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Hospice company AseraCare loses first round of False Claims trial

By [Lisa Schencker](#)

A jury in Alabama delivered a blow to AseraCare on Thursday in a case seeking to determine whether the hospice provider admitted **Medicare** beneficiaries who were not eligible for end-of-life care in order to pull in more dollars.

The jury examined whether individual medical records supported 121 hospice claims and found 104 of those claims to be false or unsupported, sources close to the case said Thursday. The case will now move to a second phase in which the jury will examine whether AseraCare knowingly submitted false claims. Such knowledge, or at least reckless disregard for the truth, is required to prove liability in False Claims Act cases.

The trial could leave AseraCare on the hook for \$200 million in damages, which would make it the largest False Claims Act case ever involving a hospice provider, according to one whistle-blower attorney who is closely following the case.

Attempts to reach AseraCare and its attorneys for comment were not immediately successful Thursday afternoon.

AseraCare, a subsidiary of Plano, Texas-based Golden Living, which operates in 19 states, has fought the allegations in court documents, saying, in part, that reasonable minds can differ in assessing whether a person is eligible for hospice care. Federal law requires two physicians to certify that a person is likely to live no longer than six more months before that person can be eligible for **hospice care**.

"The prognostication of death by a physician is a complex, highly variable and inexact process under the best of circumstances, a fact recognized both by Medicare and in the clinical literature," according to a brief AseraCare filed in the case.

But attorneys say Thursday's jury decision is a major victory for the government and the whistle-blowers who filed the complaint that triggered the federal investigation.

Mary Inman, a partner with Constantine Cannon who represents whistle-blowers,

noted that the jury reached its conclusion even though it was only allowed to see part of the evidence. The judge in the case made the unusual move of dividing the case into two parts—one addressing whether the claims were false, and the other whether the false claims were knowingly submitted. Normally, liability is decided in just one part of a False Claims Act case, although damages may be decided in another, Inman said.

"The deck was definitely stacked against [the government] in this trial, in that the jury was only allowed to see such a narrow sliver of the evidence, and even with that sliver, the fact that they found that the overwhelming majority of claims were false is great," Inman said.

She said she wouldn't be surprised if AseraCare chooses to settle now rather than face potential damages after the second phase of the trial.

She also said the case could cause hospice providers to change their business practices.

"It sends a very strong signal to the for-profit hospice industry that they need to be very careful in who is making their eligibility determinations, and that they're doing that in a way that complies with all of the government standards, and there's not undue influence being exerted on medical doctors and others making those determinations," Inman said.

Once beneficiaries enter hospice care they also generally must give up curative care, she noted, calling it egregious that some beneficiaries who might have benefited from curative care may have given it up for inappropriate hospice care.

But Mark Silberman, a partner at Duane Morris who has represented hospices in **fraud** investigations, said there's another potential concern when the government makes judgments about hospice eligibility after the fact. He said it's important to evaluate the decision to admit a patient to hospice with the information that was available at the time that decision was made.

"I think the worst-case scenario is that people who would benefit from hospice may not have it available because conscientious hospice providers might be concerned that the reasonableness of their decisions will be questioned, and that the consequences could be dire," Silberman said.

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