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Sixth Circuit Joins Eighth Circuit and Widens Circuit Split by Requiring "But-For" Causation in Some Anti-Kickback Cases

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April 04, 2023

In a much-welcomed step by the defense bar, on March 28, 2023, the United States Court of Appeals for the Sixth Circuit became the second federal appellate court to hold that "resulting from" under the 2010 amendment to the Anti-Kickback Statute (AKS) requires the government to prove that "but-for" the illegal kickbacks, the defendants would not have included particular items or services in their claim for reimbursement. *United States ex rel. Martin, et al. v. Hathaway, et al.*, No. 22-1463 (6th Cir. Mar. 28, 2023).[1] Given the Third Circuit's prior holding that only "a link" or "some connection" is required,[2] and other U.S. District Court opinions applying a "middle of the road" approach,[3] this Sixth Circuit opinion adds to the evolving area of law – with a significant blow to whistleblowers – teeing up another significant circuit split that may end up at the Supreme Court, or prompt further action by the Senate and False Claims Act champion Senator Chuck Grassley (R-IA) who appear ready to amend the statute whenever Courts adopt positions or interpretations that appear to help the defense bar.

Background

For years, Dr. Shannon Martin and Dr. Darren Hathaway practiced in a rural Michigan area at the only ophthalmology practice named South Michigan. In this area, Oaklawn Hospital was the most convenient option for surgery. Accordingly, the practice group and hospital referred local patients to each other for many years.

In 2018, Dr. Hathaway began negotiating a merger with a larger practice that did not have a spot for Dr. Martin. As a result, Dr. Martin, with the help of her husband Douglas Martin, began discussing converting ophthalmology to a hospital-based service line whereby Dr. Martin would be the hospital-based physician with the Oaklawn Board (Board). During these discussions, however, Dr. Hathaway informed the Board that creating a hospital-based ophthalmology service would be the "death knell" of his practice. On the other hand, Dr. Hathaway anticipated an increase in surgeries referred to Oaklawn after the merger. Ultimately, the Board voted not to hire Dr. Martin and she opened her own practice. In addition, Dr. Hathaway's merger with the larger practice fell through, he continued as the sole proprietor of South Michigan; and South Michigan and Oaklawn continued referring patients to one another.

Subsequently, the Martins claimed that Oaklawn rejected Dr. Martin's employment in return for Dr. Hathaway's commitment to continue sending Oaklawn local surgery referrals. The Martins filed suit under the False Claims Act (FCA) against Oaklawn and Dr. Hathaway, alleging remuneration under the AKS and false claims for services that were "tainted" by the AKS violations.

Remuneration Requires a Payment or Transfer of Value

First, the Sixth Circuit held that the Martins had not adequately alleged unlawful "remuneration" under the AKS. The AKS prohibits offering or paying "remuneration" to induce someone to make a referral for any item or service,[4] but does not define remuneration. The Martins alleged that Oaklawn's decision not to hire Dr. Martin in return for Dr. Hathaway's general commitment to continue sending Oakland surgery referrals was an AKS violation. The Sixth Circuit disagreed, holding that remuneration covers only payments or other transfers of value, which a decision not to hire was not.

Causation Standard for Anti-Kickback Claims

Second, even assuming there was remuneration, the Sixth Circuit held that neither Oaklawn nor Dr. Hathaway had submitted claims to the government for "items or services *resulting from*" an AKS violation. Relying on the ordinary meaning of "resulting from" and applying statutory construction principles, the Sixth Circuit joined the Eighth Circuit and held that the FCA requires but-for causation. The Sixth Circuit rejected the government's argument that the FCA's legislative history indicated Congress did not intend to require but-for causation, noting that legislative history should generally not be relied on when interpreting statutes that have criminal application (and criticizing the Third Circuit's reliance on legislative history to conclude that the FCA only requires "a link" or "some connection").

Applying this standard, the Sixth Circuit held that the Martins had not plausibly alleged that but-for the alleged misconduct, any claim for reimbursement would not have occurred. Rather, given the prior history of South Michigan and Oaklawn referring patients to one another, "[w]hen Oaklawn decided not to establish an internal ophthalmology line at the hospital, the same relationship continued just as it always had." Moreover, the Sixth Circuit explained that the temporal proximity between the Board's decision and the sole surgery Dr. Hathaway performed for which Oaklawn sought reimbursement – for seven months – would "create few inferences of cause and effect."

Implications

The Sixth Circuit's opinion is a blow to whistleblowers, but not the end of the issue. The government, whether it intervenes or files as amicus curiae as in this case, continues to argue that the FCA does not require a causal link. As courts across the country continue to disagree over the causation standard, we can expect whistleblowers to carefully choose their venues and, when the time comes, for the Supreme Court to decide this issue definitively.

If you have questions on this topic, reach out to Thomas H. Barnard, Ty Kelly, and Annie M. Kenville or any Baker Donelson Government Enforcement and Investigations attorney with whom you regularly work.

[1] The first circuit was the Eighth Circuit in *United States ex rel. Cairns v. D.S. Medical LLC*, 2022 WL 2930946 (8th Cir. July 26, 2022). For a full write up of that opinion, see here.

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

[3] *See, e.g.*, *United States v. Teva Pharmaceuticals USA Inc.*, No. 13 Civ. 3702 (CM), 2019 WL 1245656, at *24 (S.D.N.Y. Feb. 27, 2019).

[4] 42 U.S.C. SECTION 1320a-7b(b)(2)(A).