

Expert Analysis

Gov't Win In AseraCare FCA Case Benefits Both Sides

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On Monday, the U.S. Court of Appeals for the Eleventh Circuit issued its decision in a closely watched False Claims Act case brought by the United States against AseraCare Inc., an operator of more than 60 hospice facilities across 19 states.

In this case, the United States alleges that AseraCare knowingly submitted false certifications stating that its hospice patients were “terminally ill” — defined by statute as having six months or less to live — in order to obtain reimbursement from Medicare. After the U.S. District Court for the Northern District of Alabama granted summary judgment in favor of AseraCare in 2016, the United States appealed.

At the center of the debate is how the government might prove that a Medicare claim for hospice services, which requires a physician’s certification of medical judgment, is false under the FCA.

Throughout the litigation, AseraCare had argued that claims accompanied by a physician certification that the patient is terminally ill can only be deemed false under the FCA if the government can establish that no reasonable physician exercising proper clinical judgment could have reached that conclusion.

In contrast, the United States argued that the cornerstone of falsity is eligibility for payment and thus a claim for hospice services could be deemed false if a physician’s certification is not supported by the medical record — a finding that should be made by a jury after hearing the government’s medical expert.

The U.S. District Court for the Northern District of Alabama sided with AseraCare, finding that, “[w]hen hospice certifying physicians and medical experts look at the very same medical records and disagree about whether the medical records support hospice eligibility, the opinion of one medical expert alone cannot prove falsity without further evidence of an objective falsehood.”[1]

The court held that the government had not provided anything more than medical expert testimony in support of its falsity allegations and granted summary judgment for AseraCare. Because it found that the element of falsity had not been met, it did not consider evidence relating to the FCA’s other required elements – knowledge/scienter, materiality, and causation.[2]

The United States appealed and, on Monday, the Eleventh Circuit issued its opinion, agreeing with the district court’s articulation of the standard for falsity, but nonetheless vacating its decision. It did so because the lower court had not considered evidence reflecting AseraCare’s knowledge when reaching its determination on the element of falsity.[3]

For example, it did not factor into its falsity determination testimony that “AseraCare had a



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deliberate practice of not giving physicians relevant, accurate and complete information about patients whose certifications for hospice the doctors were being asked to sign,” testimony from a former employee that “signing certifications had become so rote for one physician that he ‘would nod off’ while signing,” or evidence of criticism by AseraCare’s internal and external auditors regarding its certification practices.[4]

Finding this to be unfair, the Eleventh Circuit remanded for the lower court to reconsider its decision based on the entirety of the evidence. It cautioned, however, that “crucially, on remand the Government must be able to link this evidence of improper certification practices to the specific 123 claims at issue in its case.”[5]

How Did We Get Here?

The winding road that led us to Monday’s decision began with several qui tam complaints filed by whistleblowers — aka, relators — who were former AseraCare employees. The complaints alleged that AseraCare had a practice of knowingly submitting false claims to Medicare in violation of the FCA, stemming from its allegedly false representations about whether its patients were actually “terminally ill,” a requirement for hospice benefits.[6]

The government ultimately intervened in and consolidated the qui tam matters. The case proceeded and culminated in a trial — one that was quite unusual. At AseraCare’s request and over the government’s vehement objection, the district court bifurcated the trial — not into liability and damages — but into a Phase One trial focused solely on falsity under the FCA and a Phase Two trial addressing everything else.

This was a novel approach, attracting nationwide attention and, as we will discuss below, contributing to the Eleventh Circuit’s ultimate reversal and remand.

After more than seven weeks of the Phase One trial, the government emerged with a victory: The jury found, based primarily on dueling expert testimony and medical record review, that AseraCare had submitted false claims for 104 of the 123 patients presented.

The win was short-lived, however, because just one week later, the court vacated the jury’s verdict. The court concluded that it had erred in failing to instruct the jury that a reasonable difference of opinion — without more — cannot be the basis for falsity under the FCA. The court then vacated the jury verdict and reopened summary judgment proceedings sua sponte.

Ultimately, as described above, the court granted summary judgment for AseraCare, concluding that the government had not presented any evidence related to falsity beyond its testifying expert and thus had not established an “objective falsehood.”[7]

The government appealed, challenging — among other things — the district court’s understanding of falsity under the FCA. Now, two plus years after oral argument, the Eleventh Circuit Court of Appeals has weighed in.

The Crux of the Decision

First, the Eleventh Circuit agreed with the district court and concluded that, to establish falsity in this case, the government must “show something more than a mere difference of reasonable opinion concerning the prognosis of a patient’s likely longevity.”[8] It must “identify facts and circumstances surrounding the patient’s certification that are inconsistent with the proper exercise of a physician’s clinical judgment.”[9]

The decision articulates a few scenarios that might constitute an objectively false, and thus actionable, physician certification, including evidence that a physician failed to familiarize herself with the patient's medical condition before signing the certification, proof that the certifying physician did not personally believe that the patient was terminally ill and/or expert evidence that "proves that no reasonable physician" could have determined that the patient was terminally ill.[10]

Next, the court turned to the district court's post-trial grant of summary judgment for AseraCare. Though commending the district court judge for reversing her position once identifying her own "reversible error," it nevertheless critiqued the district court's overly "constricted view of the evidence." [11]

The government had offered evidence from numerous witnesses beyond its medical expert, but the district court refused to consider the testimony because the government had not specifically designated those witnesses as providing evidence of falsity — as opposed to scienter — during the discovery or trial process.

The court of appeals noted that, if credited, the testimony of these witnesses — which included former AseraCare employees testifying that AseraCare had a "deliberate practice" of not providing physicians with "relevant, accurate, and complete" information about patients — could establish that AseraCare's certification procedures "were seriously flawed." [12]

Accordingly, the court concluded that the district court's rejection of this evidence was improper, especially when the government had no indication (at the time of designation) that the court would order bifurcation of the trial. Moreover, given the district court's sudden reversal of the "conceptual underpinnings" of the case following the jury verdict, it was only fair that the government be allowed to present all of its evidence. [13]

As the Eleventh Circuit stated, "[w]hen the goalpost gets moved in the final seconds of a game, the team with the ball should, at the least, have one more opportunity to punch it into the endzone." [14] Accordingly, it vacated the district court's grant of summary judgment for AseraCare and remanded to the district court for reconsideration of its post-verdict grant of summary judgment in light of all relevant evidence, giving the government one last snap, so to speak. [15]

Who Won on Monday?

At first blush, Monday's decision is a big win for the government because it sets aside the district court's post-verdict summary judgment decision in favor of AseraCare. The district court's decision had torpedoed a successful Phase One of trial for the government and abruptly halted the government's efforts to obtain damages and penalties from AseraCare for its alleged fraud.

Yet, while the decision allows the government to live another day in the AseraCare case, it also arguably erects a hefty roadblock to the government's efforts to "punch it into the endzone."

While the government may now present all of its evidence at summary judgment and/or trial, it "must be able to link this evidence of improper certification practices to the specific 123 claims at issue in its case." [16] And more generally, to establish falsity, the government must "show something more than a mere difference of reasonable opinion concerning the prognosis of a patient's likely longevity." [17] In other words, expert testimony alone will not cut it in this case. [18] Thus, while the government may have won

the battle and earned the opportunity to continue litigating its claims, AseraCare and other FCA defendants will undoubtedly take refuge in the Eleventh Circuit's articulated falsity standard, particularly as compared to the more plaintiff-friendly decisions of Polukoff v. St. Mark's Hospital and U.S. v. Paulus.[19]

The government and relators, on the other hand, will likely focus on the hospice-specific elements of the opinion and the court of appeals direction to the lower court to consider all of the government's evidence, as well as the higher court's seeming rebuke of the district court's bifurcation of the trial.

What's Next?

The government and AseraCare will return to the district court, presumably for a renewed battle on summary judgment and possibly a new trial. The key question at summary judgment will be: Does the government have the "something more" — beyond its expert testimony in the case — that the Eleventh Circuit now requires?

As the court noted, the government, in addition to expert testimony and medical records, will likely proffer evidence from former employees, certifying physicians, and internal and external auditors to undermine the deference that this decision apparently bestows upon the certifying physician in hospice cases.

As discussed above, however, the government will have to "link this evidence ... to the specific 123 claims at issue in its case." [20] The battleground will also likely revolve around how close this "linkage" requirement must be.

Is it enough, for example, to have evidence of knowledge which is "connected in time and location to the patients"? Or, for knowledge evidence to impact falsity must it be specific to the given claim at issue?

The U.S. Court of Appeals for the Eleventh Circuit left the contours of its newly-articulated "something more" and "linkage" requirements to the district court and the parties, all but assuring there will be a few more timeouts before the government takes that final snap.

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[1] United States v. AseraCare Inc. , 176 F. Supp. 3d 1282, 1283 (N.D. Ala. 2016). The FCA requires proof that the defendant (1) made a false statement, (2) with scienter, (3) that was material, (4) causing the government to make a payment. Urquilla-Diaz v.

Kaplan Univ. , 780 F.3d 1039, 1045 (11th Cir. 2015).

[2] United States v. AseraCare Inc., No. 16-13004 , 2019 BL 336407, at *23-24 (11th Cir. Sept. 9, 2019).

[4] Id. at *23-25.

[5] Id. at *25.

[6] "Terminally ill" is defined as having "a medical prognosis that the individual's life expectancy is 6 months or less." 42 U.S.C. § 1395x(dd)(3)(A). To receive hospice benefits under Medicare, a physician must certify that the patient is "terminally ill ... based on the physician's or medical director's clinical judgment regarding the normal course of the individual's illness." 42 U.S.C. § 1395f(7)(A). The certification must be accompanied by "[c]linical information and other documentation that support the medical prognosis," and such support "must be filed in the medical record with the written certification." 42 C.F.R. § 418.22(b)(2). An initial certification is valid for 90 days and similar recertifications must be obtained every additional 60- or 90-day period in which the patient remains in hospice. 42 U.S.C. § 1395f(7)(A).

[7] United States v. AseraCare Inc. , 176, F. Supp. 3d 1282, 1286 (N.D. Ala. 2016).

[8] United States v. AseraCare Inc., No. 16-13004, 2019 BL 336407, at *9 (11th Cir. Sept. 9, 2019).

[9] Id.

[10] Id.

[11] Id. at *22-23.

[12] Id. at *25.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id. at *18.

[18] An expert testifying that no reasonable physician could have concluded that the patient was terminally ill at the time of the certification could potentially suffice on its own for falsity; in this case, however, the government's expert did not testify to that. AseraCare Inc., 2019 BL 336407, at *8.

[19] United States ex rel. Polukoff v. St. Mark's Hospital , 895 F.3d 730 (10th Cir. 2018); United States v. Paulus , 894 F.3d 267 (6th Cir. 2018).

[20] AseraCare Inc., 2019 BL 336407, at *25.