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Eleventh Circuit Says Difference of Opinion Does Not Establish Falsity in False Claims Act Case

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On September 9, in a setback for AseraCare but an overall win for hospice providers, the Eleventh Circuit affirmed a Northern District of Alabama decision (available at: http://media.ca11.uscourts.gov/opinions/pub/files/201613004.pdf) to grant a new trial in a False Claims Act (FCA) case against AseraCare due to an improper jury instruction on falsity.[1] The court, however, remanded the case back to the district court to reconsider its sua sponte summary judgment decision in favor of AseraCare based on the district court's unusual decision to bifurcate the trial.

Background

In *AseraCare*, the government alleged the hospice provider falsely certified that Medicare patients were entitled to hospice care because they were "terminally ill" — that is, because the patients had "a medical prognosis that the individual's life expectancy is 6 months or less."[2]

In support of its claims, the government argued that expert testimony and evidence of improper business practices demonstrated that patients in a pool of sample AseraCare patients were not, in fact, terminally ill.[3]

Over the government's objection and in an unprecedented decision, the district court bifurcated the trial, with one phase for falsity and another phase for all other elements and claims, including knowledge and scienter. During the phase one trial on falsity, the government presented expert testimony from Dr. Solomon Liao, who disagreed with AseraCare's medical experts on how to analyze life expectancy. Liao opined, based on his clinical judgment, that patients' medical records did not support AseraCare's terminal illness certifications.

As the Eleventh Circuit observed, at the conclusion of the phase one trial, the jury was asked to determine which expert's testimony was more persuasive, "with the less persuasive opinion being deemed to be false." To assist the jury, the district court instructed that a "claim is 'false' if it is an assertion that is untrue when made or used. Claims to Medicare may be false if the provider seeks payment, or reimbursement, for health care that is not reimbursable." The jury ultimately found AseraCare submitted false claims for 104 out of 123 patients.

Thereafter, however, the district court granted a new trial, concluding it gave an incorrect instruction on falsity. It explained that a proper instruction would have advised the jury that (1) falsity requires proof of an objective falsehood and (2) a mere difference of opinion is insufficient to show falsity. The court then *sua sponte* granted summary judgment in AseraCare's favor after concluding the government failed to present evidence of an objective falsehood.

Eleventh Circuit Decision

On appeal, the Eleventh Circuit agreed the jury instruction articulated an improper falsity standard, but reversed the district court's summary judgment decision.

After examining the legal requirements for reimbursement, the court found it clear "that the clinical judgment of the patient's attending physician (or the provider's medical director, as the case may be) lies at the center of the eligibility inquiry." The validity of this judgment need not be proven by the clinical information accompanying a certification; rather that documentation helps ensure the certification has a clinical basis. In other words, "the physician's clinical judgment dictates eligibility as long as it represents a reasonable interpretation of the relevant medical records."

The court acknowledged that physicians exercising their clinical judgment about a patient's life expectancy may disagree, with neither being wrong. Accordingly, when a hospice provider submits a claim certifying a patient is terminally ill, based on the physician's or medical director's clinical judgment, "the claim cannot be 'false' — and thus, cannot trigger FCA liability — if the underlying clinical judgment does not reflect an objective falsehood."

The appellate court explained that objective falsehood can be demonstrated in various ways, including where a certifying physician fails to review a patient's records or does not subjectively believe the patient is terminally ill, or where no reasonable physician could have determined the patient was terminally ill. However, a reasonable difference of opinion does not suggest a physician's clinical judgments, or claims based thereon, are false. Thus, to state an FCA claim in the hospice context, a plaintiff alleging a patient was falsely certified for care must point to "facts and circumstances" surrounding the certification "that are inconsistent with the proper exercise of a physician's clinical judgment." Without these facts or circumstances, "the FCA claim fails as a matter of law."

The Eleventh Circuit remanded the case to the district court to reconsider summary judgment, finding that the unexpected and unusual trial bifurcation prevented the government from properly classifying and presenting certain evidence. Given the "unusual circumstances" of this case, the court found that "it is only fair that the Government be allowed to have summary judgment considered based on all the evidence presented at both the summary judgment and trial stages."

Implications

Although the Eleventh Circuit's decision was a setback for AseraCare, it is a helpful development for FCA defendants. The court itself acknowledged it will likely be more difficult for plaintiffs to present evidence of objective falsehood because presenting dueling

experts with different clinical judgments will not suffice. Further, by clarifying the standard for falsity when certification is based on clinical judgment, the decision provides guidance in other cases involving medical necessity based on a clinician's subjective judgment.

This decision also illustrates that FCA plaintiffs are attempting to use new and controversial methods, such as statistical sampling, to prove liability. Although the Eleventh Circuit did not discuss its views on this issue, lower courts addressing the admissibility of statistical evidence are split.[4] Going forward, FCA defendants should be prepared to address and challenge a plaintiff's use of statistical evidence.

Endnotes

1 *United States of America v. AseraCare, Inc.*, No. 16-13004 (11th Cir. Sept. 9, 2019).

2 42 U.S.C. § 1395x(dd)(3)(A).

3 The government identified about 2,180 patients for whom AseraCare billed Medicare for at least 365 continuous days of care. The government focused on a sample of 223 patients, and, of those, its expert identified 123 patients who he opined were ineligible for Medicare's hospice benefit. The government planned to extrapolate from that sample to impose liability for a statistically valid set of further claims.

4 *See, e.g., United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, No.12-3466, 2015 U.S. Dist. LEXIS 82379, at *20-24 (D.S.C. June 25, 2015) (noting "the cases are legion on each side of the issue" and collecting cases). In *Agape*, the district court found use of statistical sampling improper, and the Fourth Circuit declined to address that ruling. *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330 (4th Cir. 2017).