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Are Courts Reining in Causation and Remuneration in False Claims Act and Anti-Kickback Cases?

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In *US ex rel. Martin v. Hathaway*, the US Court of Appeals for the Sixth Circuit joined the US Court of Appeals for the Eighth Circuit in requiring False Claims Act (FCA) plaintiffs to establish a direct causal relationship between alleged kickbacks and specific healthcare claims. This decision widens an existing circuit split between the Eighth Circuit and the Third Circuit on the standard for causation in FCA cases.

The Sixth Circuit opinion is also one of the first to consider the contours of the term "remuneration" under the Anti-Kickback Statute (AKS). In *Martin*, the court narrowly interpreted the term remuneration to include only payments and other transfers of value – rejecting the broad "anything of value" interpretation.

While the appellants claim that en banc review is warranted based on the circuit split and questions of exceptional importance, the appellees have urged the Sixth Circuit to deny rehearing. If the panel decision stands, it provides a powerful argument for defendants moving forward against an increasingly aggressive relators' bar, and marks an important step in curbing government overreach in FCA litigation. By establishing a higher standard of causality and narrowing what constitutes remuneration under the AKS, this well-reasoned decision sets limits (at least within the Sixth Circuit) on the potential scope of FCA liability based on the plain language of the statute – a welcome development for FCA defendants.

Background

The FCA is the government's primary mechanism to combat fraud and abuse in federal funding, particularly in the healthcare industry. In 2022, healthcare fraud was the leading source of FCA settlements and judgments, frequently resulting in staggering monetary penalties for FCA defendants.

The rise in FCA claims against providers and companies in the health care industry is due, at least in some part, to the enactment of the Affordable Care Act (ACA) in 2010, which amended and expanded liability under the FCA by providing that claims "resulting from" a violation of the AKS constitute false or fraudulent claims.

Before the Sixth Circuit decision, the Third and Eighth Circuits each considered the meaning of the phrase "resulting from" and reached very different conclusions. In 2018, the Third Circuit held in *Greenfield v. Medco Health Solutions, Inc.* that while "there must be **some connection** between a kickback and a subsequent reimbursement claim," plaintiffs need not prove "but-for" causation. The Third Circuit relied on legislative history of the ACA's 2010 amendment to the FCA in reaching that conclusion. By contrast, in 2022, the Eighth Circuit in *Cairns v. D.S. Medical LLC* rejected the Third Circuit's approach. The Eighth Circuit held that under the plain language of the statute, when FCA plaintiffs seek to establish falsity or fraud through the 2010 amendment, they "must prove that a defendant would not have included particular 'items or services' **but for** the illegal kickbacks."

Sixth Circuit opinion

Causation

On March 28, 2023, the Sixth Circuit joined the Eighth Circuit by holding that the phrase "resulting from" should be interpreted as requiring but-for causation. The court first reasoned that "the ordinary meaning of 'resulting from' is but-for causation," and that there was no "'textual or contextual indication' to indicate a 'contrary' meaning.'" The court then observed that Congress added the phrase "resulting from" "against the backdrop of a handful of cases that observed similar language as requiring but-for causation."

Invoking the Eighth Circuit's analysis in *Cairns*, the Sixth Circuit pointed out that had Congress intended an alternative causation standard, it would have used other language, such as "ainted by" or "provided in violation of." Instead, Congress chose the phrase "resulting from" – an "'unambiguously causal' standard." Like the Eighth Circuit, the Sixth Circuit rejected the Third Circuit's contrary conclusion, which relied on legislative history rather than the plain meaning of the statute. Ultimately, the court found that the plaintiffs in *Martin* failed to allege but-for causation because "the alleged

scheme did not change anything."

In *Martin*, the plaintiffs alleged that a hospital's decision not to hire an internal ophthalmologist (Dr. Martin) in return for a general commitment of continued surgery referrals from another ophthalmologist (Dr. Hathaway) violated the AKS. The court dismissed the case, in part because the plaintiffs failed to identify a single claim for reimbursement that would otherwise **not** have occurred:

> "Oaklawn was the only hospital in Marshall, and South Michigan was the only local ophthalmology group. The two entities naturally referred Marshall-based patients to each other—in one direction for eye check-ups and the like, in the other direction for surgeries. When Oaklawn decided not to establish an internal ophthalmology line at the hospital, the same relationship continued just as it always had. **There's not one claim for reimbursement identified with particularity in this case that would not have occurred anyway, no matter whether the underlying business dispute occurred or not.**"

Indeed, the plaintiffs only identified one surgery performed by Dr. Hathaway for which the hospital sought reimbursement, and that procedure took place seven months after the hospital decided not to hire Dr. Martin. The court reasoned that "emporal proximity by itself does not show causation, and seven months would create few inferences of cause and effect anyway." And in response to the plaintiffs' identification of claims that Dr. Hathaway's practice submitted for reimbursement after the hospital decided not to hire Dr. Martin, the court observed that the hiring decision was made by the hospital's **board** – not its physicians, who make patient referrals. Because the plaintiffs failed to allege the hospital could "control or direct the referral decisions of its physicians," the independent decision-making of the physicians "doom the chain of causation."

Remuneration

The Sixth Circuit separately rejected the overly expansive "anything of value" definition of remuneration and found that the problem with such a broad definition is that it "lacks a coherent end point." Instead, the court held that remuneration should only cover payments and other transfers of value – not "any act that may be valuable to another."

The AKS establishes criminal and civil liability for knowingly and willfully offering or paying **any remuneration** (including any kickback, bribe or rebate) to induce or reward referrals for items or services that are reimbursable under a federal health care program. At issue in this case was whether a hospital's decision not to hire an ophthalmologist – in return for another local ophthalmologist's general commitment to continue to refer patients to its surgery center –counted as "remuneration" under the AKS. The Sixth Circuit held that it did not.

Relying on other statutory uses of the word "remuneration" (including those from around 1977, when Congress first penalized the offer of "remuneration" in return for patient referrals), the court found that Congress clearly intended prohibited remuneration to have a "payment quality." Further, the court reasoned that while other appellate courts had not addressed this exact issue, they generally define remuneration in the same way: "one that entails a payment or transfer." The court also applied the rule of lenity applicable to statutory language that gives rise to both civil and criminal liability, which further supported the narrower reading. As such, the court concluded that "remuneration" must be interpreted as a payment or transfer of value, and did not include something as "non-concrete" and "vague" as the alleged kickback scheme in this case.

The court further cautioned that "reading causation too loosely or remuneration too broadly appear as opposite sides of the same problem," given that "uch of the workaday practice of medicine might fall within an expansive interpretation of the Anti-Kickback Statute."

What's next?

The US Supreme Court recently heard a pair of consolidated cases addressing the FCA's "knowledge" standard. Many predict that the Sixth Circuit's decision – and corresponding circuit split – will similarly make its way before the Court, which may ultimately decide the requisite standard for causation in FCA cases based on violations of the AKS. It is uncertain whether other circuits, such as the First and Ninth Circuits, with their active FCA dockets, will face this question and deepen the split in the meantime.

If the reasoning of the Sixth and Eighth Circuits ultimately prevails, but-for causation would be a significant barrier to proving damages in FCA cases that rely on the "resulting from" standard in the 2010 amendment – and may motivate plaintiffs to explore alternative theories of proof for alleged AKS violations.

US ex rel. Greenfield v. Medco Health Solutions, Inc., *et al.*, No. 17-1152 (3d Cir. Jan. 19, 2018) at 22.

Id. at 14-15.

Cairns, et al. v. D.S. Medical LLC, et al., No. 20-2445 (8th Cir. July 26, 2022) at 14.

US ex rel. Martin, et al. v. Hathaway, et al., No. 22-1463 (6th Cir. Mar. 28, 2023) at 12.

Id. at 13.

Id. at 15.

Id. at 13.

Id. at 13.

Id. at 14.

Id. at 14.

Id. at 9.

See 42 U.S.C. § 1320a-7b.

Martin, No. 22-1463 at 6-7.

Id. at 7.

Id. at 10.

Id. at 15.

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