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AseraCare Ruling: FCA Is Not For Differing Medical Opinions

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In a much-anticipated decision, Judge Karon O. Bowdre finally put the nail in the coffin in the U.S. Department of Justice's False Claims Act case against long-term care provider AseraCare Inc. The government's theory of fraud in the case — like so many brought against hospice providers, skilled nursing facilities and medical providers — was based entirely on a difference in medical opinion between AseraCare's treating providers and a DOJ expert. The DOJ relied on its expert's opinion to attempt to prove that AseraCare's certifications of eligibility for hospice care were "false" because the medical records did not support "a life expectancy of 6 months or less if the terminal illness runs its normal course."[1] Wisely recognizing that such a difference of opinion could not meet the FCA's element of objective falsity, the court issued a decision that may have a major impact on this critical area of FCA jurisprudence.

On March 31, 2016, the court granted summary judgment to AseraCare based on the government's failure to prove falsity. This ruling was not entirely surprising in light of the court's rulings last fall, when Judge Bowdre took the unusual step of declaring a mistrial based on her improper jury instructions on falsity[2] and sua sponte reconsidering AseraCare's summary judgment motion. (See our previous Law360 Expert Analysis piece, "AseraCare Is Now A Key Case For FCA Defendants.")

In dismissing the case, the court issued a carefully considered and emphatic opinion that opened with a fitting quote from Pascal: "Contradiction is not a sign of falsity, nor the lack of contradiction the sign of truth."[3] The court held that the government's expert evidence amounted to a mere difference in opinion, and that "contradiction based on clinical judgment or opinion alone cannot constitute falsity under the FCA as a matter of law."[4] In her words, allowing an FCA plaintiff to prove falsity by presenting a mere difference of opinion would "totally eradicate the clinical judgment required" of certifying providers.[5]

With this ruling, the Eleventh Circuit district courts join those in the Fifth, Seventh and Ninth Circuits in holding that FCA plaintiffs — even in an intervened case — cannot establish falsity by pointing to their expert's differing interpretation of clinical signs and symptoms as presented by a patient's medical records.

Court's Summary Judgment Ruling Is a Key Decision for Long-Term Care Providers Facing Enforcement Actions

In recent years, long-term care providers have experienced a marked increase in enforcement actions. FCA litigation and government investigations probing the medical necessity of treatment, allegations of upcoding, and fair market value compensation in Stark or kickback cases are now commonplace. Many of these cases rely extensively, and oftentimes exclusively, on experts who make findings or draw conclusions that are inconsistent with those made by the treating physicians or other relevant professionals.

The DOJ's strategy of attempting to expand FCA enforcement beyond objective falsity and into the realm of medical judgment has been widespread. For example, the DOJ recently intervened in three FCA lawsuits against SavaSeniorCare LLC, which operates more than 200 skilled nursing facilities as one of the nation's largest long-term care providers. The DOJ's case against Sava, in which it alleged that Sava knowingly and routinely submitted Medicare claims for medically unnecessary rehabilitation therapy services, is premised on the government's disagreement with the patients' treating physicians and Sava clinicians regarding what rehabilitation treatments should have been provided and for how long.[6] And the Sava consolidated cases are only the latest in a string of high-profile nationwide FCA suits the DOJ is pursuing against large nursing home corporations, such as HCA ManorCare and LifeCare Centers, using this same strategy of offering a different medical opinion as to lengths of stay or therapy minutes.[7]

The DOJ has also targeted other hospice centers in addition to AseraCare: In 2014, for example, the DOJ partially intervened against Evercare Hospice and Palliative Care alleging that Evercare submitted claims for medically unnecessary hospice services because, based on a post hoc review, the medical records did not "support" the physician's medical prognosis of terminal illness.[8] In each of these cases (except Sava, where the court has not yet ruled), the courts rejected motions to dismiss arguing that a difference in medical opinion is not enough to prove falsity under the FCA.[9]

Given the DOJ's track record on this issue at the pleading stage, the AseraCare court's holding that "the opinion of one medical expert alone cannot prove falsity"[10] is that much more significant. The AseraCare court recognized — even after hearing the entirety of the government's evidence during a two-month bifurcated trial — that the government's case "boils down to conflicting views of physicians about whether the medical records support AseraCare's certifications that the patients at issue were eligible for hospice care."[11] The court held that to survive summary judgment dismissal, an FCA plaintiff must "'direct the court to admissible, objective evidence ... other than [a medical expert's] testimony, that would prove falsity and show that the Government presented more evidence than merely a difference of opinion to which reasonable minds could differ."[12]

After hearing the government's evidence and "careful[ly] review[ing]" the government's briefing on the issue, the court concluded that the government "failed to point the court to any admissible evidence to prove falsity other than Dr. Liao's opinion that the medical records for the 123 patients at issue did not support the Certifications of Terminal Illness."[13] The government's briefing pointed to information separate and apart from its expert's testimony: patients' medical records, local coverage determinations and hospice guidelines.[14] But the court found this evidence insufficient as none of it was "objective evidence of falsity" because "AseraCare's medical experts, as well as the certifying physicians, also reviewed the same medical records and found that they did support the [certifications] of the patients at issue."[15]

The court wisely cautioned: “If the court were to find that all the Government needed to prove falsity in hospice provider case was one medical expert who reviewed the medical records and disagreed with the certifying physician, hospice providers would be subject to potential FCA liability any time the Government could find a medical expert who disagreed with the certifying physician’s clinical judgment. The court refuses to go down that road.”[16] Other courts hearing FCA cases premised on nothing more than a difference in clinical judgment should heed Judge Bowdre’s thoughtful warning. The FCA is not meant to function as a “federal malpractice statute”[17] where any question regarding a health care provider’s judgment constitutes a viable FCA claim.

Repercussions Beyond Long-Term Care Cases

The reasoning and holding of AseraCare carries implications for FCA cases far beyond long-term care. Health care providers face a variety of enforcement actions premised on a “battle of the experts” as to whether a particular procedure, measure of compensation or medical decision is supported by a medical record or otherwise justified. For example, government regulators have signaled recently that they are bringing renewed scrutiny to the financial relationships between health care industry members (providers, suppliers, etc.) and physicians.[18] In FCA cases focused on financial relationships, the government often attacks purported fair market value compensation arrangements by soliciting expert opinions that differ from those obtained by the participants in the financial arrangement. Defendants in these cases should utilize AseraCare to urge courts that the FCA requires plaintiffs to do more than hire an expert.

Particularly if affirmed by the Eleventh Circuit Court of Appeals, the AseraCare court’s sound reasoning should reverberate beyond the health care world. FCA cases, regardless of the alleged violation, require an “objective falsehood” — rather than a difference of opinion. See, e.g., United States ex rel. Morton v. A Plus Benefits, Inc., 139 Fed. Appx. 980, 983 (10th Cir. 2005) (“We agree that liability under the FCA must be predicated on an objectively verifiable fact.”); United States v. Southland Mgmt. Corp., 326 F.3d 669, 675 (5th Cir. 2003) (en banc) (warning against basing FCA liability on a subjective assessment of whether living conditions are “decent, safe, and sanitary”); United States ex rel. Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992) (“The phrase ‘known to be false’…does not mean ‘scientifically untrue’; it means ‘a lie.’”); Boisjoly v. Morton Thiokol, Inc., 706 F. Supp. 795, 810 (D. Utah 1988) (holding that “an engineering judgment and recommendation to NASA in regard to the implication of launching at temperatures colder than previously experienced ... [is] not a statement of fact that can be said to be true or false, and thus cannot form the basis of an FCA claim”).

This limiting principle is reinforced by the holding in AseraCare. The court’s refusal to “go down the road” of subjecting defendants to potential FCA liability without objective falsity should make it more difficult for FCA plaintiffs to survive summary judgment when merely offering an expert’s differing medical or scientific opinion.

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[1] Memorandum Opinion at 1, United States v. AseraCare Inc., No. 12-cv-00245-KOB (N.D. Ala. Mar. 31, 2016), ECF 497 (hereinafter "Summary Judgment Memorandum Opinion").

[2] Judge Bowdre concluded she had made two errors in her falsity instructions: (1) failing to instruct the jury about objective falsity and (2) overruling the defendant's requested instruction that opinion is not enough to prove falsity. Motion for Reconsideration of Order to Grant A New Trial at 12-13, United States v. AseraCare Inc., 2:12-cv-245-KOB (N.D. Ala. Oct. 26, 2015) (citing Trial Tr. at 7305, 7307), ECF 479.

[3] Summary Judgment Memorandum Opinion at 1.

[4] Id. at 7.

[5] Id. at 5.

[6] United States' Consolidated Complaint in Intervention at 40-45, ¶¶ 175-97, United States ex rel. Hayward v. SavaSeniorCare, LLC, et al., No. 3-11-cv-0821 (M.D. Tenn. Oct. 26, 2015), ECF 59; see also Press Release, Department of Justice, Government Intervenes in Lawsuits Alleging That Skilled Nursing Chain SavaSeniorCare Provided Medically Unnecessary Therapy (Oct. 29, 2015), https://www.justice.gov/opa/pr/government-intervenes-lawsuits-alleging-skilled-nursing-chain-savaseniorcare-provided.

[7] DOJ intervened in three FCA lawsuits against HCR Manorcare ("HCR"), alleging that HCR knowingly submitted claims to Medicare and Tricare for medically unnecessary rehabilitation therapy services by relying on medical expert opinions that disagree with the clinical judgments made by HCR practitioners. United States' Consolidated Complaint in Intervention at 40-47, ¶¶ 170-95, United States ex rel. Ribik v. ManorCare, Inc., et al., No. 1:09-cv-0013-CMH-TCB (E.D. Va. Apr. 10, 2015), ECF 84; see also Press Release, Department of Justice, Government Sues Skilled Nursing Chain HCR Manorcare for Allegedly Providing Medically Unnecessary Therapy (Apr. 21, 2015), https://www.justice.gov/opa/pr/government-sues-skilled-nursing-chain-hcr-manorcare-allegedly-providing-medically-unnecessary. DOJ also intervened in two FCA lawsuits against Life Care Centers of America, Inc. ("Life Care"), based on the theory that Life Care knowingly submitted claims for medically unnecessary rehabilitation therapy services by relying on medical expert opinions that contradict those of Life Care practitioners. United States' Consolidated Complaint in Intervention at 32-40, ¶¶ 133-58, United States ex rel. Martin v. Life Care Centers of America, Inc., et al., 1:08-cv-0251 (E.D. Tenn. Nov. 28, 2012), ECF 62.

There have been half a dozen large FCA settlements involving allegedly unnecessary therapy in the past two years, with several settling for over $30 million each. See, e.g., Press Release, Department of Justice, Nation's Largest Nursing Home Therapy Provider, Kindred/Rehabcare, to Pay $125 Million to Resolve False Claims Act Allegations (Jan. 12, 2016), https://www.justice.gov/opa/pr/nation-s-largest-nursing-home-therapy-provider-kindredrehabcare-pay-125-million-resolve-false; Extendicare Health Services Inc. Agrees to Pay $38 Million to Settle False Claims Act Allegations Relating to the Provision of Substandard Nursing Care and Medically Unnecessary Rehabilitation Therapy: Company Also Required to Enter Five Year Chain-wide Corporate Integrity Agreement (Oct. 10, 2014), https://www.justice.gov/opa/pr/extendicare-health-services-inc-agrees-pay-38-million-settle-false-claims-act-allegations.

[8] DOJ intervened in two FCA lawsuits against Evercare Hospice and Palliative Care ("Evercare"), alleging that Evercare knowingly submitted false claims to Medicare for patients who were not

terminally ill, by relying on medical expert opinions that disagree with the clinical judgments made by Evercare practitioners. United States of America's Consolidated Complaint in Intervention at 34-52, ¶¶ 163-241, United States ex rel. Fowler and Towl v. Evercare Hospice, Inc., et al., 11-cv-00642-PAB-BNB (D. Colo. Nov. 10, 2014), ECF 46; see also Press Release, Department of Justice, United States Intervenes in False Claims Act Lawsuits Against Evercare Hospice and Palliative Care, Now Known as Optum Palliative Care and Hospice (Aug. 28, 2014), https://www.justice.gov/opa/pr/united-states-intervenes-false-claims-act-lawsuits-against-evercare-hospice-and-palliative.

[9] Order Denying Motion to Dismiss, United States ex rel. Ribik v. ManorCare, Inc., et al., No. 1:09-cv-0013-CMH-TCB, (E.D. Va. Sept. 8, 2015), ECF 125; Order Denying Motion to Dismiss at 18-20, United States ex rel. Martin v. Life Care Centers of America, Inc., et al., No. 1:08-cv-0251 (E.D. Tenn. Sept. 29, 2014), ECF 184; Order Denying Motion to Dismiss at 19-22, United States ex rel. Fowler and Towl v. Evercare Hospice, Inc., et al., No. 11-cv-00642-PAB-BNB (D. Colo. Sept. 21, 2015), ECF 120.

[10] Summary Judgment Memorandum Opinion at 2.

[11] Id. at 1.

[12] Id. at 3.

[13] Id.

[14] Id. at 4.

[15] Id. at 7.

[16] Id. at 5-6.

[17] United States ex rel. Phillips v. Permian Residential Care Ctr., 386 F. Supp. 2d 879, 884 (W.D. Tex. 2005) (emphasizing that "courts have limited the False Claims Act from becoming a federal malpractice statute").

[18] Press Release, Department of Health and Human Services Office of the Inspector General, Fraud Alert: Physician Compensation Arrangements May Result in Significant Liability (June 9, 2015) http://oig.hhs.gov/compliance/alerts/guidance/Fraud_Alert_Physician_Compensation_06092015.pdf.