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BLOG

# Sixth Circuit Interpretation of Antikickback Statute and Its Interplay with False Claims Act Offers Some Comfort to Providers by Clarifying Standards

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The Sixth Circuit Court of Appeals recently issued a key decision interpreting narrowly an important element of the Anti-Kickback Statute (AKS) and the interplay between the AKS and the False Claims Act (FCA).[1] The court's decision perpetuates a circuit split, now two to one, on whether the but-for causation must be proven to maintain an FCA action on an AKS-violation theory. While not ripe for Supreme Court review yet, the decision signals that this critical and controversial issue may ultimately need clarification from the high court.

The case at issue, *Hathaway*, involves a qui tam complaint alleging violations of the AKS and the FCA against a Michigan hospital. The relator, an ophthalmologist, claimed he was denied employment at Oaklawn Hospital because the hospital had a continuing arrangement with a different ophthalmologist who referred patients to the hospital for surgeries. The relator claimed that this amounted to "an illegal fraudulent scheme" under the AKS and that Oaklawn violated the FCA for reimbursement based on the referrals. The relator appealed the dismissal of his complaint. The Sixth Circuit considered two issues on appeal: (1) whether the AKS's prohibition on "remuneration" covers only "payments and other transfers of value or any act that may be valuable to another" and (2) whether but-for causation is required to allege an FCA violation "resulting from" an AKS violation. After deciding for the defendants on both issues, the Sixth Circuit affirmed the district court's dismissal.

## Remuneration Under the AKS

The relator argued that the district court erred in dismissing the complaint because it had sufficiently alleged remuneration. The complaint alleged that by deciding not to hire the relator to work as an internal ophthalmologist, Oaklawn was providing something of value to the other ophthalmologist in exchange for continued referrals. The Sixth Circuit disagreed. It held that the dictionary definition of "remuneration," Congress's use of the term in contemporary statutes, and the AKS's safe harbors all indicate that Congress intended that remuneration in violation of the AKS specifically requires payments or other transfers of value in exchange for a referral. Thus, a general commitment to continue sending surgery referrals by the ophthalmologist to Oaklawn did not entail a payment or transfer of value to the ophthalmologist. The court rejected the relator's broader interpretation of the term as lacking a "coherent endpoint," suggesting that such an interpretation would lead to untenable conclusions. For example, even a "general practitioner who refuses to send patients for kidney dialysis treatment at a local health care facility until it obtains more state-of-the-art equipment" would be in violation of the AKS. The court also noted that the rule

of lenity favors a narrower definition of remuneration because an AKS violation creates both civil and criminal liability.

## Causation

The Sixth Circuit also rejected a more lenient causation standard for FCA claims brought under an alleged AKS violation, and instead adopted the Eighth Circuit's interpretation that plaintiffs must prove but-for, or actual, causation. That is, a plaintiff must prove that the defendant violated the AKS and, as a direct result of that violation, induced the referral of the patient to a particular provider.

As part of the Affordable Care Act of 2010, Congress passed a law stating 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] In *United States ex rel. Greenfield v. Medco Health Solutions Inc.*, 880 F.3d 89 (3d Cir. 2018), the Third Circuit held that an FCA claim under this AKS-violation theory only requires a "link" that shows at least one of the defendant's reimbursement claims was made in violation of the AKS.[3] In doing so, the Third Circuit rejected the argument that a plaintiff must show that the kickback directly influenced a patient's decision to use a particular medical provider. But in *United States ex rel. Cairns v. D.S. Medical LLC*, 42 F.4th 828 (8th Cir. 2022), the Eighth Circuit disagreed with the Third Circuit's interpretation and held that the ordinary meaning of the text requires that plaintiffs show "actual causality."[4] The Eighth Circuit reasoned that the phrase "resulting from" in the 2010 law indicates that Congress intended that the plaintiff must prove an "unambiguously causal" relationship between the AKS violation and the submission of a false claim (i.e., but-for causation).

Here, the Sixth Circuit sided with the Eighth Circuit. It reasoned that Congress chose to use a phrase that clearly requires a causal link between the alleged kickback scheme and the reimbursement claims. The Sixth Circuit reiterated its concern that an overly expansive reading of the AKS could unduly punish "doctors of good intent, sweeping in the vice-ridden and virtuous alike."

On review, therefore, the Sixth Circuit held that the complaint failed to allege but-for causation. The referral relationship between the ophthalmologist and Oaklawn existed before Oaklawn decided not to hire the relator as an internal ophthalmologist, and thus the claims at issue were not a direct result of some alleged scheme not to hire the relator in exchange for referrals.

# TAKEAWAYS

This case offers some clarity, at least within the Sixth Circuit, as to what conduct qualifies as remuneration and what falls short through its tight interpretation of that term. Moreover, it addresses an important question about an elemental standard for supporting an FCA claim under a kickback theory. The issue is still live in most circuits, which invites uncertainty and inapposite application of the law elsewhere, but allegations of AKS violations through the FCA must clear a high bar to prove causation in these cases.[5] And eventually, if the circuit split continues to grow, the Supreme Court may need to resolve the issue.

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[1] *United States ex rel. Martin v. Hathaway*, No. 22-1463 (6th Cir. Mar. 28, 2023).

[2] 42 U.S.C. § 1320a-7b(g).

[3] *United States ex rel. Greenfield v. Medco Health Sols., Inc.*, 880 F.3d 89, 98 (3d Cir. 2018).

[4] *United States ex rel. Cairns v. D.S. Med. LLC*, 42 F.4th 828, 834–35 (8th Cir. 2022).

[5] On April 11, 2023, the relators have requested rehearing en banc in *Hathaway*, and that request remains pending as of the publishing of this article.

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