There Is No Circuit Split Over Doctors' FCA Liability

By **Matthew Gill** (May 18, 2020)

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Doctors use their judgment to make difficult decisions. Medicare and Medicaid pay doctors based on those decisions.

For instance, doctors have to diagnose their patients, and diagnosis codes are tied to payments. Then doctors have to decide if a treatment is right for their patient, considering the research, available resources and the patient. If doctors choose the wrong treatment option or don't fully document their decision, Medicare and Medicaid may not reimburse them.

Doctors may even estimate how long their patients will live (Medicare only covers hospice care for patients expected to live less than six months). These are complex decisions on which billions of taxpayer dollars depend.

But how far can whistleblowers and the U.S. government go under the False Claims Act to penalize doctors for a decision they disagree with? And, can doctors ever go from making difficult decisions that will affect their business to making unsupported decisions driven by their business?

Recent articles have argued that the U.S. Court of Appeals for the Eleventh Circuit's decision in United States v. Aseracare[1] protects doctors and prevents the government from second-guessing them.[2] Aseracare has been contrasted with decisions in other U.S. Courts of Appeals, and some commentators see a circuit split shaping up.

In reality, the courts are more united on this issue than commentators realize. What separates Aseracare is the Eleventh Circuit's focus on the role of medical experts — which will demand more from plaintiffs' experts to make a case going forward.

The False Claims Act

The U.S. Congress passed the False Claims Act[3] during the U.S. Civil War to combat fraud upon the Union Army. Known as the Lincoln Law because of Abraham Lincoln's support, it held military contractors responsible for submitting false claims to the government for payment.

The FCA makes it illegal for someone to overcharge the government, provide something different than what the government contracted for, underpay the government or to retain an overpayment received from the government. The FCA subjects both making false statements and creating false records to significant penalties.

It is a fraud statute, so the action must be knowing, meaning actual knowledge, or in deliberate ignorance or reckless disregard of the truth. Violators are liable for treble damages, meaning three times the funds they fraudulently received, and a $5,000 to $20,000 penalty per false claim.[4]

The FCA also permits private citizens to bring FCA enforcement actions on behalf of the government (so-called qui tam suits). Qui tam FCA actions incentivize whistleblowers who notify the government of fraud by paying them between 15% and 30% of the money recovered. That percentage depends primarily on whether the government intervened in the

case and tried the lawsuit, or whether the whistleblower proceeded himself.

False Claims and Clinical Judgments

The FCA was originally employed against military suppliers, which was the statute's focus well into the 20th century.[5] In fact, the statute was amended in 1986 to better pursue military contractors.[6] Health care enforcement under the FCA has exploded in the 21st Century.[7] Almost 90% of funds the government collected under the FCA last year came from the health care industry.[8]

Although the origins of the statute were founded on defrauding the government through the provision of inadequate goods, its expansion has presented new challenges. For example, determining whether a health care claim submitted to the government is false turns on complicated questions of medical research, experience and clinical standards. When a military contractor underdelivers supplies, or lies about whether the delivery meets an industry standard, it is easier to establish the falsehood.

Treating patients is different than delivering a product because it requires a doctor to use her judgment to decide what the best course of action is for the patient. In fact, the Medicare hospice regulations expect doctors to base their decisions "on such complex medical factors as patient history and comorbidities…."[9]

Courts have also noted: "The court is concerned that allowing a mere difference of opinion among physicians alone to prove falsity would totally eradicate the clinical judgment required of the certifying physicians."[10] Where reasonable professionals may differ on the problem, the solution and the method to correct one with the other, courts are hard-pressed to find fraud on the government fisc.

The Supposed Split

This year, several U.S. circuit courts have grappled with the proper approach to analyzing a doctor's diagnosis and treatment decisions under the FCA. On March 4, the U.S. Court of Appeals for the Third Circuit held that "a physician's expert testimony challenging a hospice certification creates a triable issue of fact for the jury regarding falsity."[11]

Then, on March 23 the U.S. Court of Appeals for the Ninth Circuit weighed in with its view, holding that the FCA contains no exception for clinical judgments and opinions.[12] Other courts have taken — according to commentators — a similar view to the Ninth Circuit.[13]

By comparison, the U.S. Court of Appeals for the Eleventh Circuit's 2019 decision in United States v. Aseracare has been characterized as giving doctors a more deferential review of their medical judgments. The Eleventh Circuit held that:
A reasonable difference of opinion among physicians reviewing medical documentation ex post is not sufficient on its own to suggest that [the original medical judgments, and therefore the claims based thereon] … are false under the [False Claims Act].[14]

Some have read Aseracare as holding that opinions and clinical judgments cannot be false under the FCA. At first glance, commentators have portrayed the courts of appeals as split on whether actions for medical judgment reimbursements are actionable.

Aseracare Examined

There is no split. Although the Eleventh Circuit appears to have been more deferential to

expert medical judgments, the Aseracare opinion is a careful analysis of the expert testimony presented in that case. The ruling carries an important lesson about expert opinions: that the plaintiff must offer an expert opinion that, not only was the defendant's determination wrong, it was so wrong that no reasonable physician could have made the decision.[15]

Three former AseraCare Inc. employees initiated a qui tam suit against Aseracare, a hospice care provider, alleging that the company routinely submitted false Medicare claims in violation of the FCA. The relators asserted that AseraCare overbilled Medicare by claiming patients were eligible for Medicare hospice benefits when they were not.

Medicare guidelines only permit payment when a patient is expected to live six months or less, but the relators claimed that Aseracare routinely submitted claims for payment for patients who would live for more than six months. The relators alleged this was done to increase the number of patients at Aseracare's 60 hospice facilities and increase Aseracare's revenue. The federal government eventually took over the suit.

At trial, the government relied on a medical expert to establish the requisite falsity under the FCA. The expert reviewed medical records to determine whether patients were eligible for hospice care. The expert opined that in his clinical judgment, he disagreed with several of the AseraCare's decisions to certify that a patient qualified for care and to request payment from Medicare.[16]

But, crucially, the expert did not testify that AseraCare's initial diagnoses were wrong, lacked foundation or that the opposing experts were wrong.[17] In opposition, Aseracare offered its own expert testimony and highlighted the fact that the plaintiff's expert had changed his own position on several of the patient's determinations.[18] In the end, the jury was left with the initial doctor (and his experts) claiming the medical decisions were justified, and the opposing expert testifying that he disagreed with them and would have made a different determination.

After the jury returned its verdict against AseraCare, the trial court concluded that the jury instructions had been wrong. The court reconsidered summary judgment, holding that "the government's proof under the FCA for the falsity element would fail as a matter of law if all the government has as evidence of falsity in the second trial is [plaintiff's expert's] opinion based on his clinical judgment and the medical records that he contends do not support the prognoses…."[19] The trial court ruled "that a mere difference of opinion between physicians, without more, is not enough to show falsity."[20]

The Importance of Experts

The government's expert in Aseracare disagreed with some of AseraCare's determinations and testified he would have reached a different outcome. [21] By relying on these opinions, the jury was tasked not with determining fraud but, rather, selecting between two different opinions on a medical issue.

On appeal, the Eleventh Circuit held that such a fine-grained review of clinical decisions is not what the False Claims Act is for. On the contrary, the court noted that, for clinical judgments to be considered false, a plaintiff would need to show more than clinical disagreement — he would have to demonstrate that "expert evidence proves that no reasonable physician could have concluded that a patient was terminally ill given the relevant medical records."[22]

Of course, the jury is free to weigh expert opinions, but without expert testimony that the clinical determination was unreasonable, courts should hesitate to put the question to the jury. Put simply, if the best testimony a plaintiff can muster is that another medical professional would have reached a different conclusion, but that the initial conclusion was reasonable, then the initial conclusion cannot be false.

The Aseracare court established a standard in line with the FCA's purpose of punishing fraud. When challenging whether a doctor's treatment plan was medically necessary, the plaintiff must put forth evidence that no reasonable doctor could have come to the conclusion the treatment was medically necessary, thus the certification must have been false. This provides guidance for experts in FCA health care cases, who must now testify not only that they disagree with the underlying medical decisions, but that no reasonable physician would have made that determination.

In fact, the expert who was the subject of the Third Circuit's recent opinion in Druding testified to exactly that.[23] Druding, like Aseracare, dealt with certifying patient's hospice eligibility. The expert examined the records of 47 patients and opined that the documents did not support a certification of need for hospice in 35% of these patients' hospice certification periods. He testified that any reasonable physician would have reached the conclusion he reached.[24]

There are good reasons for this deferential standard. Diagnosing can be complicated and many doctors manage a substantial case load. Opening up doctors to second-guessing by lay people and experts who are reviewing the written record may lead doctors to the most conservative and unremarkable treatment plans, even when their experience tells them another approach is better.

A more demanding standard will also discourage nonmeritorious lawsuits, meaning doctors can spend more time with patients and less time in court.[25] None of this is to say that doctors will be immune from government lawsuits when the Centers for Medicare & Medicaid Services or the U.S. Department of Health and Human Services suspect they are taking advantage of the system, but the high standard should discourage weak lawsuits.

Health care professionals should take heart — plaintiffs cannot use the False Claims Act to second guess clinical judgments unless their experts meet a substantial burden. Deposing and crossing plaintiffs' experts will be crucial in medical necessity cases going forward; hiring an impartial expert to review and explain the initial diagnoses will be strong affirmative evidence too. If a doctor can articulate why she made her diagnosis — including the tests, symptoms and guidelines used — she can defend against armchair whistleblowers reviewing records after the fact.

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[1] 938 F.3d 1278 (11th Cir. 2019).

[2] See. e.g., Derek M. Adams & Rosie Dawn Griffin, Ninth Circuit Follows Third Circuit's

Lead on the Falsity of Clinical Judgments (Mar. 27, 2020), https://www.feldesmantucker.com/ninth-circuit-follows-third-circuits-lead-on-the-falsity-of-clinical-judgment; Third Circuit Creates Budding Circuit Split in United States v. Care Alternatives, Ruling That "Objective Falsity" Is Not Required Under FCA, The National Law Review (Mar. 10, 2020), https://www.natlawreview.com/article/third-circuit-creates-budding-circuit-split-united-states-v-care-alternatives-ruling; Samantha P. Kingsbury, Laurence J. Freedman, Brian P. Dunphy, Eleventh Circuit Rules in AseraCare Case that Disagreements in Clinical Judgment, Without Objective Falsity, Do Not Prove Fraud Under the FCA, Mintz Insight Center (Sept. 11, 2019), https://www.mintz.com/insights-center/viewpoints/2406/2019-09-eleventh-circuit-rules-aseracare-case-disagreements.

[3] 31 U.S.C. § 3729 et seq.

4 31 U.S.C.S. § 3729.

[4] Id.

[5] James B. Helmer Jr., False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots, 81 U. Cin. L. Rev., 1271-72 (2013) (discussing reports of fraud, waste, and abuse in military contracting well into the 1980s).

[6] Id.

[7] See, e.g., Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019, Department of Justice (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019; Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015, Department of Justice (Dec. 3, 2015) ("Including this past year's $1.9 billion, the department has recovered nearly $16.5 billion in health care fraud since January 2009 to the end of fiscal year 2015 — more than half the health care fraud dollars recovered since the 1986 amendments to the False Claims Act.").

[8] Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019, Department of Justice (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.

[9] 42 CFR § 412.3(d)(i).

[10] United States v. AseraCare Inc, 176 F. Supp. 3d 1282, 1285 (N.D. Ala. 2016).

[11] United States ex rel. Druding v. Druding, 952 F.3d 89, 101 (3d Cir. Mar. 4, 2020).

[12] Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc., No. 18-55020, 2020 U.S. App. LEXIS 8986, at *6 (9th Cir. Mar. 23, 2020). See also, Murad Hussain Manvin S. Mayell Emily Reeder-Ricchetti, Is This Any Message to Send Our Medical Heroes? Second-Guessing the Clinical Judgments of Doctors on the Front Line (Mar. 27, 2020), https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2020/03/is-this-any-message-to-send-our-medical-heroes.

[13] United States v. Paulus, 894 F.3d 267 (6th Cir. 2018); United States ex rel. Polukoff v. St. Mark's Hosp., 895 F.3d 730 (10th Cir. 2018).

[14] 938 F.3d at 1297.

[15] In this way, the Third Circuit is right: the falsity determination does bleed into scienter. Druding, 952 F.3d at 100. A court may infer that if a doctor's decision was so far beyond the standard for a reasonable physician and therefore is false, then there's no chance the defendant thought it was medically necessary.

[16] 938 F.3d at 1287.

[17] Id. ("Dr. Liao made clear that his testimony was a reflection of only his own clinical judgment based on his after-the-fact review of the supporting documentation he had reviewed. He conceded that he was 'not in a position to discuss whether another physician [was] wrong about a particular patient's eligibility. Nor could he say that AseraCare's medical expert, who disagreed with him concerning the accuracy of the prognoses at issue, was necessarily 'wrong.' Notably, Dr. Liao never testified that, in his opinion, no reasonable doctor could have concluded that the identified patients were terminally ill at the time of certification.").

[18] Id.

[19] Id. at 1290.

[20] Id.

[21] Id. at 1296..

[22] Id. at 1297.

[23] Druding, 952 F.3d 89 at 94 (3d Cir. Mar. 4, 2020).

[24] Id.

[25] Those costs promise to grow in the future, as the number of Medicare beneficiaries is expected to grow from about 55 million beneficiaries today to over 80 million by 2030. See The Medicare Payment Advisory Commission, Report to Congress: Medicare Payment Policy, at 19, fig. 1-10a (Jun. 2019), http://www.medpac.gov/docs/default-source/reports/mar19_medpac_entirereport_sec.pdf.