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Client Alert

Government Matters

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AseraCare Saga Illustrates the Importance of Internal Compliance

On September 9, 2019, the Eleventh Circuit issued a highly anticipated opinion addressing the critical question of when Medicare claims for reimbursement (in this case, claims for hospice care) can be considered "false" under the federal False Claims Act (FCA).[1] Importantly, the decision could be viewed as a victory for health care providers because it established limitations on the government's ability to argue that a Medicare claim is false based on the allegedly flawed clinical judgment of the physician responsible for providing or certifying to the necessity of the care billed to the government.

In *AseraCare*, the government alleged that the defendants falsely certified patients as eligible for hospice care based on erroneous clinical determinations by physicians that the patients were terminally ill. To prove that defendants' certifications were false, the government relied on the opinion of its own expert witness, who concluded that the majority of the patients whose records the expert reviewed were ineligible for hospice because the patients were not terminally ill as required by Medicare.[2]

Significantly, the court held that when a physician's clinical judgment required for billing purposes is at issue, "the claim cannot be 'false'—and thus cannot trigger FCA liability—if the underlying clinical judgment does not reflect an objective falsehood."[3] The court explained 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."[4] In practice, this means that the government cannot simply employ its own clinical expert to review a batch of past claims, obtain an expert opinion that conflicts with the original certifying clinical judgment, and then—without more—expect to make it past a motion for summary judgment on the theory that the claims were "false" under the FCA.

Instead, the government must have evidence that the underlying clinical judgment justifying the billing was objectively false. In the case of hospice care where a physician must certify that a patient is terminally ill to qualify

for Medicare reimbursement, "[w]here . . . a certifying physician fails to review a patient's medical records or otherwise familiarize himself with the patient's condition before asserting that the patient is terminal, his ill-formed 'clinical judgment' reflects an objective falsehood. The same is true where a plaintiff proves that a physician did not, in fact, subjectively believe that his patient was terminally ill at the time of certification. 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."[5]

These constraints on the government's ability to prove falsity under the FCA are important. But it would be a mistake for providers to think that they can rely only on the correctness of a physician's clinical judgment, and neglect to put in place an adequate compliance program that addresses issues including sufficient procedures and documentation, potential issues with respect to compensation incentives, and auditing and monitoring of claims.

Given that the Eleventh Circuit's opinion was issued this month, one of the most interesting sentences in the opinion is, "The underlying case began in 2008, when three former AseraCare employees, acting as *qui tam* relators, filed a complaint against AseraCare alleging submission of unsubstantiated hospice claims."[6] The case has therefore been pending for **eleven years**. And a dogged Department of Justice has pursued the case through investigation, trial, and appeal. There is no doubt that the government's pursuit of the case, like many other past and ongoing matters, was at least partially driven by what the government perceived as deficiencies in the company's internal practices affecting certification for government reimbursement.

The old saying remains true that an ounce of prevention can be worth a pound of the cure. The *AseraCare* opinion is significant because it reaffirms the importance of a physician's underlying clinical judgment in determining eligibility for care and reimbursement. But companies would do well to remember that the government will remain focused on the presence or absence of genuine compliance efforts in exercising its enforcement discretion.

[1] *United States v. AseraCare, Inc.*, No. 16-13004, 2019 WL 4251875 (11th Cir. Sept. 9, 2019).
[2] *Id.* at *1, *4.
[3] *Id.* at *14.
[4] *Id.* at *15.
[5] *Id.*
[6] *Id.* at *3.