

6th Circ. Ruling's Seismic Shift In FCA Kickback Causation

By **Nina Shaw, Eric Sitarchuk and Alison Tanchyk** (April 5, 2023, 5:11 PM EDT)

In *U.S. v. Hathaway*, the U.S. Court of Appeals for the Sixth Circuit issued two significant holdings for defendants in False Claims Act matters predicated on the Anti-Kickback Statute.

First, the court joined the U.S. Court of Appeals for the Eighth Circuit in concluding that the plain text of the AKS requires that, to prove that a false claim results from a violation of the AKS, a relator must prove but-for causation — directly linking the alleged kickback to the false claim.

Second, the Sixth Circuit held that the statutory definition of remuneration under the AKS is limited to monetary payments and other transfers of value and, in doing so, rejected the sweeping definition of "anything of value" or "any act that may be of value to another."

Sixth Circuit Adopts But-For Causation Standard for AKS-Based FCA Claims

Before 2010, relators and the government frequently relied on AKS violations to make out FCA cases. Some courts presumed, without much analysis, that AKS violations were per se FCA violations, or that compliance with the AKS was a condition of payment.

A few dug more deeply and questioned these assumptions, while exploring the contours of the express and implied certification theories of falsity. Other courts presumed that AKS violations were material, while some suggested that materiality had to be proven.

While the weight of the authority seemed to be on the government's side, there was enough confusion that Congress saw fit to step in.

In 2010, Congress amended the AKS, in part, to bring clarity to the relationship between the FCA and the AKS and resolve some of these open questions.

The amendment provided 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.



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Rather than resolving the causation question, however, the amendment led to a growing split over the question of what claims result from an AKS violation.

Relying on an expansive conception of legislative history, the U.S. Court of Appeals for the Third Circuit, in its 2018 U.S. ex rel. *Greenfield v. Medco Health Solutions Inc.* decision, concluded that, while it is not sufficient to merely assert that a false claim was tainted by a kickback, it would be too exacting to require plaintiffs to prove that beneficiaries would not have used the relevant services absent — i.e., but-for — the alleged kickback scheme.[1]

The Third Circuit held that the causation standard only requires a link between the alleged kickbacks and resulting 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."

The Eighth Circuit, however, came to a different conclusion in its 2022 decision in *U.S. v. D.S. Medical LLC*. [2] There, the court held that the plain meaning of the statutory phrase "resulting from" means but-for causation, namely, that the claims would not have been submitted to the government absent the illegal kickback.

The other courts to weigh in on the issue split on whether to follow the *Greenfield* formulation.[3]

In *Hathaway*, the Sixth Circuit joined the Eighth Circuit in rejecting the Third Circuit's lenient causation standard, reasoning that "the ordinary meaning of 'resulting from' is but-for causation."

The court noted that *Greenfield* offered little assistance because it turned primarily on legislative history in the face of clear statutory language.

The *Hathaway* court explained that, under ordinary principles of statutory construction, it is inappropriate to interpret a statute with criminal applications based on legislative history because "no one should be imprisoned based on a document or statement that never received the full support of Congress and was presented to the President for signature."

Looking to the case in front of it, the *Hathaway* court ruled that the relators could not show causation because the medical practices at issue had a long-standing history of exchanging referrals with one another even before the alleged scheme took place.

Accordingly, because the alleged scheme did not change anything — i.e., the hospital would have received the referrals regardless of whether it hired the relator — but-for causation could not be established.

Sixth Circuit Applies a Narrow Definition of "Remuneration" Under the AKS

The question of what constitutes remuneration in *Hathaway* turned on whether the court would adopt a virtually boundless conception of "anything of value."

In *Hathaway*, an ophthalmologist and her husband alleged that a hospital refused to hire her in return for another ophthalmology practice's general commitment to send referrals to the hospital. The

ophthalmologist claimed that this constituted an illegal kickback scheme in violation of the AKS and the FCA.

The Sixth Circuit disagreed and rejected the anything-of-value definition propounded by the relators and the government. In reaching its decision, the court examined the dictionary definition of "remuneration," Congress' use of "remuneration" in other contexts, and the four corners of the statute, ultimately determining that remuneration requires a payment or transfer of some kind.

The court analogized the AKS to other federal statutes that prohibit bribery and observed, citing to the U.S. Supreme Court's 2016 decision in *McDonnell v. U.S.*, which said that those statutes bar "quid pro quo corruption — the exchange of a thing of value for an 'official act.'"

Further, the court observed that a broader definition lacks a coherent end point. The court considered various scenarios that would not qualify as remuneration under this standard, for example, a hospital that "opens a new research center, purchases top of the line surgery equipment, or makes donations to charities in the hopes of attracting new doctors," or 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."

The court recognized — as FCA defendants have long advocated — that defining remuneration as "anything of value" opens floodgates of potential liability, sweeping in conduct that is "vice-ridden and virtuous alike."

The court continued that an expansive reading of "remuneration" like the one proposed by the relators and the government would do "little to protect doctors of good intent."

What's Next: Implications for FCA and AKS Enforcement

The significance of this decision is difficult to overstate. With *Cairns* and *Hathaway*, there are now two carefully reasoned appellate decisions that unequivocally hold that the 2010 amendments to the AKS require but-for causation to prove false claims resulting from an AKS violation. This represents a seismic shift from what the government has claimed its burden to be.

When the government has argued that it had to prove nothing other than a taint of a kickback, causation was virtually assumed. With *Cairns* and *Hathaway*, courts are likely to require exacting proof of causation — as required by the plain language of the statute.

Under this framework, the government will have to show that, absent the kickback, the allegedly false claim would not have been submitted.

The application of a but-for causation requirement also raises questions of what will be required to prove damages in an AKS-based FCA case moving forward.

Under a taint theory, the government has advocated, and a number of courts have accepted, that the full value of the tainted claims is the proper measure of damages — essentially a 100% forfeiture theory.

For example, in its 2008 *U.S. v. Rogan* decision, the U.S. Court of Appeals for the Seventh Circuit concluded that it "did not think it important that most of the patients for which claims were submitted received some medical care — perhaps all the care reflected in the claim forms." [4]

The apparent indifference to causation inherent in the Rogan court's conception of damages is inconsistent with the Sixth and Eighth Circuit's statutorily based approach to but-for causation, which requires claims to actually result from a kickback to violate the law.

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

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

[3] Compare U.S. ex rel. Fitzer v. Allergan, Inc., 2022 WL 3599139, at *10 (D. Md. Aug. 23, 2022) (adopting the Third Circuit's reasoning in Greenfield and declining to adopt the but-causation standard) with U.S. ex rel. Everest Principals, LLC v. Abbott Labs., Inc., 2022 WL 3567063, at *8 (S.D. Cal. Aug. 18, 2022) (declining to resolve circuit split regarding causation requirement because the underlying allegations sufficed under either standard).

[4] 517 F.3d 449, 453 (7th Cir. 2008).