

The False Claims Act and Kickbacks: Factual Causality Required

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In a significant precedential development, two federal circuit courts have imposed strict causation requirements in health care kickback cases under the Federal False Claims Act (FCA), placing under duress one of the go-to bases for such suits. At the heart of the development is a question about the meaning of a 2010 legislative change, when Congress said that the FCA applies to claims for items or services “resulting from” illegal remuneration paid for health care referrals in violation of the Anti-Kickback Statute (AKS).

In the first decade after this change, courts resisted heightened causation requirements and rejected a need to show but-for causation—i.e., that a claim only “results from” a kickback if the claim would never have happened had the kickback not been paid. Instead, courts allowed suits to proceed on weaker grounds, such as a failure to disclose an anti-kickback violation regardless of whether a causal relationship existed. And in 2018, the U.S. Court of Appeals for the Third Circuit rejected the notion that the statutory language “resulting from” requires a “direct



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causal link” between the alleged kickbacks and the resulting claim. Citing to legislative history, the Third Circuit held that “resulting from” requires only “some connection” between the tainted referral and the claim, which could be established if “a particular patient is exposed to an illegal recommendation or referral and a provider submits a claim for reimbursement pertaining to that patient.” *Greenfield v. Medco Health Solutions*, 880 F.3d 89 (3d Cir. 2018).

The landscape has swiftly changed: in recent months both the Sixth and the Eighth Circuits have held that but-for causation is required to prove that a false claim results from an illegal kickback.

The Eighth Circuit acted first in its July 2022 decision in *Cairns v. D.S. Medical*, 2022 WL 2930946 (8th Cir. July 26, 2022), holding that the plain language of the AKS phrase “resulting from” means but-for causation. In doing so, the Eighth Circuit explicitly rejected the Third Circuit’s decision as “an approach that we have already rejected: relying on legislative history and ‘the drafters’ intentions’ to interpret the statute.”

On March 28, the Sixth Circuit joined the Eighth Circuit in adopting a but-for causation standard. In *Martin v. Hathaway*, No. 22-1463 (6th Cir. Mar. 28, 2023), the Sixth Circuit agreed with the *Cairns* interpretation of the statutory term “resulting from,” explaining that such “an understanding applies unless strong ‘textual or contextual indication[s]’ indicate a ‘contrary’ meaning”—which they did not.

Kickback violations have been a robust source of FCA cases. In 2022, such violations provided for over half of all FCA health care recoveries, according to the U.S. Department of Justice’s annual review. These two circuit court decisions represent a significant limitation on such cases, especially as to increasingly aggressive theories brought by private relators that seek to expand the sort of business arrangements that might violate the AKS and support an FCA recovery.

‘Cairns v. D.S. Medical’

Cairns involved a Missouri neurosurgeon who used spinal implants to treat degenerative-disc disease and other spinal disorders. The neurosurgeon used implants distributed by a

company wholly owned by his fiancée, leading to a lucrative arrangement for them both. Physicians in other practices brought suit and the United States intervened, alleging that the couple and their businesses submitted false claims after violating the AKS.

At trial, the district court instructed the jury that the government could establish falsity or fraud if the defendants failed to disclose the anti-kickback violation affirmatively when they sought payment from federal health insurance programs. The jury returned a verdict for the government on two of three FCA claims. The district court awarded treble damages and statutory penalties totaling approximately \$5.5 million. Defendants appealed.

In July 2022, the Eighth Circuit reversed the judgement, holding the district court should have instructed the jury it must find “but-for causation” rather than the simple failure to disclose an AKS violation. The Eighth Circuit’s analysis rested on two simple words: “resulting from.” The court noted that the Supreme Court had interpreted a nearly identical phrase, “results from,” in the context of the Controlled Substances Act (CSA), and concluded that that the phrase imposes “a requirement of actual causality, which meant that the use of drugs had to be a “but-for cause of the death.” See *Burrage v. United States*, 571 U.S. 204, 210-11 (2014).

As the Eighth Circuit explained, though “[t]he context here may be different [in the FCA], ... our conclusion is the same.” It explained that the term “resulting”—the present-principle form of the verb—has the same meaning as its present-tense cousin, “results,” and thus also expresses “a but-for causal relationship.” In other words, the Eighth Circuit held that the government had

to prove that the defendants would not have submitted claims for particular “items or services” absent the illegal kickbacks.

In reaching its decision, the Eighth Circuit rejected the government’s alternative causation standards, such as claims “tainted by” kickbacks or “provided in violation of” the AKS, again based on the plain language of the statute. The court also rejected government arguments that the 2010 amendment to the AKS had codified pre-2010 cases which held that nondisclosure of an anti-kickback violation was enough to make a claim “false or fraudulent” regardless of whether a causal relationship existed, and arguments rooted in legislative history. Simply put, as the court explained, “the phrase ‘resulting from’ ... is unambiguously causal,” and “when a statute is unambiguous, we start and end in the same place: with the words of the statute itself.”

‘Martin v. Hathaway’

In *Martin*, an ophthalmologist named Dr. Martin alleged that a local hospital decided not to hire her based on promises from her former employer, Dr. Hathaway—another local ophthalmologist who owned the only ophthalmology practice in the area—that he would continue an existing referral relationship with the hospital. After the hospital decided not to hire Dr. Martin, she and her husband filed an FCA action against Dr. Hathaway and the hospital. The Martins alleged that the hospital’s rejection of Dr. Martin’s employment for continued referrals constituted an illegal kickback scheme in violation of the AKS, which in turn resulted in the submission of false claims under the FCA.

On appeal of the lower court’s decision to dismiss the lawsuit, the Sixth Circuit articulated stricter standards for both causation and

remuneration that tighten the requirements for a successful FCA suit based on an AKS violation. As to causation, the court followed *Cairns* and applied a but-for causation standard, noting that the Eighth Circuit had taken “this approach in this precise setting.” The Sixth Circuit concluded that the Martins had not plausibly alleged but-for causation, because the alleged scheme between the local ophthalmologist and the hospital “did not change anything.” The local practice and hospital referred patients to each other before any alleged misconduct and continued to do the same after. As the *Martin* court explained, “[t] here’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.” Thus, the court upheld the district court’s dismissal of the Martins’ amended complaint.

Although it declined to intervene in the case, the government filed an amicus brief in *Martin*, which again sought to rely on legislative history for a looser causation standard. But like the Eighth Circuit, the Sixth Circuit rejected the government’s position, and with it the Third Circuit’s decision in *Greenfield*, citing both the plain meaning of the phrase “resulting from” and a concern about considering legislative history in construing a statute with criminal applications.

Separate from the causation issue, the Sixth Circuit in *Martin* also analyzed whether the hospital’s decision not to hire Dr. Martin in return for a general commitment of continued referrals from Dr. Hathaway was “remuneration” covered under the AKS—a term that is also not defined in the statute. After an extensive analysis of the term, including its definition and application in other federal statutes, the court concluded that

“remuneration” “covers just payments and other transfers of value,” but does not cover just “any act that may be valuable to another.” The court found that the Martins had not alleged remuneration under that definition: while the decision not to hire Dr. Martin may have benefitted Dr. Hathaway, it did not “entail a payment or transfer of value to Dr. Hathaway” and “is not remuneration by any standard definition of the term.”

On both fronts, the Sixth Circuit relied on what it deemed a “faithful interpretation” of the statutory language, and a concern that “reading causation too loosely or remuneration too broadly” could sweep in “[m]uch of the workday practice of medicine,” exposing well-meaning medical practitioners to AKS liability.

The Martins continue to press otherwise. In a recent petition for rehearing en banc filed on April 11, they argued that the panel’s rulings on remuneration and causation “undercut the policy” behind the FCA and AKS, and that the court’s “but-for” causation standard further conflicts with the Third Circuit, arguing instead that any payment “tainted” by improper remuneration for referrals is a false claim under the FCA. The court directed defendants to file a response by April 27.

Takeaways

These cases do not wholly erase theories of FCA liability that are premised on AKS

violations. For one thing, *Greenfield* remains the law in the Third Circuit (at least for now), the Sixth Circuit may decide to rehear *Martin* en banc, and we can expect efforts to urge the Supreme Court to resolve any circuit split. In any event, as the *Martin* court explained, “[a] faithful interpretation of the ‘remuneration’ and ‘resulting from’ requirements still leaves plenty of room to target genuine corruption”: “So long as proof exists that ... claims would not have been submitted to the government without those referrals, causation for False Claims lawsuits would be satisfied too.” But these decisions signal a desire to reign in sweepingly broad theories of FCA liability. And they provide significant tools for defendants to attack the increasingly creative kickback theories advanced in FCA cases based on tenuous claims of causality and remuneration.

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