Key Ruling In False Claims Act Case Could Have Important Implications For Defendants

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A recent decision of a United States District Court in Alabama may signal that the playing field traditionally dominated by the government will no longer be so one-sided against providers defending against False Claim Act ("FCA") claims. In *United States v. AseraCare Inc.*, No. 2:12-CV-00245-KOB (N.D. Ala. June 25, 2015) (the "Reconsideration Order"), the Northern District of Alabama affirmed its previous grant of AseraCare's request for bifurcation, ordering the trial to be conducted in two phases: one phase on the falsity element of the government's FCA claim, and a second phase on the other elements of the FCA claim and all other claims. That is, the government must first prove an "objective falsehood" in the claims submitted by the defendant before being able to present evidence that the defendant acted knowingly. *See Reconsideration Order*, pg. 1. In bifurcating the trial, the district court acknowledged the inherent prejudice, jury confusion, and waste of resources caused by allowing the government to present evidence of general corporate practices unrelated to specific patients before a determination has been made as to whether the claims in question are, in fact, false claims. *Id.* at 5.

The Hospice Care Benefit Under Medicare Part A

The *Aseracare* case involves hospice care, a benefit under Medicare Part A. The Medicare Hospice Benefit is administered by the Centers for Medicare & Medicaid Services (CMS) on behalf of the Department of Health and Human Services. The Medicare Hospice Benefit pays a predetermined fee, based on the type of care provided by the hospice provider, for each day an eligible patient receives hospice care. To be eligible for hospice care under Medicare, "an individual must be . . . (a) [e]ntitled to Part A of Medicare; and (b) [c]ertified as being terminally ill in accordance with § 418.22." 42 C.F.R. § 418.20.

Per the regulations, patients must be certified as terminally ill before CMS will pay the provider for hospice care. To qualify for the Medicare Hospice Benefit, "the individual's attending physician . . . and . . . the medical director . . . of the hospice program providing . . . the care, [must] each certify in writing at the beginning of the period, that the individual 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(a)(7)(A)(i). A patient is considered to be "terminally ill" if the patient has a medical prognosis of life expectancy of six months or less. 42 U.S.C. § 1395x.

After the patient is certified as eligible and has received hospice care, the provider submits a claim for the hospice services it provided the patient to CMS a the Medicare Administrative Contractor (MAC). The MAC processes Medicare Hospice Benefit claims for CMS and determines whether to pay or deny the claim for the Medicare Hospice Benefit.

United States v. AseraCare Inc.

In *AseraCare*, patients referred for hospice care were initially evaluated and certified by their attending physician and AseraCare's hospice medical director. *United States v. AseraCare Inc.*, No. 2:12-CV-245-KOB, 2014 U.S. Dist. LEXIS 167970, at *7 (N.D. Ala. Dec. 4, 2014). The AseraCare medical director often relied on nurses and other staff for initial and recertification eligibility determinations, sometimes making the initial certifications by telephone based upon patient

information verbally communicated by AseraCare nurses instead of the physical medical file. *Id.*

The relators (and the government) alleged that AseraCare schemed to defraud Medicare by coercing its employees to interpret medical records liberally so that AseraCare could submit hospice claims for borderline patients. *Id.* at *1-2. Specifically, the government alleged, among other things, that the certification of terminal illness for many patients signed by AseraCare's medical director was unsupported, and that the submission of those claims for payment satisfied the falsity element under the FCA. *Id.* at *14. To support those allegations, the relators and the government pointed to purportedly objective information in patient medical records, as well as testimony from the government's paid expert. *Id.* at *14-15. Notably, the district court acknowledged that the government expert's testimony regarding his review of the medical records in question was the only evidence of the falsity element, and that it was undisputed the expert could not say any physicians were wrong when they certified patients as terminally ill. *Id.* at *14.

AseraCare urged the district court to grant summary judgment as to the government's claims based on the purported false certifications and adopt the standard and reasoning of another district court in *U.S. ex rel. Geschrey v. Generations Healthcare, LLC*, 922 F. Supp. 2d 695, 695 (N.D. Ill. 2012), where the court found, under very similar facts, that a simple difference of opinion between healthcare providers was insufficient to support a FCA claim. AseraCare argued that because the government failed to provide evidence that its medical director did not or could not believe, based on his clinical judgment, that the certifications in question were appropriate, the government had failed to meet its evidentiary burden. *Id.* at *15. The district court in Alabama recognized that the Geschrey standard was "appealing and logical," noted that the FCA required "proof of an objective falsehood" to show falsity, and implied that the evidence presented by the government was of doubtful credibility. *Id.* Nonetheless, the district court declined to follow the Geschrey standard and instead denied AseraCare's motion, ruling that the mere difference of opinion between the medical director and the government's expert provided the basis for the government's otherwise dubious claims to proceed. *Id.* The Eleventh Circuit Court of Appeals denied AseraCare's request for interlocutory appeal.

Prior to trial, AseraCare moved the district court to bifurcate the trial into two phases: one phase on the falsity element of the government's FCA claim, and a second phase on the other elements of the FCA claim and all other claims. *United States v. AseraCare Inc.*, No. 2:12-CV-00245-KOB (N.D. Ala. May 20, 2015) (the "Bifurcation Order"). AseraCare argued that if the trial was not bifurcated it would be prejudiced by the government's conflation of the falsity and knowledge elements, the jury would be confused, and the trial would be longer if the government presented "pattern and practice" evidence of general corporate practices before the jury determined whether any of the specific claims sampled were false. *Bifurcation Order*, pg. 2. The government objected to bifurcation on the basis that it should be permitted to present evidence of the company's purported practice of not giving physicians relevant, accurate and complete information about a patient when asking the doctor to sign the certification. *Id.* The government also claimed that the falsity and knowledge elements of a FCA claim are interwoven and cannot be tried separately because AseraCare's knowledge of the scheme to submit false claims is evidence itself that the claims were false. *Id.* pg. 3. Finally, the government claimed bifurcation would not economize the litigation because of the duplication of evidence and witnesses required to show both falsity and knowledge. *Id.*

In ordering the trial to be bifurcated, the district court held that the government's position with respect to the interwoven nature of the falsity and knowledge elements of a FCA claim, along with its purported need to establish falsity through evidence of knowledge, was without merit as it amounted to an argument that the existence of a scheme proves the falsity of the claims. *Id.* The court also noted that the government was required under the law to show that each claim within the sample was false – a requirement that cannot be inferred by reference to general corporate practices unrelated to specific patients or claims. *Id.* The court also found that any concern the government raised related to the potential duplication of evidence did not outweigh the likely prejudice to AseraCare and confusion of the jury in the event the trial was not bifurcated. *Id*.

The government subsequently moved the court to reconsider its Order, stating it "strongly object[ed]" to the court's ruling, and repeating essentially the same arguments. *See United States v. AseraCare Inc.,* No. 2:12-CV-00245-KOB (N.D. Ala. June 10, 2015) (the "Motion for Reconsideration," pg. 2). The government also noted that no court had ever bifurcated the elements of false claims liability because they are not "so distinct and separable that they may be tried without

injustice." *Id.* The court was unpersuaded, however, noting that no district court has held a trial in a case involving similar facts, and that bifurcation was not inappropriate simply because it had never been done before. *See Reconsideration Order*, pg. 3. As a result, the government's motion for reconsideration was denied.

Importance of the Bifurcation Ruling

The AseraCare decision has the potential to provide FCA defendants with a strong weapon against the government's usual tactic of focusing on evidence suggesting the provider was engaged in a fraudulent scheme to cast the provider in a negative light and then presenting their expert's review of specific claims. Because of the wide latitude courts have to make decisions related to the manner in which a case is tried, the Northern District of Alabama's Order bifurcating the trial of FCA claims should stand, and the government will be required to present evidence that the claims were objectively false without evidence concerning general company practices unrelated to the individual claims. As a result, AseraCare will be able to rebut the government's evidence of falsity, including presenting its own experts to argue that the government's expert got it wrong or that reasonable minds could disagree on whether the medical record supports the diagnosis *prior* to any discussion of general company practices unrelated to the claims in question. Such a change in the traditional dynamic of how the government is required to prove its claims in FCA cases – if adopted by other courts - will help to establish fairness in a process where the deck has traditionally been stacked against the provider.

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