The Sixth Circuit Raised the Causation Standard and Narrowed the Definition of Remuneration for AKS-Based FCA Claims

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The Sixth Circuit deepened the divide between courts regarding the correct standard of causation that applies to claims "resulting from" a violation of the Anti-Kickback Statute ("AKS") for purposes of False Claims Act ("FCA") liability. On March 28, 2023, the Sixth Circuit joined the Eighth Circuit in interpreting the phrase "resulting from" to mean "but for" causation. It is not enough in the Sixth and Eighth Circuits to show merely a causal link between the claim and the scheme. An FCA plaintiff must show that an allegedly false or fraudulent claim would not have been submitted "but for" the alleged kickback scheme. Thus, FCA plaintiffs in those circuits must cross a wider chasm for their claims to prevail. The Sixth Circuit also narrowly construed the definition of "remuneration" such that it does not include any act that may be valuable to another and instead requires an actual transfer of value.

I. Courts disagree on what is required to show a claim "resulted from" an AKS violation for purposes of FCA liability.

The AKS imposes criminal liability on anyone that "knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate)" to induce or reward referrals for items or services reimbursable under a federal healthcare program. 42 U.S.C. § 1320a-7b(b). But AKS violations can also lead to liability under the FCA because a "claim that includes items or services ***resulting from*** a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]." 42 U.S.C. § 1320a-7b(g) (emphasis added).

In 2018, the Third Circuit addressed the question of what type of causal connection is sufficient to satisfy the "resulting from" language.[1] The Third Circuit reviewed the statutes' legislative history and rejected a "but for" causation standard, which would require showing "direct causation" or that a kickback directly influenced a patient's or medical professional's judgment.[2] This, the court explained, "would dilute the False Claims Act's requirements vis-à-vis the Anti-Kickback Statute, as direct causation would be a precondition to bringing a False Claims Act case but not an Anti-Kickback Statute case."[3] Instead, only a "link" is required. This means a plaintiff must merely show "some connection between a kickback and a subsequent reimbursement claim."[4]

In 2022, the Eighth Circuit created a circuit split by rejecting the Third Circuit's conclusion.[5] Merely showing that (i) a claim failed to disclose an AKS violation or was "tainted" by a kickback, or (ii) that the AKS violation "*may* have been a contributing factor" is not enough.[6] Rather, the Eighth Circuit looked at the dictionary definitions of "resulting" and concluded the text "resulting from" meant "a but-for causal relationship."[7]

The Eighth Circuit limited its holding, however, by explaining that not every FCA case "requires a showing of but-for causation." Rather, "but for" causation applies only when a plaintiff seeks to establish falsity or fraud through an AKS violation pursuant to 42 U.S.C. § 1320a-7b(g).[8] There are of course other ways of showing a claim was false or fraudulent under the FCA. District courts have since acknowledged this limitation. For example, the U.S. District Court for the Western District of Texas found the Eighth Circuit's holding inapplicable where the plaintiff did not rely exclusively on the AKS to demonstrate falsity and asserted alternative theories of falsity.[9]

On the other hand, some districts courts have rejected the Eighth Circuit's "but for" causation standard and viewed the Third Circuit's use of legislative history as more persuasive.[10]

II. The Sixth Circuit joined the Eighth Circuit in upholding a "but for" causation standard.

On March 28, 2023, the Sixth Circuit joined the Eighth Circuit in upholding the "but for" standard of causation.[11] The case involved friction between medical providers in a small town in Michigan. The town's only local option for ophthalmology services was a practice with two ophthalmologists, Dr. Martin and Dr. Hathaway. Likewise, the only local option for surgery was a local hospital. The practice and hospital therefore had a history of referring patients to each other.

In 2018, however, Dr. Martin sought to become employed by the hospital, which could mean the hospital would no longer need to send patients to Dr. Hathaway's practice. In turn, Dr. Hathaway told the hospital he expected to increase his surgical referrals due to a contemplated merger, but he threatened to cease referring to the hospital if it hired Dr. Martin. As a result, the hospital did not hire Dr. Martin. She responded by filing a *qui tam* lawsuit alleging that the hospital's decision not to hire her was "remuneration" to Dr. Hathaway, which tainted all referrals between Dr. Hathaway and the hospital going forward.

The district court dismissed Dr. Martin's case. On appeal, the Sixth Circuit affirmed and adopted the Eighth Circuit's reasoning that "resulting from" means "but for" causation. The court found that Dr. Martin had not identified any claims for reimbursement that would not have occurred but for the hospital's decision not to hire. Instead, the court held the claims at issue all arose from the pre-existing relationship between the hospital and practice that was not altered by the alleged kickback scheme. Thus, Dr. Martin failed to meet the "but for" causation threshold.

Unlike the Eighth Circuit, the Sixth Circuit did not limit its holding to FCA cases where plaintiffs are attempting to show causation only through an AKS violation pursuant to 42 U.S.C. § 1320a-7b(g).

III. The Sixth Circuit also narrowly construed the definition of "remuneration" such that it requires an actual transfer of value.

The Sixth Circuit also held that the term "remuneration" in the text of the AKS covers just payments and other transfers of value, not any act that may be valuable to another. The court reasoned that a broad definition of "remuneration" would cover more than intended under the law. To make its point, the Sixth Circuit gave the follow example:

> Consider the hospital that opens a new research center, purchases top of the line surgery equipment, or makes donations to charities in the hopes of attracting new doctors. Or consider the general practitioner who refuses to send patients for kidney dialysis treatment at

> a local health care facility until it obtains more state-of-the-art equipment. Are these all forms of remuneration? Unlikely at each turn.[12]

Additionally, the statute provides examples—kickbacks, bribes, and rebates—none of which were present in this case. The court found no evidence that anyone paid anyone anything, and therefore, Dr. Hathaway could not have been liable.

IV. Implications

For defense counsel and healthcare providers, the Sixth Circuit's broad application of the "but for" standard of causation to FCA cases involving AKS violations, combined with a narrower interpretation of the term "remuneration," is a significant step towards protecting providers with good intention involved in legitimate and ordinary business practices.

Whistleblowers may criticize the decision as weakening the statutes' ability to stop fraud and abuse. But the Sixth Circuit preemptively addressed this concern by explaining its "faithful interpretation of the 'remuneration' and 'resulting from' requirements still leaves plenty of room to target genuine corruption."[13] The Sixth Circuit also explained that its interpretation of the term "remuneration" still encompasses a wide range of payments—including consulting contracts, inflated rent payments, bogus salaries, bonuses, speaking fees, referral fees, commission payments to a romantic partner, and the opportunity to purchase company stock.[14]

We will continue to monitor legislation, enforcement actions, and court opinions interpreting causation and other elements of an FCA claim. For more information about the FCA, the AKS, or other healthcare compliance questions, please contact a member of our Government Enforcement and Litigation Practice Group below. Please also refer to the Practice Group's annual False Claims Act Year in Review publication.

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[1] *United States ex rel. Greenfield v. Medco Health Sols., Inc.*, 880 F.3d 89, 96–100 (3d Cir. 2018).
[2] *See id.* at 96.
[3] *Id.* at 97.
[4] *Id.* at 100.
[5] *See United States ex rel. Cairns v. D.S. Med. LLC*, 42 F.4th 828, 834 (8th Cir. 2022).
[6] *Id.* at 835 (emphasis in original).
[7] *Id.* at 834.
[8] *Id.* at 836.
[9] *See United States ex rel. Hueseman v. Prof'l Compounding Ctrs. of Am., Inc.*, No. 5:14-cv-00212, 2023 WL 2669879, at *10 n.4 (W.D. Tex. Mar. 27, 2023).
[10] *See United States ex rel. Fitzer v. Allergan, Inc.*, No. 1:17-cv-00668, 2022 WL 3599139, at *10 (D. Md. Aug. 23, 2022); *see also United States ex rel. Everest Principals, LLC v. Abbott Labs., Inc.*, No. 3:20-cv-00286, 2022 WL 3567063, at *8 (S.D. Cal. Aug. 18, 2022) (holding relator had sufficiently pleaded causation by "adequately establish[ing] a 'link' between the kickback and the claim for reimbursement").
[11] *United States ex rel. Martin v. Hathaway*, No. 22-1463, 2023 WL 2661358 (6th Cir. Mar. 28, 2023).
[12] *Id.* at *5.

[13] *Id.* at *9.
[14] *See id.*