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BLOG

Eighth Circuit Undercuts 2010 False Claims Act Amendment Designed to Connect Anti-Kickback Statute Violations to False Claims Act Claims

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On July 26, 2022, the United States Court of Appeals for the Eighth Circuit issued a decision that creates a new circuit split on the question of what evidence is needed to prove that a violation of the Anti-Kickback Statute (AKS) renders a claim false or fraudulent under the False Claims Act (FCA). The Eighth Circuit held that a plaintiff "must prove that a defendant would not have included particular items or services *but for* the illegal kickbacks."[1] The decision, adopting a position expressly rejected by the Third Circuit in 2018, is a clear win for defendants in the Eighth Circuit. What follows will be questions surrounding what evidence is sufficient to meet this "but-for" standard, and watching whether other circuits take the opportunity to align with either side of this split—or perhaps develop alternative interpretations.

Background

The Eighth Circuit case involves a neurosurgeon, who used spinal implants to treat various spinal conditions, and his fiancé, who owns the distributorship from which he purchased the spinal implants he used in his procedures. According to the court's opinion, (fraud and abuse suspicions were raised because) the neurosurgeon was his fiancé's only large customer, yet the fiancé made $1.3 million in commissions from one manufacturer alone in a single year. The neurosurgeon, in turn, was offered company stock from the same manufacturer. The relators raised concerns regarding the neurosurgeon's high-volume implant use and his financial relationships and filed complaints against the neurosurgeon, his fiancé, his practice, and the distributorship. The United States intervened and filed its own complaint.

The government's FCA case relied on the 2010 amendment to the AKS that provides that "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]."[2] Specifically, the government contended that the kickbacks "tainted" the neurosurgeon's choice of implant, and the resulting claims were, therefore, false or fraudulent under the FCA. The district court instructed the jury that "the government could establish falsity or fraud once it proved, by a preponderance of the evidence, that the Medicare or Medicaid claim failed to disclose the [AKS] violation."[3] The jury returned a verdict for the government on two of the three claims. The district court then awarded treble damages and statutory penalties in the amount of $5.5 million.

Eighth Circuit Decision

In reversing the district court's judgment, the court concluded that the 2010 amendment's "resulting from" language creates a but-for causal requirement between an AKS violation and the items and services included in the claim. The court concluded that the statutory text is unambiguous, and that the plain meaning of the phrase "resulting from" requires a showing of but-for causation. In support of its reasoning, the court analogized to the "results from" language contained the Controlled Substances Act, which the Supreme Court of the United States reviewed in *Burrage v. United States*.[4] There, the Supreme Court looked at the dictionary definition of "results" and concluded that the ordinary meaning imposes a requirement of actual causality. Using the same reasoning, the Eighth Circuit came to the same conclusion regarding the "resulting from" language employed by the 2010 amendment. The Eighth Circuit also relied on the *Burrage* Court's explanation that a "but-for causal relationship" "requires proof that the harm would not have occurred in the absence of—that is, *but for*—the defendant's conduct."[5] Applying this logic, the Eighth Circuit concluded that the government, in this case, had to prove that the defendant would not have included particular items or services but for the illegal kickback.

The court rejected the government's attempt to rely upon the legislative history and context of the 2010 amendment in support of the argument that the 2010 amendment was a legislative effort to codify a series of pre-2010 cases that had concluded that non-disclosure of an AKS violation was sufficient to make a claim false or fraudulent for purposes of the FCA.[6] The court reasoned that Congress's words were clear and unambiguous, and therefore consideration of these extraneous points was inappropriate.

Circuit Split

The Eighth Circuit acknowledged that the Third Circuit reached an opposite conclusion in *United States ex rel. Greenfield v. Medco Health Solutions, Inc.*[7] There, a specialty pharmacy that serviced hemophilia patients made donations to two charities that subsequently referred hemophilia patients to the specialty pharmacy. The plaintiff brought an FCA claim against the specialty pharmacy, alleging that the specialty pharmacy submitted false or fraudulent claims that were tainted by kickbacks paid to the referral sources. The lower court granted summary judgment in the specialty pharmacy's favor, holding—like the Eighth Circuit—that the plaintiff was required to prove a "direct link between the alleged kickback scheme and each false claim."[8]

On appeal, the government—which had previously chosen not to intervene in the case—filed an amicus curiae, arguing that the 2010 amendment requires proof of submission of "a claim that [seeks] reimbursement for medical care that was provided in violation of the Anti-Kickback Statute."[9] The court noted the government's argument—requiring but-for causation—would "lead to the incongruous result whereby 'a defendant could be convicted of criminal conduct under the [AKS] for paying kickbacks to induce medical referrals, but would be insulated from civil [FCA] liability for the exact same conduct, absent additional proof that each medical decision was in fact corrupted by the kickbacks.'"[10] Ultimately, the court held that a plaintiff must establish "some connection between a kickback and a subsequent reimbursement claim," but rejected the lower court's requirement of but-for causation.[11]

The Eighth Circuit's decision in *Midwest Neurosurgeons* thus creates a clear circuit split as to the proper interpretation of the "resulting from" language in the 2010 amendment to the AKS.

KEY TAKEAWAYS

Increased Evidentiary Burden for Plaintiffs—But Standard Remains Unclear

The Eighth Circuit's holding increases the evidentiary burden for FCA plaintiffs, whether DOJ or relators, to show that the allegedly false FCA claim was the result of the conduct that constituted the AKS violation. However, the court did not explicitly state the evidence that would be required under its stricter interpretation. It remains to be seen what evidence will be deemed sufficient to establish causation—and what defenses may be sufficient to defeat causation. Given that patients and providers often have multiple reasons for selecting a particular item or service, there will undoubtedly be interesting questions regarding how this standard applies in practice.

Circuit Split Creates Uncertainty

Attention will now turn to the other circuits, to see what positions they may take with respect to the interpretation of the "resulting from" language in the 2010 amendment to the AKS. The marked split between the Third and Eighth Circuits creates new opportunities for defendants seeking to avoid FCA liability, but the uncertainty regarding the applicable standard and evidentiary requirements must also be taken into consideration when developing a defense strategy.

We will continue to monitor this issue for further developments. If you have additional questions or need further assistance, please reach out to T. Reed Stephens (Partner; White Collar, Regulatory Defense and Investigations), Amy H. Kearbey (Partner; White Collar, Regulatory Defense and Investigations), Kaitlin Pierce Marino (Associate; White Collar, Regulatory Defense and Investigations), Christopher Parker (Associate; White Collar, Regulatory Defense and Investigations), or your Winston & Strawn relationship attorney.

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[1] *United States ex rel. Cairns v. D.S. Medical LLC et al.*, No. 20-2445, --- F.4th --- at 14 (8th Cir. July 26, 2022) (internal quotations omitted) (emphasis added) ("*Midwest Neurosurgeons*").

[2] 42 U.S.C. § 1320a-7b(g).

[3] *Midwest Neurosurgeons*, ---F.4th --- at 6 (internal quotations omitted).

[4] *Id*. at 10; *see also Burrage v. United States*, 571 U.S. 204, 210–11 (2014).

[5] *Midwest Neurosurgeons*, ---F.4th --- at 11 (internal citations omitted).

[6] *Id*. at 13.

[7] *United States ex rel. Greenfield v. Medco Health Solutions, Inc.*, 880 F.3d 89 (3d Cir. 2018).

[8] *Id.* at 93.

[9] *Id.*

[10] *Id*. at 96.

[11] *Id*. at 100.

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