



Health Care / Health Care Litigation ADVISORY ■

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Update on the *AseraCare* False Claims Act Litigation – A Win for AseraCare and Health Care Providers

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In November 2015, we published a [client advisory](#) on the closely watched *AseraCare* litigation and its potential impact on the falsity element under the False Claims Act (FCA). *AseraCare* involves allegations that a hospice admitted patients who were not eligible for the Medicare hospice benefit and examines whether the government must show more than a mere difference between physicians' opinions regarding a patient's eligibility to establish falsity under the FCA. The court made a number of significant rulings—the most notable was in October of last year when it reopened summary judgment arguments and vacated a jury award that sided with the government. The court determined it "committed major reversible error in the jury instructions" by failing to instruct the jury that an "objective falsehood"—and not a mere difference of opinion among physicians—is required to establish falsity under the FCA.

On March 31, 2016, the court granted summary judgment in favor of AseraCare, finding that "contradiction based on clinical judgment or opinion alone cannot constitute falsity under the FCA as a matter of law." In reopening summary judgment arguments, the court afforded the government an opportunity to highlight its admissible, objective evidence, other than its expert's testimony, that would prove falsity and show that it presented evidence of more than merely a difference of opinion between each party's physicians. The court determined that the government's evidence still only pointed to conflicting expert opinions that the medical records for the 123 patients at issue did not support the certifications of terminal illness (COTIs). AseraCare's medical experts, as well as the physicians who initially certified the patients as being eligible for the Medicare hospice benefit, reviewed the same medical records and found that the records did support the COTIs of the patients at issue. As a result, the court granted summary judgment in favor of AseraCare, noting that "when two or more medical experts look at the same medical records and reach different conclusions about whether those medical records support the certifying physicians' COTIs, all that exists is a difference of opinion. This difference of opinion among experts regarding the patients' hospice eligibility alone is not enough to prove falsity...."

The *AseraCare* decision affirms what many believe is the correct standard for falsity under the FCA—evidence of objective falsehood, rather than a mere difference of opinion among experts—and is a win for providers. With the good news, however, comes a warning: providers need to ensure that robust documentation of medical necessity remains a top compliance priority in order to mitigate risks associated with retrospective review of eligibility for services.

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