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Expert Analysis

Two Recent Cases Illustrate Need to Rely on Causal Concepts in FCA Cases



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In 2010, Congress amended the anti-kickback statute (AKS) to confirm that claims "resulting from" illegal kickbacks are false and thus actionable under the federal False Claims Act (FCA), 42 U.S.C. § 1320a-7b(g). Congress did not specify, though, what it means for a claim to result from an illegal kickback. The question does not matter for a criminal AKS case, because the offer or receipt of the payment completes the crime. No referral or claim need result. But a civil FCA case requires more: the submission of a false claim to a federal health care program. What then links the submitted claim to the illegal kickback for purposes of showing falsity?

Courts have resisted arguments that a claim only "results from" a kickback if the kickback caused the referral that led to the claim. The FCA and the AKS seek to safeguard the independence of medical decision-making from the taint of kickbacks. The fear is that a strict causation requirement can lead to under-enforcement as courts would struggle to unravel why doctors or pharmacists recommended a given drug or service to patients. The U.S. Court of Appeals for the Third Circuit recently expressed sympathy for the DOJ's view that no causal relationship should be required because, if it were, even the most prototypical example of harmful kickbacks would be hard to prove, see *Greenfield v. Medco Health Solutions*, 880 F.3d 89 (3d Cir. 2018). The DOJ argued that no causal relationship should be required when a service provider bribes a doctor for patient referrals, the bribed doctor refers a patient, and the provider then bills Medicare for its care of the referred patient; that claim, it argued, violates the FCA regardless of whether the DOJ can prove the kickback actually influenced the referral decision.

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Increasingly, though, relators have pushed cases that go beyond such paradigmatic hypotheticals. As whistleblowers press more indirect kickback theories, it becomes harder to discern a link between the purported kickback and the claim submitted. Without explicitly resorting to traditional causation concepts, courts struggle to articulate when a claim "result[s] from" a kickback—resulting in decisions that deploy fuzzier descriptions of what links the claim to the illegal payment, but that rely on traditional causation concepts at their core. Two cases in the last year illustrate the challenge and underscore the need to rely on causal concepts.

'Greenfield v. Medco Health Solutions'

In January 2018, the Third Circuit rejected a whistleblower's suit because he failed to proffer evidence of a link between the purported illegal payment and any claim submitted to a federal health care program.

The relator sued his former employer, a specialty pharmacy and its affiliates, for making charitable donations to prominent hemophilia organizations so that those organizations would endorse the pharmacy as an "approved provider," 880 F.3d at 91-92. The relator illustrated the importance of the charitable contributions as a kickback for the endorsement, and ultimately the receipt of business, by describing the events that followed his employer's notice to the charities of its decision to slash its contribution beginning in 2011. One of the charities notified its members of the reduced pledge and encouraged them to request that the pharmacy restore its funding, resulting in 75 member letters to the pharmacy making that request. The pharmacy asked the relator to study the likely effects on its business if it opted not to increase funding. He concluded that the reduction put all new and existing business at risk, leading to an expected decrease in market share; based on that analysis, the pharmacy restored its annual donation to the full amount in 2012.

The relator argued that his employer violated the FCA because its charitable contributions were kickbacks to induce recommendations, at least some of which were directed to Medicare beneficiaries. He showed that the pharmacy submitted 24 patient claims to Medicare at the time of the payments. But the relator did not cite an example of a federally insured patient who decided to use the pharmacy because the charities listed it as an "approved provider" or even a patient had seen the charities' recommendation.

The district court granted the pharmacy's motion for summary judgment. It held that it was not a sufficient "link" to show that the pharmacy submitted claims for Medicare patients at the same time it made the charitable payments. Instead, the relator "must show that federally insured patients were referred to [defendants] as a result of its donations" to charity, namely, "evidence … that those patients chose [defendants] because of its donations."

On appeal, the relator argued that the district court erred by requiring a direct "link" between the charitable donations—the alleged kickbacks—and the customers for whom Medicare claims were submitted. He effectively argued that temporal proximity—making illegal payments and submitting claims—alone established a false claim because the pharmacy had certified its compliance with the AKS while submitting the claims.

The pharmacy, by contrast, urged the Third Circuit to adopt the district court's more stringent requirement that the charitable contributions must have been a "but-for" cause.

The Third Circuit rejected both the relator's approach of "no link at all" and the defendant's proposed "direct causal link." Temporal proximity seemed too thin to connect false claims and an alleged kickback scheme. But a direct causal link imposed too high a barrier given Congress' intentions to strengthen whistleblower cases and broadly reach illegal schemes interfering with medical professionals' judgment. Instead, "something in between"— "some connection"—was necessary: a relator "must point to at least one claim that covered a patient who was recommended or referred" by the alleged kickback recipient. "A kickback does not morph into a false claim unless a particular patient is exposed to an illegal recommendation or referral and a provider submits a claim for reimbursement pertaining to that patient."

'Guilfoile v. Shields Pharmacy'

In March 2017, Judge Denise Casper in the U.S. District Court of the District of Massachusetts similarly grappled with FCA allegations that tenuously linked improper kickbacks and false claims. 2017 WL 969329 (D. Mass. Mar. 10, 2017).

The plaintiff filed an FCA retaliation claim against his former employer, an integrated entity, including pharmacies, that partnered with hospitals to provide services to hospital patients. The plaintiff learned of a contract between the defendants and a third-party consultant through which the defendants paid the consultant $35,000 per quarter for each hospital contract that he successfully referred. The plaintiff believed that these payments constituted illegal kickbacks and argued that his termination after raising such concerns constituted retaliation under the FCA.

Defendants moved to dismiss the case. They argued that even if the consultancy payments were kickbacks, the plaintiff failed to show how the payments could reasonably result in the submission of false claims, because he did not allege that the consultant was in a position to refer federal patients to the defendants' service.

The district court agreed. Looking to the statutory requirement that the false claim "result[s] from" the illegal kickback, Judge Casper explained that the plaintiff must allege "facts to show that false claims may have been submitted as a result of the alleged kickbacks" to the recipient thereof. In particular, the complaint must explain how the alleged kickback "could have reasonably led to the potential submission of false or fraudulent claims," which was not shown. The plaintiff has appealed and the First Circuit decision is pending.

Causation in FCA Cases

The expansion of FCA cases to kickbacks made to nonprescribers, and the reaction of courts to such allegations, demonstrates that despite courts' rejection of strict "but-for causation" standards, causation has a role in cases premised on AKS violations.

Both the *Medco* and *Guilfoile* cases recognized the need for some link, and dismissed the cases in the absence of any such link. In articulating the necessary link, the courts call on traditional categories of causation, in concept if not in name. The *Guilfoile* court, for example, expressed concern that the consultant was never in a position to recommend the pharmacy's services to a patient, an appeal both to the legal causation concept of foreseeability and whether a kickback to a paid consultant, not a prescribing doctor, was the sort of injury the FCA sought to address. In *Medco*, the court hesitated to impose a "but-for" cause requirement, but imposed a factual causation requirement by looking to whether the charities' recommendation actually sat in the causal chain.

But these cases leave many questions unanswered. In *Medco*, the relator pled no link at all, so the court's required link is a thinly articulated "some connection." In *Guilfoile*, in light of the complaint's deficiencies, the court did not articulate how to evaluate when a payment might "reasonably lead" to a false claim. As relators continue to pursue AKS claims in connection with nontraditional payments, such as those to consultants or charities, courts will need to develop a more robust set of tools to analyze whether the asserted false claim "resulted from" the purportedly illegal payment.

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