

Eli's Hospice Insider

Lawsuits: New Court Ruling Could Make Hospices' Lives Easier

Whistleblowers may pose less of a threat under new court decision.

A ruling in the long-running whistleblower lawsuit against for-profit hospice chain **AseraCare** should cause the feds to abandon one of their favorite strategies when it comes to qui tam cases.

Background: In 2015, jurors in Alabama federal court found that 104 of the 121 claims they examined in the case against AseraCare were false. But in an unusual move, Judge **Karon 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. The feds appealed the ruling and the parties argued the case in front of the 11th Circuit Court of Appeals. Observers have been waiting on a decision in the case since last year (see Eli's Hospice Insider, Vol. 9, No. 5).

The appeals court issued its decision Sept. 9, Frisco, Texas-based AseraCare says in a release. "The Eleventh Circuit agreed with AseraCare and the District Court that a mere difference of reasonable physician's opinions on a terminal patient's prognosis will not constitute falsity under the False Claims Act," AseraCare cheers in the release. "This opinion provides comfort for the physicians who are making these difficult determinations related to terminally ill patients as well as the hospice providers who are reimbursed by Medicare for services for these patients."

The **Centers for Medicare & Medicaid Services'** own "rulemaking commentary signals that well-founded clinical judgments should be granted deference," the ruling says.

Plus: "The Court of Appeals also clarified that any other evidence presented by the government in an effort to impose False Claims Act liability must be directly linked to the claim the government contends is false," the release adds.

The case began with three qui tam relators who filed suit in 2008, note attorneys **Jonathan Diesenhaus, Peter Spivack, Michael Theis, Jennifer Brechbill,** and **Rebecca Umhofer** with firm **Hogan Lovells** in Washington, D.C., in online analysis. The DOJ sought \$202 million in fines and penalties in the case.

"The AseraCare trial featured the spectacle of two physicians giving differing opinions on whether 123 specific AseraCare patients were sufficiently 'terminally ill' so as to justify hospice services," recalls attorney **Brian Daucher** with **Sheppard Mullin** in Costa Mesa, California. "The jury was asked to choose which doctor they believed," Daucher says in online analysis.

"This holding should be the death knell for most hospice false claims cases," Daucher says. "DOJ's recent penchant for prosecution of false claims cases against hospice providers should end," he predicts.

"This instruction could have wide-ranging impact in FCA litigation," the Hogan Lovells attorneys forecast. "The court's caution may be aimed at an approach relators and the government frequently invoke in health care cases - alleging that evidence of a 'corporate scheme' and evidence of false claims can support an inference of causation and then a basis for extrapolation."

The feds can still pursue hospices with a variety of medical review programs, Daucher concedes. But some of the ruling's logic could help hospice providers in those arenas as well.

The ruling's argument against extrapolation failing to be linked to specific claims may prove useful, the Hogan Lovells attorneys expect.

Meanwhile, AseraCare must head back to court. The Sept. 9 ruling "set[s] up more litigation on the question whether

AseraCare's certifications were made in good faith," Daucher notes.