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Hospice provider AseraCare scores a win in unusual False Claims case

By [Lisa Schencker](#) | March 31, 2016

A federal judge Thursday sided with hospice care provider AseraCare in an unusual fraud case, ruling that disagreements between physicians over whether patients should be eligible for hospice care do not, by themselves, prove fraud.

Some say the decision rightly spared a hospice where physicians may have been simply trying to make the best decisions for patients. Others, however, question the judge's methods for overseeing the case, saying she failed to consider other evidence that would have bolstered the government's allegations of fraud.

The government alleged that [AseraCare](#) ⁽¹⁾ knowingly submitted false claims to Medicare for beneficiaries who were not eligible for end-of-life care based on their medical records. AseraCare, however, argued that reasonable minds can disagree whether a person is eligible for hospice care.

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longer than six months before that person is eligible for hospice care.

U.S. District Court Judge Karon Owen Bowdre agreed with AseraCare on Thursday, writing that, "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."

AseraCare, a subsidiary of Plano, Texas-based Golden Living, which operates in 19 states, praised the decision in a statement. AseraCare would have been on the hook for \$200 million in damages had it been found liable.

"AseraCare believes strongly that hospice is an important aspect of the continuum of care and is pleased that this matter has been resolved in a way that will not create needless barriers for patients who elect the Medicare hospice benefit," AseraCare said.

AseraCare facilities see about 10,000 patient admissions each year, according to court documents. Most patients are enrolled in Medicare.

The U.S. Justice Department declined to comment Thursday on the ruling or whether it will appeal the decision.

But Mary Inman, a partner at Constantine Cannon who is not involved with the case, said she believes the decision will be overturned on appeal, partly because of the highly unusual way the judge handled the case.

The judge split the case into two parts—one addressing whether the claims were false, and the other whether the false claims were knowingly submitted. Inman said that in nearly 20 years of practice, she's never seen that done in a fraud case.

That split meant the government wasn't allowed to introduce certain evidence during the first part of the trial, such as bonuses and incentives AseraCare offered to employees who could achieve certain numbers, Inman said. Now, following this decision, there will be no second part to the trial.



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"You can't just look at clinical judgment in a vacuum without zooming out to see what might have affected that medical judgment," Inman said.

Inman said it seemed as if the judge's ruling chastised the government for not providing more evidence of falsity. It was the judge, however, who said the government couldn't yet present such evidence.

The judge's decision followed a series of strange twists in the case. In October, an Alabama jury actually decided^[2] the first part of the case, ruling against AseraCare. The jury found 104 hospice claims to be false or unsupported. The judge, however, then threw out that decision, saying she had given the jury an incorrect instruction.

On Thursday, she then reached her summary judgment, finding the opposite of what the jury did.

"One of the things this case shows is just how unmanageable a case becomes when you try to slice and dice the presentation of the evidence into these neat pieces," said Ari Yampolsky, an associate attorney at Constantine Cannon who also represents whistle-blowers.

But then it's unusual for False Claims Act cases to even go to trial in the first place. Most False Claims Act cases settle because of the large amounts of money at stake. Providers found liable in such cases can face triple damages and penalties for each false claim submitted.

Mark Silberman, a partner at Duane Morris who represents hospices in audits and fraud cases, said it's not unusual for hospices to have to deal with questions about appropriate certification of patients for their services.

He, too, believes hospices shouldn't face fraud liability just because another medical professional may reasonably disagree with its certifications.

"If a medical professional says, 'Here are the criteria, and in my professional opinion, I believe this person is appropriate for hospice care,' that, I believe, should constitute a barrier to fraud prosecution," Silberman said.

In general, however, he said the trend has been to apply the False Claims Act more broadly against providers.

The case was originally brought by whistle-blowers who were AseraCare employees.

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