonstrating that the certifying physician did not or could not have believed, based on his or her clinical judgment, that the patient was eligible for hospice care").

[13] Memorandum Opinion, United States v. AseraCare Inc., 2:12-CV-245-KOB (N.D. Ala., Dec. 4, 2014), ECF 268, at 15.

[14] Id. at 16.

[15] Defendants' Motion for Certification Pursuant to 28 U.S.C. § 1292(b), United States v. AseraCare Inc., 2:12-CV-245-KOB (N.D. Ala., Dec. 10, 2014), ECF 271.

[16] Order, United States v. AseraCare Inc., 2:12-CV-245-KOB (N.D. Ala., Dec. 19, 2014), ECF 277.

[17] See United States v. Prabhu, 442 F. Supp. 2d 1008, 1032 (D. Nev. 2006); United States ex rel. Frazier v. IASIS Healthcare Corp., 812 F. Supp. 2d 1008, 1017 (D. Ariz. 2011) (dismissing complaint for failing to state a claim that "physicians were performing medically unnecessary procedures for Medicare/Medicaid patients" where "[Relator] does not plead facts to support a reasonable inference that the physician knew the procedure was medically unnecessary at the time it was performed"); United States ex rel. Phillips v. Permian Residential Care Ctr., 386 F. Supp. 2d 879, 884 (W.D. Tex. 2005) (stating that the False Claims Act should not be used to call into question a health care provider's specific course of treatment and granting motion for summary judgment as to the False Claims Act claim).

[18] Phillips, 386 F. Supp. 2d at 884 (emphasizing that "courts have limited the False Claims Act from becoming a federal malpractice statute").
