Appeals Court Ruling Deepens Circuit Split Surrounding Plaintiffs' Burden in False Claims Act Cases

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In this article, the authors explore the split between federal circuit courts of appeals concerning False Claims Act actions based on Anti-Kickback Statute violations.

A decision by the U.S. Court of Appeals for the Sixth Circuit has widened a circuit split concerning False Claims Act (FCA) actions based on Anti-Kickback Statute (AKS) violations.

In *U.S. ex rel. Martin v. Hathaway*,[1] the U.S. Court of Appeals for the Sixth Circuit joined the U.S. Court of Appeals for the Eighth Circuit in ruling that the government and relators must meet an exacting "but for" causation standard – rather than the more relaxed and plaintiff-friendly standard articulated by the U.S. Court of Appeals for the Third Circuit – when pursuing FCA actions based on AKS violations.

BACKGROUND

In 2010, Congress amended the AKS to expressly provide that claims submitted to the government that include "items or services resulting from a violation" of the AKS necessarily constitute "false or fraudulent claim[s] for purposes of" the FCA.[2] This statutory amendment clarified that alleged violations of the criminal AKS can serve as the predicate for lawsuits filed under the civil FCA.

As the cases mounted, litigants began challenging the level of proof that the amendment's "resulting from" language requires. Specifically, parties disputed whether:

(a) A "but-for" causation standard – showing that the supposed false claims would not have been submitted had it not been for the alleged

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1 U.S. ex rel. Martin v. Hathaway, No. 22-1463, 2023 U.S. App. LEXIS 7319, *21 (6th Cir. Mar. 28, 2023).

2 See Guilfoile v. Shields, 913 F.3d 178, 190 (1st Cir. 2019) (citing 42 U.S.C. § 1320a-7b(g), as amended by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)).

illegal kickbacks – applied; or

(b) Only some general "link" between the alleged AKS violation and the claim(s) at issue is required.

In 2018, the Third Circuit was the first appellate court to enter the fray, holding in *U.S. ex rel. Greenfield v. Medco Health Sols., Inc.*,[3] that the more relaxed, plaintiff-friendly standard applied. Noting Congress' apparent desire to "strengthen whistleblower action based on medical care kickbacks," the court opined that the imposition of a strict, but-for causation requirement would "hamper False Claims Act cases" by "dilut[ing] the False Claims Act's requirements vis-à-vis the Anti-Kickback Statute," and would thus "lead to results" that are contrary to the purpose underlying the 2010 AKS amendments.[4]

The circuit court determined that a plaintiff need only show that at least one of the claims at issue "sought reimbursement for [an item or service] that was provided in violation of the Anti-Kickback Statute."[5] Many lower courts from a variety of jurisdictions initially followed the Third Circuit's lead.[6]

THE EIGHTH CIRCUIT TAKES A DIFFERENT PATH AND THE SIXTH CIRCUIT FOLLOWS

Last summer, however, the Eighth Circuit refused to follow suit and endorsed the more exacting "but for" standard in *U.S. ex rel. Cairns v. D.S. Med. LLC*.[7] In rejecting the Third Circuit's approach, the Eighth Circuit criticized its sister court for relying too heavily on legislative intent, and it instead looked only to the plain meaning of the statutory text.

Recognizing that, consistent with dictionary definitions, the U.S. Supreme Court had already determined that the word "resulting" expresses a "but-for causal relationship," the Eighth Circuit found that this more exacting "but for"

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[3] U.S. ex rel. Greenfield v. Medco Health Sols., Inc. 880 F.3d 89, 95 (3d Cir. 2018).

[4] Id. at 97 (citing 155 Cong. Rec. S10852, S10853 (daily ed. Oct. 28, 2009) (Sen. Kaufman)) (brackets omitted).

[5] Id. at 98.

[6] See, e.g., U.S. ex rel. Bawduniak v. Biogen Idec, Inc., Civil Action No. 12-cv-10601-IT, 2018 U.S. Dist. LEXIS 70848, at *10-11 (D. Mass. Apr. 27, 2018); Kuzma v. N. Ariz. Healthcare Corp., No. CV-18-08041-PCT-DGC, 2022 U.S. Dist. LEXIS 106969, at *34 (D. Ariz. June 15, 2022); U.S. ex rel. Heller v. Guardian Pharmacy, LLC, 521 F. Supp. 3d 1254, 1276 n.93 (N.D. Ga. 2021); U.S. v. Teva Pharm. USA, Inc., 2019 U.S. Dist. LEXIS 35148, at *73 (S.D.N.Y. Feb. 27, 2019); U.S. ex rel. Headen v. Abundant Life Therapeutic Servs. Tex., LLC, No. H-18-773, 2019 U.S. Dist. LEXIS 72838, at *17-18 (S.D. Tex. Apr. 30, 2019).

[7] U.S. ex rel. Cairns v. D.S. Med. LLC, 42 F.4th 828, 835-836 (8th Cir. 2022).

causal standard was supported by a "wall" of precedent.[8] For this reason, the Eighth Circuit found no reason to look beyond the plain meaning of the "actual words" of the statute.[9]

On March 28, 2023, the Sixth Circuit followed the Eighth Circuit and similarly rejected the Third Circuit's legislative-intent-based reasoning, stating that "[t]he ordinary meaning of 'resulting from' is but-for causation."[10] After finding no strong contextual clues to support a "'contrary' meaning," it ruled that the more demanding standard applies.[11]

In further support of its opinion, the Sixth Circuit noted that "the same [statutory] language creates both civil and criminal liability," and it therefore emphasized its reticence to interpret a criminal statute in a way that might result in the imprisonment of a defendant "based on a document or statement that never received the full support of Congress and was presented to the President for signature."[12] The Sixth Circuit was careful to note that its interpretation "leaves plenty of room to target genuine corruption," while avoiding an outcome that would sweep "the workaday practice of medicine . . . within an expansive interpretation of the [AKS]."[13]

TAKEAWAYS

The Sixth and Eighth Circuit decisions significantly raise the bar for FCA plaintiffs, and if their defendant-friendly standard gains further momentum in the courts, the government and relators will encounter a much higher degree of difficulty in meeting their burdens – at summary judgment, trial, and even at the pleading stage. Indeed, it is noteworthy that, unlike *Cairns* – which arose from a challenge to jury instructions – *Hathaway* affirmed a dismissal on only the pleadings, thereby potentially paving a path through which defendants might find success in attacking these lawsuits early.

At some point, the Supreme Court will likely settle the split, which – given the Court's current composition and other precedent – may bode well for defendants. Nevertheless, health care providers must remain vigilant to ensure that their practices do not tread too closely to the line between the workaday

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[8] Id. at 835 (citing Burrage v. U.S., 571 U.S. 204, 210-11, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014)).

[9] Id. at 836.

[10] U.S. ex rel. Martin v. Hathaway, No. 22-1463, 2023 U.S. App. LEXIS 7319, at *20 (6th Cir. Mar. 28, 2023) (citing Burrage v. U.S., 571 U.S. 204, 210-11 (2014)).

[11] Id. (citing Burrage v. U.S., 571 U.S. 204, 212 (2014).

[12] Id. at *25.

[13] Id.

practice of medicine and what might be interpreted as genuine corruption, particularly in the Third Circuit or within other jurisdictions whose appellate courts have yet to take a position on this issue.