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Fraud and Compliance

Eleventh Circuit Reverses District Court's Summary Judgment Order in AseraCare While Simultaneously Adopting Defense-Friendly View of FCA Falsity

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***This Featured Article is contributed by AHLA's Health Care Liability and Litigation Practice Group.**

On September 9, 2019, the Eleventh Circuit issued its long-awaited decision in *United States v. AseraCare*, a False Claims Act (FCA) qui tam originally filed in 2008.^[1] The government alleged that AseraCare falsely certified patients as eligible for Medicare-reimbursed hospice services, which requires a physician-certified terminal diagnosis. The case eventually proceeded to the first phase of a bifurcated trial, ^[2] where the jury largely found for the government on the issue of falsity.

The central question in *AseraCare* was whether "a medical provider's clinical judgment that a patient is terminally ill [can] be deemed false

based merely on the existence of a reasonable difference of opinion between experts as to the accuracy of that prognosis." The Eleventh Circuit ultimately answered that important question in the negative, although it reversed and remanded for further consideration.

At trial, the government's expert identified patients who, in his view, were not eligible for the hospice benefit. The government argued that this expert testimony demonstrated that the patients in question were not terminally ill. Importantly, however, the government's expert "made clear that his testimony was a reflection of only his own clinical judgment based on his after-the-fact review of the supporting documentation he had reviewed," and conceded that he was "not in a position to discuss whether another physician [was] wrong about a particular patient's eligibility." And perhaps even more importantly, the government's expert "never testified that, in his opinion, no reasonable doctor could have concluded that the identified patients were terminally ill at the time of certification."

After trial, the district court *sua sponte* considered whether it should grant summary judgment in favor of AseraCare and, after giving the parties time to brief and argue the issue, did so. The main question for the district court was "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." The district court ultimately decided the answer to this question was no: "[A]fter careful review of all [the parties'] submissions and the Phase One [trial] record, . . . that the Government has failed to point the court to any admissible evidence to prove falsity other than [expert] opinion that the medical records for the 123 patients at issue did not support the Certifications of Terminal Illness that were submitted for Medicare

reimbursement." Because "[t]he Government presented no evidence of an objective falsehood for any of the patients at issue," it could not satisfy the falsity element of its FCA claim as a matter of law.

Although the Eleventh Circuit ultimately reversed and remanded, its decision contains language that is surely going to prove very useful to FCA defendants moving forward, particularly in hospice eligibility cases. For example, the Eleventh Circuit agreed "with the general sense of the legal standard embraced by the district court after the verdict," concurring with the district court's post-verdict conclusion that "physicians applying their clinical judgment about a patient's projected life expectancy could disagree, and neither physician be wrong." The Eleventh Circuit went on to hold:

It follows that when a hospice provider submits a claim that certifies that a patient is terminally ill "based on the physician's or medical director's clinical judgment regarding the normal course of the individual's illness," . . . the claim cannot be "false"—and thus cannot trigger FCA liability—if the underlying clinical judgment does not reflect an objective falsehood.

The Eleventh Circuit held that objective falsity could be shown in a variety of ways, including through evidence that the certifying physician failed to review the patient records or otherwise familiarize himself with the patient's condition before asserting that the patient was terminally ill, or where the plaintiff could prove that the certifying physician did not, in fact, subjectively believe that the patient was terminally ill at the time of certification. Moreover, the court held that "[a] claim may also reflect an objective falsehood when expert evidence proves that no reasonable physician could have concluded that a patient was terminally ill given the relevant medical records."

However, the Eleventh Circuit made clear that "a reasonable difference of opinion among physicians reviewing medical documentation *ex post* is not sufficient on its own to suggest that those judgments—or any claims based on them—are false under the FCA. A properly formed and sincerely held clinical judgment is not untrue even if a different physician later contends that the judgment is wrong." The Eleventh Circuit concluded that where an FCA plaintiff fails to "identify facts and circumstances surrounding the patient's certification that are inconsistent with the proper exercise of a physician's clinical judgment," those claims fail as a matter of law. Put simply, "the Government must show something more than the mere difference of reasonable opinion concerning the prognosis of a patient's likely longevity."

Despite agreeing with the district court's recitation of the proper standard of falsity in FCA hospice eligibility cases, the Eleventh Circuit reversed and remanded based on its conclusion that the district court should have, but did not, consider all of the evidence, "both in the trial record and the summary judgment record," in order to determine whether a triable issue existed regarding falsity.

Although it is unclear whether or not, on remand, the district court will ultimately conclude that the government presented enough evidence regarding falsity to survive summary judgment, what is clear is that the Eleventh Circuit's holding that a mere difference of reasonable opinion concerning prognosis is not enough to prove falsity under the FCA will be cited by FCA hospice defendants in summary judgment briefs for many years to come.

[1] No. 16-13004 (Sept. 9, 2019).

[2] Over the government's "vehement" objections, the district court granted AseraCare's motion to bifurcate the trial into two phases: one

phase on the falsity element of the FCA and a second on the FCA's remaining elements and the government's common law claims.

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