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Eli's Hospice Insider

Lawsuits: AseraCare Lawsuit Dismissal Gives Hope For Fighting Whistleblower Cases

Different medical opinions not enough to carry False Claims case, judge says.

Whistleblowers won't be raking in the large amounts of cash they likely hoped for in the potential $200 million False Claims Act lawsuit against an Alabama-based hospice chain.

Recap: Last fall, jurors in Alabama federal court found that 104 of the 121 claims they examined in the case against **AseraCare** were false (see Eli's Hospice Insider, Vol. 8, No. 12). But in an unusual move, Judge **Karen Bowdre** tossed out the judgment and ordered a new trial based on erroneous jury instructions. Then she told the **Department of Justice** to come up with proof that the case could prove false claims via "object falsity" rather than a difference of medical opinion.

Based on the DOJ being unable to present evidence other than other medical experts' opinion, Bowdre on March 31 granted summary judgment to AseraCare. "The court held that the government's expert evidence amounted to a mere difference in opinion, and that 'contradiction based on clinical judgment or opinion alone cannot constitute falsity under the FCA as a matter of law,'" **Latham & Watkins** attorneys **Anne Robinson**, **David Tolley** and **Erin Eckles** say in an analysis on the firm website.

"In her words, allowing an FCA plaintiff to prove falsity by presenting a mere difference of opinion would 'totally eradicate the clinical judgment required' of certifying providers."

"The outcome is significant because it confirms that mere difference of clinical judgment here, regarding conditions for a medical certification of hospice eligibility is not enough to show that the claims are objectively false under the False Claims Act," explains attorney **Victoria Thavaseelan** with **McDermott Will & Emery** in analysis. The decision is "a significant win for AseraCare," Thavaseelan notes.

Bottom line: "If the court were to find that all the Government needed to prove falsity in a hospice provider case was one medical expert who reviewed the medical records and disagreed with the certifying physician, hospice providers would be subject to potential FCA liability any time the Government could find a medical expert who disagreed with the certifying physician's clinical judgment," Bowdre says in the decision. "The court refuses to go down that road."

Not over: A spokesperson for the **U.S. Attorney's Office** in Birmingham told The Birmingham News that they will seek permission to appeal the judge's ruling.

"We disagree with the (judge's dismissal) order and fully expect it to be overturned on appeal," said **Jim Barger**, a Birmingham attorney who represents whistleblowers in the lawsuit, according to the newspaper.

But "with this ruling, the Eleventh Circuit district courts join those in the Fifth, Seventh and Ninth Circuits in holding that FCA plaintiffs even in an intervened case cannot establish falsity by pointing to their expert's differing interpretation of clinical signs and symptoms as presented by a patient's medical records," the Latham & Watkins attorneys point out.

"The FCA is about fraud, a lie not legitimate clinical disagreement or subjective interpretations of medical record documentation," attorney **Katie McDermott** with **Morgan, Lewis & Bockius** told the News.

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