

The following article is about a recent court decision about false claims submitted to the Medicare Program.

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Sincerely,

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Further Update Post-AseraCare: Use of Physician Experts to Prove False Claims

AseraCare, a hospice provider, defeated allegations in a federal trial court that it knowingly submitted false claims to the Medicare Program for patients who were not terminally ill. On appeal, the Appellate Court emphasized that one physician's testimony on behalf of the government against AseraCare that contradicted physicians who certified patients for hospice care was insufficient to prove falsity under the federal False Claims Act (FCA). The Court said:

“When 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...A mere difference of opinion between physicians, *without more*, is not enough to show falsity.”

The Court rejected the idea that providers have liability for fraud any time the government can find a single medical expert who disagrees with certifying physicians' clinical judgment. The Court quoted Blaise Pascal in this regard: “Contradiction is not a sign of falsity, nor the lack of contradiction the sign of truth [*United States v. AseraCare, Inc.*, 938 F.3d 1278 (2019)].”

After the Department of Justice (DOJ) appealed this decision, AseraCare settled the case with the DOJ for \$1 million. What has happened since the decision in the AseraCare case?

The U.S. Supreme Court declined to review a whistleblower case alleging that RollinsNelson, a healthcare management company, violated the False Claims Act because it submitted claims for admissions that were medically unnecessary. Like AseraCare, the key question was whether reimbursement of claims submitted to the Medicare Program can be “false” under the FCA based on after-the-fact review of medical records that contradicts the medical opinions of patients’ physicians who determined that patients met eligibility criteria. The Court rejected the ruling in AseraCare and said that the whistleblower could proceed with her claims [*Winter v. Gardens Reg’l Hosp. & Med. Ctr.*, No. 18-55020 (9th Cir. Mar. 23, 2020)].

The U.S. Supreme Court also declined to review a case on the same issue involving Care Alternatives, a hospice provider. Care Alternatives allegedly submitted false claims to the Medicare Program by admitting patients who were ineligible for the hospice benefit. The lower appellate court decided that submission of false claims may occur when experts contradict physicians’ reasoning for certifying patients for hospice care [*United States ex rel. Druding v. Care Alternatives*, No. 18-3298 (3d Cir. Mar. 4, 2020)].

Now we have another decision in the Druding case [*Druding v. Care Alternatives*, Civil Action No. 08-2126, U.S District Court for the District of New Jersey, December 15, 2021]. The U.S. Court of Appeals for the Third Circuit remanded the Druding case back to the U.S. District Court. The District Court granted summary judgment to Care Alternatives, which means that there was no dispute as to material facts and that the party asking for summary judgment was entitled to judgment as a matter of law.

The Court acknowledged that Care Alternatives “had longstanding problems with maintaining necessary and proper documentation and that it was well aware of those problems.” The Court noted that Care Alternatives provided training to staff about how to write visit notes and keep proper documentation. The Court also noted that Care Alternatives had a quality program that included periodic chart audits to help ensure that staff completed paperwork appropriately in compliance with applicable requirements, and to detect and prevent false claims.

Nonetheless, the Court said that insufficient documentation did not have the effect of inducing Medicare to pay claims or that missing and/or insufficiently documented certifications were material to the decision to pay. The Court also said that there was no evidence that Care Alternatives failed to provide appropriate hospice services to patients or that there was no medical documentation to support physicians’ hospice certifications. In

short, nothing in the record showed that the Medicare Program ever refused to pay any of Care Alternatives' claims, despite inadequate or missing supporting documentation, or when compliance was lacking.

Federal Courts continue to reach different conclusions about the key issue raised in the AseraCare case. A national standard to determine falsity under the federal FCA of claims submitted to federal and state healthcare programs is certainly needed. Until this issue is clarified, providers remain vulnerable to enforcers who utilize expert testimony to "second-guess" physicians who determine eligibility.

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