

# The Salcido Report: False Claims Act Public Disclosure Alert

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## When Can Opinions be “False” and Result in False Claims Act Liability: Three Circuit Courts Provide Conflicting Guidance

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### Key Points

- Recently three circuit courts have considered when opinions can be false under the FCA.
- Although the circuits disagree regarding whether plaintiff must establish “objective falsity” to assert an FCA violation, they agree that the common law provides guidance regarding when an opinion can be false under the FCA.
- Under the common law test, opinions generally should not be deemed false unless the speaker did not believe the opinion, knows facts that precludes the opinion or does not know facts that would justify the opinion.
- Courts should apply the common law test when determining whether an opinion is false under the FCA.

Although the False Claims Act (FCA), as its title indicates, requires that claims be “false,” the FCA contains no definition of falsity. Rather than define exactly what renders a claim false, courts have applied a specific analytical framework to determine whether claims are false. That is, depending upon context, a claim can be factually false or legally false. If it is legally false, it may be false because of either an express or implied false certification. Courts may also find that claims are false under a fraud in the inducement theory of FCA liability.<sup>1</sup>

But this framework does not provide guidance to determine when, if ever, opinions can be false. Congress’s failure to provide a statutory definition of falsity creates a statutory gap because representations on claims frequently call for an exercise of discretion or for representations that cannot be adjudged as true or false. For example, in one case the government contended that claims for health care services were false because the physician’s documentation to support the claim was insufficient when there was, in fact, no published standard to assess what level of documentation was sufficient.<sup>2</sup> In another, the plaintiff asserted that the defendant contractor falsely certified that it maintained vehicles in “good appearance” when there was no indication of what constituted a good appearance.<sup>3</sup> In these cases, and multiple others, courts

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ultimately addressed this statutory gap by ruling that the FCA required an objective falsehood and dismissed plaintiff's claim because plaintiff did not establish that defendant's representation was objectively false.<sup>4</sup>

Recently courts have had the opportunity to reexamine—and have split—regarding whether the FCA requires an objective falsehood. Specifically, the issue has arisen in the context of whether a physician's clinical opinion can be a false opinion under the FCA. The 11th Circuit, in *United States v. AseraCare, Inc.*,<sup>5</sup> relying upon the U.S. Supreme Court's decision in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*,<sup>6</sup> found that mere clinical disagreement is insufficient to constitute an actionable falsehood because the FCA, under these circumstances, requires the alleged falsehood to be objectively false.<sup>7</sup> Shortly thereafter, both the 3rd Circuit, in *U.S. ex rel. Druding v. Care Alternatives*,<sup>8</sup> and the 9th Circuit, in *U.S. ex rel. Winter v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*,<sup>9</sup> rejected the 11th Circuit's conclusion that the FCA required proof of "objective falsity." Both circuits believed that an "objective falsity" standard unnecessarily conflated the FCA's falsity and knowledge elements. All three circuits agreed that the common law provided useful guidance regarding whether a false opinion can be actionable under the FCA.<sup>10</sup>

The circuit courts' focus on whether the FCA requires an objective falsehood is misplaced.<sup>11</sup> In evaluating the standard courts should employ to determine whether opinions can be false under the FCA, courts should focus on the issue upon which these circuits agreed—i.e., that the common law test serves as an appropriate basis to assess the issue—and not the peripheral issue upon which they disagreed, i.e., whether the FCA requires an "objective" falsehood.<sup>12</sup> As a general matter, the common law set forth the general rule that a sincere statement of pure opinion, by itself, is not an untrue statement of material fact even if it is ultimately wrong.<sup>13</sup> Instead, generally, an opinion can only be false, in accordance with common law principles, when the person does not actually hold the opinion, utters an opinion that contains an embedded fact which is false, knows of facts that would preclude the opinion or does not know facts that would justify the opinion.<sup>14</sup> If these facts are not established, a sincere opinion cannot be false and there should be no liability under the FCA.

Knowing the standard to apply in determining when clinical opinions—or any opinions—can be actionable under the FCA is very important. Health care entities, in particular, have an affirmative statutory duty to remit known overpayments.<sup>15</sup> To discharge the duty to remit a known overpayment, they must know, in the first instance, whether an overpayment exists. For example, does an overpayment exist when reasonable experts disagree regarding a clinical opinion or is it sufficient to demonstrate that a clinical opinion is true—or, at least, not false—as long as the clinician reasonably believes the service is appropriate and there are not objectively verifiable facts at odds with the clinician's opinion regarding the appropriate course of care? Under the common law standard the Supreme Court applied in *Omnicare* and the 11th Circuit applied in *AseraCare*, there can be two or more reasonable opinions, with none of them being false or wrong. Under these circumstances, there would be no overpayment owed to the government. Alternatively, if the legal standard is a claim may be false when two reasonable clinicians disagree, a health care provider may have a duty to remit an overpayment whenever an internal audit reveals that two clinicians reasonably disagree.

Set forth below is a discussion of *Omnicare*, upon which the 11th Circuit relied in *AseraCare*, which applied the common law rules regarding when an opinion can be

false. As noted below, *AseraCare* correctly followed this approach. Finally both the 9th and 3rd Circuit decisions are addressed. The 9th Circuit's decision, in assessing a dismissal under Fed. R. Civ. P. 12(b)(6), correctly applied the common law factors regarding when an opinion can be false. It reversed the district court's dismissal because it found that relator had plausibly pled facts showing that those certifying claims did not believe their opinions and did not have a factual foundation to support their opinions. Finally, the 3rd Circuit, while invoking the common law, failed to apply it in any meaningful way, and improperly conflated the FCA's falsity and knowledge elements while professing an intent to avoid that result.

## Supreme Court's Determination in *Omnicare* Regarding When an Opinion Can Be False

Prior to the 11th, 9th and 3rd Circuits' recent consideration of when clinical opinions can be false under the FCA, the Supreme Court addressed the issue of when opinions can be false in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*.<sup>16</sup> In *Omnicare*, the Court considered whether two statements of opinion in a company's Securities and Exchange Commission (SEC) filing were untrue statements of material fact or omitted material facts necessary to make the statements not misleading.<sup>17</sup> Specifically, the company's registration statement represented that the company believed that its "contractual arrangements with other healthcare providers ... are in compliance with applicable federal and state laws."<sup>18</sup> The registration statement also stated that the company believed that its "contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients" that it serves.<sup>19</sup> The plaintiff asserted that the company's statements were materially false based upon lawsuits the government later filed against the company alleging that the company's receipt of payments from drug manufacturers violated the antikickback laws.<sup>20</sup> The plaintiff also contended that a company lawyer had warned that a particular contract "carrie[d] a heightened risk" of liability under the antikickback laws.<sup>21</sup>

The Court first addressed the general issue of when an opinion itself may constitute a factual misstatement. The Court ruled that a sincere statement of pure opinion is not an "untrue statement of material fact" even if an investor can ultimately prove the belief was wrong.<sup>22</sup> The Court found that the two statements to which plaintiff objected were pure statements of opinion, stating in essence, "we believe we are obeying the law."<sup>23</sup> Because plaintiff did not contest that the company's opinions were honestly held but only that those opinions were wrong, the Court ruled that plaintiff did not establish that the company made a false statement.<sup>24</sup>

Relying in part on common law principles, the Court provided two examples to contrast when a company's statement of pure opinion in the SEC filing can be false: (1) the speaker does not actually hold the opinion or (2) the opinion contains an embedded fact which is false.<sup>25</sup> The Court noted that the first example would apply if, for example, a person stated "I believe our marketing practices are lawful" if her own state of mind is that the company is violating the law.<sup>26</sup> The Court noted that the second example would apply if, for example, a person stated "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access" and an embedded fact—we use a patented technology—was false.<sup>27</sup>

The second issue the Court addressed concerned when an opinion may be rendered misleading by the omission of discrete factual representations. In the context of registration statements, the Court ruled that an opinion may omit material facts that renders it misleading if it leaves out material facts regarding the speaker's inquiry into or knowledge about the opinion and those facts conflict with what a reasonable investor would take from the opinion.<sup>28</sup> For example, the court noted that an opinion may omit material facts rendering it misleading if the speaker stated we "believe our conduct is lawful" but made the statement without consulting with a lawyer because a reasonable investor may understand an opinion statement to convey facts about how the speaker formed the opinion.<sup>29</sup> However, the Court noted that an opinion is not misleading if it omits some facts that cut the other way because opinions sometimes rest on a weighing of competing facts.<sup>30</sup>

The Court noted that these principles were consistent with common law. Specifically, under the common law respecting the tort of misrepresentation, an opinion may constitute a misrepresentation regarding undisclosed facts when the expression of an opinion carries with it an implied assertion that the speaker knows no facts which would preclude such an opinion and the speaker does know facts which justify it.<sup>31</sup>

Thus, collectively, the Court identified the following examples of when a person may make a "false" opinion: (1) the speaker does not actually hold the opinion (2) the opinion contains an embedded fact that is false; (3) the speaker knows facts that would preclude such an opinion; or (4) the speaker does not know facts that would justify the opinion.

### **Eleventh Circuit's Decision in *AseraCare* Applies *Omnicare's* Common Law Test**

In *AseraCare*, the 11th Circuit considered the circumstances in which a certification can be considered "false" when the hospice provider certifies that the patient is "terminally ill" and clinicians can reasonably disagree regarding whether a patient is "terminally ill."

To establish its case, the government retained an expert physician to review a sample of claims to determine whether patients admitted to the hospice were terminally ill. Upon direct review of patients' medical records and clinical histories, the government's expert opined that 123 patients from a sample were ineligible for the hospice benefit at the time the defendant received reimbursement for their care.<sup>32</sup> However, he conceded that he could not say the defendant's medical expert, who disagreed with him concerning the accuracy of the prognoses at issue, was necessarily wrong.<sup>33</sup> Moreover, the government's expert never testified that, in his opinion, no reasonable doctor could have concluded that the identified patients were terminally ill at the time of certification.<sup>34</sup>

At the conclusion of trial, after the jury had heard the government's and the hospice's expert clinicians' divergent opinions regarding whether the patients were terminally ill, the district court provided the following instruction to the jury on falsity: "A claim is 'false' if it is an assertion that is untrue when made or used. Claims to Medicare may be false if the provider seeks payment, or reimbursement, for health care that is not reimbursable."<sup>35</sup> Thus, under the court's instruction, the precise question before the jury was which doctor's interpretation of those medical records sounded more correct. In other words, in this battle of experts, the jury was to decide which expert it thought

to be more persuasive, with the less persuasive opinion being deemed a “false” opinion.<sup>36</sup>

Under the Court’s falsity instruction, the jury ultimately found that the defendant had submitted false claims for 104 of the 123 patients at issue during the relevant time period.<sup>37</sup>

Following the partial verdict in this first phase of trial, the defendant moved for judgment as a matter of law, arguing that the court had articulated the wrong legal standard in its jury instructions.<sup>38</sup> The district court agreed, noting that it “became convinced that it had committed reversible error in the instructions it provided to the jury.”<sup>39</sup> It ultimately concluded that proper jury instructions would have advised the jury of two “key points of law” that the court had not previously acknowledged: (1) that the FCA’s falsity element requires proof of an objective falsehood; and (2) that a mere difference of opinion between physicians, without more, is not enough to show falsity.<sup>40</sup> The court ultimately concluded that the only way to cure the prejudice its instruction caused was to order a new trial.<sup>41</sup>

The 11th Circuit concurred with the district court that a mere reasonable disagreement among clinicians is insufficient to establish FCA falsity. The court noted that a government witness conceded that “two doctors using their clinical judgment could come to different conclusions about a patient’s prognosis and neither be right or wrong.”<sup>42</sup> The court concluded that under these circumstances the physician’s judgment could not be false, ruling that a “properly formed and sincerely held clinical judgment is not untrue even if a different physician later contends that the judgment is wrong.”<sup>43</sup>

In reaching this conclusion, the 11th Circuit cited to and relied upon the Supreme Court’s decision in *Omnicare*.<sup>44</sup> In addition to adhering to *Omnicare*’s general principle that a properly formed and sincerely held opinion is not untrue even if a different person contends that it is wrong, the *AseraCare* court also identified essentially the same factors that could render the opinion false. For example, the court noted that the physician’s opinion can be false if the plaintiff proves that the physician did not, in fact, subjectively believe that her patient was terminally ill at the time of certification.<sup>45</sup> The physician’s opinion can also be false if it is at odds with verifiable facts such as when expert evidence proves that no reasonable physician could have concluded that a patient was terminally ill given the relevant medical records.<sup>46</sup> The physician’s opinion can also be false if the physician knows of no facts that would justify the opinion such as failing to review a patient’s medical records or otherwise familiarize herself with the patient’s condition before asserting that the patient is terminal because it fails to reflect clinical judgment.<sup>47</sup>

But the court concluded, by contrast, that a reasonable difference of opinion among physicians reviewing medical documentation ex post is not sufficient on its own to suggest that those judgments—or any claims based on them—are false under the FCA.<sup>48</sup> The court acknowledged that compelling the plaintiff to establish objective falsity “will likely prove more challenging for an FCA plaintiff” than “to find an expert witness willing to testify to a contrasting clinical judgment regarding cold medical records.” But ultimately, “if this is a problem, it is one for Congress or CMS to solve.”<sup>49</sup>

## Ninth Circuit Essentially Applies Same Common Law Test as Described in *AseraCare*

In *Winter*, relator contended that defendants submitted Medicare claims falsely certifying that patients' inpatient hospitalizations were medically necessary.<sup>50</sup> The district court ruled that to prevail, plaintiff must show that defendant knowingly made an objectively false representation "so a statement that implicates a doctor's clinical judgment can never state a claim under the FCA because 'subjective medical opinions ... cannot be proven to be objectively false'."<sup>51</sup>

The 9th Circuit reversed, ruling that Congress imposed no requirement of proving an "objective falsity" and it could not engraft that requirement on to the statute.<sup>52</sup> The court concluded that a "doctor, like anyone else, can express an opinion that he knows to be false, or that he makes in reckless disregard of its truth or falsity."<sup>53</sup>

The court noted that CMS defines a "reasonable and necessary" service as one that "meets, but does not exceed, the patient's medical need," and is furnished "in accordance with accepted standards of medical practice for the diagnosis or treatment of the patient's condition ... in a setting appropriate to the patient's medical needs and condition."<sup>54</sup> The court noted that the Medicare program trusts doctors to use their clinical judgment based on "complex medical factors," but does not give them unfettered discretion to decide whether inpatient admission is medically necessary.<sup>55</sup> "The factors that lead to a particular clinical expectation must be documented in the medical record in order to be granted consideration."<sup>56</sup>

The court noted that because Congress did not define "false or fraudulent," it would presume that Congress "incorporated the common-law definitions including the rule that a statement need not contain an 'express falsehood' to be actionable."<sup>57</sup> As to false opinions, the Court noted that under "the common law, a subjective opinion is fraudulent if it implies the existence of facts that do not exist, or if it is not honestly held."<sup>58</sup> The court noted that the FCA imposes liability for all "false or fraudulent claims" and "it does not distinguish between 'objective' and 'subjective' falsity of carve out an exception for clinical judgments and opinions."<sup>59</sup>

The court stated that the 11th Circuit's decision in *AseraCare* was not directly to the contrary.<sup>60</sup> First, it noted that *AseraCare* did not conclude that all subjective statements are incapable of falsity.<sup>61</sup> Second, *AseraCare* confined its decision to the hospice benefit which the court stated defers to whether a physician has based a recommendation for hospice treatment on a genuinely held clinical opinion whether a patient was terminally ill.<sup>62</sup>

The court concluded that a physician's certification that inpatient hospitalization was "medically necessary" can be false or fraudulent for the same reasons any opinion can be false or fraudulent. Like in *AseraCare*, the court noted that these "reasons include if the opinion is not honestly held, or if it implies the existence of facts—namely, that inpatient hospitalization is needed to diagnose or treat a medical condition, in accordance with accepted standards of medical practice—that do not exist."<sup>63</sup>

The court concluded that for purposes of Rule 12(b)(6), the relator adequately pled these factors. For example, there was reason to conclude that the physicians may not have believed that an admission was necessary or that there was no factual foundation to conclude that an admission was necessary. The court observed, for

instance, that relator, who was a former Director of Care Management at Gardens Regional Hospital, claimed that she observed that the admissions in the hospital spiked once owners of a nursing facility, which made referrals to the hospital, became co-owners of a management company that operated the hospital.<sup>64</sup> The court noted that this reveals that defendants had a financial motive to falsify Medicare claims and pressure physicians to increase admissions when presumably the physicians would not otherwise believe that admission was necessary.<sup>65</sup> The court also noted that relator's complaint identified 65 allegedly false claims in "great detail" and that the admissions failed to satisfy InterQual criteria that represents the "consensus of medical professionals' opinions," which presumably would also indicate that the physicians did not actually believe that admission was necessary.<sup>66</sup> Finally, relator set forth anecdotal information that she confronted one doctor regarding the admissions, and he stated that hospital management pressured him into recommending patients for medically unnecessary inpatient admission, thereby indicating that physicians did not believe these admissions to be necessary or that there was no factual foundation to support the admission.<sup>67</sup>

Finally, the court pointed out that relator had alleged more than just a reasonable difference of opinion.<sup>68</sup> For example, she alleged that a number of the hospital admissions were for diagnoses that laboratory tests have disproven, and that several admissions were for psychiatric treatment, even though the hospital was not a psychiatric hospital—and one of those patients never even saw a psychiatrist.<sup>69</sup> The court concluded that even if it were to discount relator's evaluation of medical records, these other facts would be sufficient to make her allegations of fraud plausible.<sup>70</sup>

Thus, ultimately, while the 9th Circuit disagreed regarding whether the FCA required an objective falsehood, it ultimately applied the same common law rule regarding when an opinion can be false as the 11th Circuit did in *AseraCare*. Namely, as a general matter, an opinion cannot be false unless the speaker implies the existence of facts that do not exist or if the opinion is not honestly held.

### **Third Circuit Invokes Common Law But Fails to Apply It in Analysis Regarding When a "False" Opinion is Actionable**

In *Druding*, relators alleged that defendant hospice admitted patients who were ineligible for hospice care and directed its employees to alter improperly those patients' Medicare certifications to reflect eligibility.<sup>71</sup> Relators retained an expert who opined based upon a medical record review that patients were inappropriately certified for hospice care 35 percent of the time.<sup>72</sup> In his view, any reasonable physician would have reached the same conclusion.<sup>73</sup> Defendant's expert disagreed and opined that a reasonable physician would have found that all of the patients were hospice-eligible on each occasion.<sup>74</sup> At summary judgment, the district court ruled for defendant finding that a mere difference of opinion between experts regarding the accuracy of the prognosis was insufficient to create a triable dispute of fact as to the element of falsity.<sup>75</sup>

The 3rd Circuit reversed. It rejected the district court's holding that a "mere difference of opinion" is insufficient to show FCA falsity. It found that a mere "difference of medical opinion is enough evidence to create a triable dispute of fact regarding FCA falsity."<sup>76</sup> It also concluded that the district court's "objective" falsity standard improperly conflates the elements of falsity and scienter.<sup>77</sup>

But the 3rd Circuit's decision in *Druding* contains two clear flaws. First, while invoking the common law, it did not apply the common law standard to determine when opinions can be false. Second, while stating that the 11th Circuit in *AseraCare* wrongfully conflated the FCA's falsity and knowledge elements, the 3rd Circuit then proceeded to conflate the knowledge element with falsity and effectively wrote the FCA's falsity element out of the statute.

As to the falsity element, since Congress did not define what makes a claim "false" or "fraudulent," the court looked to common law to fill the gap but did not apply it to the facts.<sup>78</sup> For example, the court noted that the common law recognized that opinions can be false.<sup>79</sup> However, the court did not identify any evidence that (1) the speaker (either the doctors making the certification or the defendant's expert) does not actually hold the opinion; (2) the opinion contains an embedded fact which is false; (3) the speaker knows facts that would preclude such an opinion; or (4) the speaker does not know facts that would justify the opinion. As the Supreme Court noted in *Omnicare*, in applying the common law rule, a sincere statement of pure opinion, as a general matter, is not an "untrue statement of material fact" even if the speaker is ultimately wrong.<sup>80</sup> The 3rd Circuit did not apply this principle.

As to conflating falsity and knowledge, the 3rd Circuit asserted that the trial court wrongfully conflated falsity with knowledge because the district court noted, in rejecting relators' claim, that relators failed to establish evidence that any physician lied or certified a patient as hospice-eligible whom that physician believed was not hospice-eligible.<sup>81</sup>

But, rather than conflate the falsity and knowledge elements, the district court correctly segregated the falsity and knowledge element because when determining whether an opinion is false, under the common law, the common law looks to the speaker's intent. For example, did the speaker know the opinion was false? Did the speaker know that no facts supported the opinion? Did the speaker know that material facts undermined the opinion?

By contrast, the 3rd Circuit's ruling conflates the falsity and knowledge elements and undermines the Supreme Court's ruling in *Omnicare*. It undermines *Omnicare* because by ruling that falsity can be determined by merely an after-the-fact battle between two clinicians who reasonably disagree, *Omnicare's* principle that an honestly held opinion without more cannot be false is subverted.<sup>82</sup>

Moreover, falsity and knowledge are conflated because there would be substantial risk that a juror's perception of whether the underlying claim is false could be tainted merely because the juror hears evidence that the facility had flawed policies and procedures. For example, as the district court and 11th Circuit feared in *AseraCare*, a juror could find a claim to be false—even though evidence existed in the medical record that the patient was terminally ill—because the juror heard evidence that the hospice defendant had flawed procedures and policies to determine whether the patient was terminally ill in the first instance.<sup>83</sup> The existence of flawed policies does not render a particular medical claim to be false if the medical evidence shows that the patient was in fact terminally ill. Thus, while ostensibly the 3rd Circuit designed its rule to avoid conflation of falsity and knowledge, its ruling provided substantial risk that such conflation would occur in practice. Additionally, it potentially writes the falsity element out of the statute to the extent plaintiff's knowledge evidence clouds the jury's perception of whether the underlying opinion is a false opinion in the first instance.



## Takeaways from Developing Case Law

There are countless examples of FCA certifications that require ultimately an opinion or exercise of discretion. These range from opining on whether a service is medically necessary, whether sufficient documentation exists to support a claim and whether the compensation paid to physicians is set at fair market value for purposes of the Stark law.

In resolving whether these certifications are false, the Supreme Court's decision in *Omnicare* and the 11th Circuit's decision in *AseraCare* provide a framework, grounded in the common law, to resolve when opinions can be false at the pleading stage, at summary judgment and during an internal audit when deciding whether an overpayment obligation exists.

At the pleading stage, plaintiff alleging a false opinion must plead plausible facts with sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable by asserting how the defendant knew that the opinion is false, knew that facts precluded that opinion or does not know facts that would justify the opinion.<sup>84</sup> Similarly, at the summary judgment stage, the plaintiff must offer concrete evidence from which a reasonable juror could return a verdict in plaintiff's favor that the defendant knew that the opinion is false, knew that facts precluded that opinion or does not know facts that would justify the opinion. Finally, when conducting an internal audit, a company will know that it does not have an overpayment obligation regarding an opinion unless there is clear evidence that the person rendering the opinion did not believe that opinion, knew that facts precluded that opinion or did not know facts that would justify the opinion.

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Mr. Salcido has been lead counsel in several FCA actions in which he successfully defended clients in FCA actions that the government or relator filed at trial or summary judgment.

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<sup>1</sup> For a detailed discussion regarding how courts have distinguished legally and factually false claims and express and implied false certification cases and the standard applied in fraudulent inducement cases, see *False Claims Act & the Health Care Industry: Counseling & Litigation at 2:03* (3d ed. American Health Law Ass'n 2018).

<sup>2</sup> *United States v. Prabhu*, 442 F. Supp. 2d 1008, 1032–33 (D. Nev. 2006) (defendant's "claims are not false . . . because his documentation practices would fall within the range of reasonable medical and scientific judgment regarding how to document the medical necessity of pulmonary rehabilitation services. . . . To establish falsity under the FCA, it is not sufficient to demonstrate that the person's practices could have or should have been better. Instead, plaintiff must demonstrate that an objective gap exists between what the Defendant represented and what the Defendant would have stated had the Defendant told the truth. . . . Accordingly, because, at a minimum, reasonable minds may differ regarding whether the documentation underlying [defendant's] claims satisfied some undefined standard, the Government has not establish[ed] falsity as a matter of law") (citations and footnote omitted).

<sup>3</sup> *U.S. ex rel. Wilson v. Kellogg Brown & Root*, 525 F.3d 370, 377–78 (4th Cir. 2008).

<sup>4</sup> See, e.g., *U.S. ex rel. Thomas v. Siemens AG*, 593 Fed. Appx. 139, 143 (3d Cir. 2014) (holding that a "statement is 'false' when it is objectively untrue" and finding that the relator did not demonstrate an objectively untrue statement when the relator contended that the defendant had failed to disclose accurately on a form the discounts it provides to other customers because the government forms were ambiguous and the government itself accepted different interpretations of how those forms should be completed, including what kinds of discounts needed to be disclosed); *U.S. ex rel. Hill v. Univ. of Med. & Dentistry*, 448 Fed. Appx. 314, 316 (3d Cir. 2011) ("Because [e]xpressions of opinion, scientific judgments or statements as to conclusions which reasonable minds may differ cannot be false, . . . FCA liability will not attach") (internal quotation marks and citation omitted); *U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 836 (7th Cir. 2011) ("A statement may be deemed 'false' for purposes of the False Claims Act only if the statement represents 'an objective falsehood'") (citations omitted); *Kellogg Brown & Root*, 525 F.3d at 377–78 (to prove falsity, plaintiffs must show that the "statement or conduct alleged . . . represent[s] an objective falsehood" and plaintiffs could not satisfy this standard when defendant allegedly breached general maintenance standards in contract—such as keeping vehicles in "safe operating condition and good appearance"—and did not specify a specific maintenance program or require specific acts of maintenance and holding that an "FCA relator cannot base a fraud claim on nothing more than his own interpretation of an imprecise contractual provision" but instead must show an expression of fact "which (1) admit[s] to being adjudged true or false in a way that (2) admit[s] of empirical verification") (citations and internal quotations omitted); *U.S. ex rel. Will v. A Plus Benefits, Inc.*, 139 Fed. Appx. 980, 982 (10th Cir. 2005) ("At a minimum the FCA requires proof of an objective falsehood") (citations omitted).

<sup>5</sup> 938 F.3d 1278 (11th Cir. 2019).

<sup>6</sup> 575 U.S. 175, 178 (2015).

<sup>7</sup> For a prior Salcido Report addressing the Eleventh Circuit's decision in detail, see 11th Circuit's Decision in AseraCare: Important in Determining When Clinical Judgment Regarding Medical Necessity Can Result in an Overpayment and How Evidence Regarding Corporate Knowledge Must be Tied to Claims to Establish False Claims Liability (Oct. 10, 2019) <https://www.akingump.com/images/content/1/0/v2/109840/The-Salcido-Report-False-Claims-Act-Public-Disclosure-Alert.pdf>.

<sup>8</sup> 952 F.3d 89 (3d Cir. 2020).

<sup>9</sup> 953 F.3d 1108 (9th Cir. 2020).

<sup>10</sup> See, e.g., Druding, 952 F.3d at 95 (“Since Congress did not define what makes a claim ‘false’ or ‘fraudulent’ under the FCA, the Supreme Court has looked to common law to fill the definitional gap”); Winter, 953 F.3d at 1117 (noting Congress incorporated common law definitions related to falsity).

<sup>11</sup> Courts, in rejecting objective falsity, have asserted that the standard is misplaced because it seeks to add an extra-textual requirement above what the FCA itself requires. See Winter, 953 F.3d at 1113 (“We hold that a plaintiff need not allege falsity beyond the requirements adopted by Congress in the FCA, which primarily punishes those who submit, conspire to submit, or aid in the submission of false or fraudulent claims. Congress imposed no requirement of proving ‘objective falsity,’ and we have no authority to rewrite the statute to add such a requirement”). The precedent applying this standard, however, belies the conclusion that the courts were seeking to rewrite or expand the FCA. See, e.g., above at n. 4. Instead, the precedent reflects that the invocation of an objective falsity standard is simply a recognition that sincere statements of opinion cannot be false or fraudulent and the plaintiff must show more to establish FCA falsity. The use of the moniker “objective falsity” is simply a label to capture this concept rather than an attempt to add an additional element to FCA liability. Indeed, in AseraCare, the 11th Circuit, in describing what objective falsity encompassed, described precisely the common law elements to determining when opinions can be false and anchored its decision, as noted, in the Supreme Court’s ruling in Omnicare. See *id.*, 938 F.3d at 1297. Rather than expand the FCA with extra-textual requirements, courts have simply used the common law to fill a statutory gap regarding when opinions can be false. All courts have agreed that this gap filling practice is appropriate. See Omnicare, 575 U.S. at 183-86; Winter, 953 F.3d at 1117; Druding, 952 F.3d at 95.

<sup>12</sup> Courts, including the Supreme Court, have applied common law rules to construe the FCA’s materiality and knowledge elements. See, e.g., Escobar, 136 S. Ct. at 1999, 2002 (noting that it is “well a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses” and that the FCA materiality definition “descends from ‘common-law antecedents’”) (citations omitted); *United States v. Safeway Inc.*, No 11-cv-3406, 2020 U.S. Dist. LEXIS 103094, at \*53 (C.D. Ill. June 12, 2020) (noting Supreme Court in *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007) adopted common law meaning of recklessness in construing that term in Fair Credit Reporting Act and noted “that a common law term in a statute comes with a common law meaning, absent anything pointing another way” and applying that meaning to reckless disregard under the FCA because the FCA, too, “does not point another way”).

<sup>13</sup> 575 U.S. 175, 178 (2015).

<sup>14</sup> See *id.* at 184-86, 191-92.

<sup>15</sup> See 42 U.S.C. § 1320a-7k(d) (mandating that health care providers and suppliers to report and remit overpayments within 60 days of when those overpayments are “identified”). Of course, all persons who do business with the government have an affirmative duty to remit known overpayments to the federal government. See 31 U.S.C. § 3729(a)(1)(G).

<sup>16</sup> 575 U.S. 175 (2015).

<sup>17</sup> *Id.* at 178.

<sup>18</sup> *Id.* at 179.

<sup>19</sup> *Id.* at 180.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 186. The Court, using dictionaries, noted that a “fact” is “a thing done or existing” or “[a]n actual happening” while an opinion is a “a belief[,] a view” and “rest[s] on grounds insufficient for complete demonstration.” *Id.* at 183.

<sup>23</sup> *Id.* at 186.

<sup>24</sup> *Id.*

<sup>25</sup> Id. at 184-86.

<sup>26</sup> Id. at 184.

<sup>27</sup> Id. at 185-86.

<sup>28</sup> Id. at 189.

<sup>29</sup> Id. at 188. The Court noted that, at times, reliance from regulators or consistent industry practice might accord with a reasonable investor's expectations. Id. at n. 5.

<sup>30</sup> Id. at 189-90. As an example, the Court noted that if a junior attorney expressed doubts about a practice's legality but six of his more senior colleagues disagreed, the omission would not make the statement of opinion that the arrangement complied with law misleading, even if the minority position ultimately proved correct, because a reasonable investor does not expect that every fact known to the issuer supports its opinion. Id. at 190.

<sup>31</sup> Id. at 191-92. The Court noted that even under this standard an investor cannot state a claim by alleging that the opinion was wrong but must call into question the issuer's basis for offering the opinion. Id. at 194. Specifically, the Court ruled that the "investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." Id. (citation omitted). The Court concluded that this "is no small task for an investor." Id.

<sup>32</sup> Id. at 1285. Specifically, in developing its case, the government began by identifying a universe of approximately 2,180 patients for whom defendant had billed Medicare for at least 365 continuous days of hospice care. Id. at 1284. The government then focused its attention on a sample of 223 patients from within that universe. Id. at 1284-85. Through direct review of these patients' medical records and clinical histories, the government's primary expert witness identified 123 patients from the sample pool who were, in his view, ineligible for the hospice benefit at the time the defendant received reimbursement for their care. Id. at 1285. Should it prevail as to this group, the government intended to extrapolate from the sample to impose further liability on the defendant for a statistically valid set of additional claims within the broader universe of hospice patients for whom the defendant received Medicare payments. Id. at 1285.

<sup>33</sup> Id. at 1287.

<sup>34</sup> Id.

<sup>35</sup> Id. at 1289. Prior to trial, the defendant moved the district court to bifurcate trial into two phases: Phase One would address the FCA's falsity element and Phase Two would address the FCA's remaining elements and the government's common-law claims. Id. at 1286. The district court granted the motion in light of its concern that evidence pertinent to the knowledge element of the FCA would confuse the jury's analysis of the threshold question of whether the claims at issue were "false" in the first instance. Id. at 1287. The court did allow in Phase One general testimony regarding the defendant's business practices and claims submission process during the relevant time period, but only to contextualize the falsity analysis and "afford[] the jury an opportunity to more fully understand the hospice process within [the defendant]." Id., at 1287. The court noted that such evidence was not, however, admissible to prove the falsity of the claims at issue. Id.

<sup>36</sup> Id. at 1288-89.

<sup>37</sup> Id. at 1289.

<sup>38</sup> Id. at 1289-90.

<sup>39</sup> Id. at 1290.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id. at 1296.

<sup>43</sup> Id. at 1297.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Id. at 1301.

<sup>50</sup> 953 F.3d at 1112.

<sup>51</sup> Id. at 1113.

<sup>52</sup> Id.

<sup>53</sup> Id. (citation omitted).

<sup>54</sup> Id.

<sup>55</sup> Id. at 1114.

<sup>56</sup> Id. (quoting 42 C.F.R. 412.3(d)(1)(i)).

<sup>57</sup> Id. at 1117 (citation omitted).

<sup>58</sup> Id. (citing Restatement (Second) of Torts 525, 539).

<sup>59</sup> Id.

<sup>60</sup> Id. at 1118.

<sup>61</sup> Id. at 1118-19 (for example, AseraCare noted that a claim could be false if “the [doctor] does not actually hold that opinion” or simply “rubber-stamp[s] whatever file was put in front of him” if the opinion is “based on information that the physician knew, or had reason to know, was incorrect” or if “no reasonable physician” would agree with the doctor’s opinion, “based on the evidence”).

<sup>62</sup> Id. at 1119.

<sup>63</sup> Id. (citation omitted).

<sup>64</sup> Id. at 1112, 1115.

<sup>65</sup> Id. at 1119-20.

<sup>66</sup> Id. at 1120.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id. at 1120-21.

<sup>70</sup> Id.

<sup>71</sup> 952 F.3d at 91.

<sup>72</sup> Id.

<sup>73</sup> Id. at 94.

<sup>74</sup> Id. at 91.

<sup>75</sup> Id.

<sup>76</sup> Id. at 100. See also id. at 101 (“We therefore find that a physician’s expert testimony challenging a hospice certification creates a triable issue of fact for the jury regarding falsity”).

<sup>77</sup> Id. at 95.

<sup>78</sup> Id.

<sup>79</sup> Id. (citing Restatement (Second) of Torts §§ 525, 539 that “an opinion may be false when the speaker makes an express statement contrary to the opinion he or she actually holds”). Also, like the 11th Circuit in *AseraCare*, it cited to the Supreme Court’s decision in *Omnicare*, but unlike the *AseraCare* court, did not apply its rule.

<sup>80</sup> See id., 575 U.S. at 186.

<sup>81</sup> 952 F.3d at 96. The 3rd Circuit unscored that the falsity and knowledge elements must be kept separate: “we make clear that in our Court, findings of falsity and scienter must be independent from one another for purposes of FCA liability.” Id. at 100. As noted in detail below, its rule fails to achieve this objective.

<sup>82</sup> Perhaps recognizing this flaw, the 3rd Circuit appears to seek to sidestep this issue—regarding when clinical opinions can be false—by asserting that this case is really a legally false claim case, and not a factually false claim case. Specifically, the court noted that the issue is whether defendant adhered to the regulatory requirement that the clinical information and documentation must support the prognosis. Id., 952 F.3d at 100. But the analysis of whether the physician’s clinical opinion that the patient is terminally ill can be false (a factually false issue) is no different from the analysis of whether the physician’s clinical opinion that the documentation supports her opinion that the patient is terminally ill can be false under the regulation (the legally false issue). The court’s analysis of factual falsity versus legal falsity, in this context, is merely a distinction without a difference. The falsity issue still revolves around whether the common law criteria for when opinions can be false are satisfied and here the court did not provide any grounds for why the medical record documentation was not sufficient to support the physicians’ clinical opinion that the patient was terminally ill.

<sup>83</sup> See *AseraCare*, 938 F.3d at 1287 (noting that the district court bifurcated the falsity and knowledge elements “in light of its concern that evidence pertinent to the knowledge element of the FCA would confuse the jury’s analysis of the threshold question of whether the claims at issue were ‘false’ in the first instance. The court noted that, while ‘pattern and practice’ evidence showing deficiencies in *AseraCare*’s admission and certification procedures could help establish *AseraCare*’s knowledge of the alleged scheme to submit false claims—the second element of the government’s case—the falsity of the element of the claims ‘cannot be inferred by reference to *AseraCare*’s general corporate practices unrelated to specific patients”). The 11th Circuit agreed with this general approach. See id. at 1305 (noting on remand that the government must be able to link its knowledge evidence to the specific false claims to establish both elements). The Court in *Omnicare* also endorsed the principle that a reckless truth does not result in liability if the underlying representation is true. See id., 575 U.S. at 185, n. 2 (“if our CEO did not believe that her company’s TVs had the highest resolution on the market, but (surprise!) they really did, § 11 would not impose liability for her statement”).

<sup>84</sup> As the Supreme Court noted in *Omnicare*, this pleading standard would require that, at a minimum, plaintiff assert more than simply that the opinion is wrong, but must call into question the speaker’s basis for offering the opinion. 575 U.S. at 194. Specifically, the plaintiff should identify the particular (and material) facts going to the basis for the speaker’s opinion such as facts about the inquiry the speaker did or did not conduct or the knowledge she did or did not have, whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. Id. As the Court concluded, this “is no small task.” Id.

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