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The Deepening Circuit Split Over the Causal Connection Between AKS Violations and FCA Liability

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In the healthcare industry, violations of the Anti-Kickback Statute ("AKS") currently serve as one of the biggest drivers of liability under the federal False Claims Act ("FCA") for healthcare and life sciences companies, which are exposed to potentially ruinous damages and penalties. A critical question facing courts is the causal nexus that plaintiffs must establish between an AKS violation and a claim for federal reimbursement for that claim to be "false" under the FCA. The Department of Justice ("DOJ") has encouraged courts to conclude that whenever the intended result of a kickback occurs and a related claim is subsequently submitted, the requisite nexus is satisfied. Federal courts of appeal increasingly disagree. On March 28, 2023, the Sixth Circuit joined the Eighth Circuit in holding that in the context of an alleged AKS violation, FCA liability attaches only if the allegedly false claim would not have been submitted *but for* the AKS violation.[1] The Sixth and Eighth Circuits departed from an earlier decision from the Third Circuit, which had largely adopted DOJ's view.[2]

The AKS broadly prohibits the offering, payment, or receipt of remuneration to induce referrals reimbursed by federal healthcare programs. As part of the Patient Protection and Affordable Care Act, Congress amended the AKS to provide that "a claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim" under the FCA.[3]

The relevant causation standard to apply in this context presents more than just an academic debate. The AKS's broad scope criminalizes many types of arrangements that would be lawful—and are common—in virtually every other industry. DOJ often relies on enforcement discretion to allow arrangements to proceed undisturbed where they present technical violations of the law but pose a low risk of fraud and abuse. But whereas enforcement of the AKS is limited to DOJ and the Department of Health and Human Services Office of the Inspector General, the FCA is enforced by both DOJ and private whistleblowers. Referred to as "relators," FCA whistleblowers are financially incentivized to expand the scope of affected claims, as they stand to gain both 15–30% of any settlement with defendants and mandatory attorney's fees. Such settlements can easily balloon through the statutory authorization of treble damages plus per-claim penalties now exceeding $27,000, at most, per impacted claim. These heavy penalties enhance the importance of appropriately defining the scope of an AKS violation.

Last year, interpreting the key "resulting from" language, the Eighth Circuit concluded that the amended version of the AKS unambiguously requires "but for" causation—i.e., proof that, absent the kickback, the claim at issue would not have been submitted.[4] Arriving at this conclusion, the Eighth Circuit followed the cardinal rule of statutory interpretation: "As always, we begin with the text of the statute."[5] "With no statutory definition

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[1] *United States ex rel. Martin v. Hathaway*, 63 F.4th 1043, 1052 (6th Cir. 2023); *United States ex rel. Cairns v. D.S. Med. LLC*, 42 F.4th 828, 834–35 (8th Cir. 2022).

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

[3] 42 U.S.C. § 1320a-7b(g).

[4] *Cairns*, 42 F.4th at 834–35.

[5] *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007) (Thomas, J.).

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available," the panel scrutinized the "plain meaning" of "resulting from" "at the time of enactment."[6] The panel noted that the Supreme Court had already undertaken that task in interpreting nearly identical text in the Controlled Substances Act.[7] Reviewing a number of dictionary definitions, the Supreme Court in *Burrage v. United States*[8] held that the phrase "results from" requires "actual causality"—i.e., a but-for causation standard.[9] After examining for itself dictionary definitions of "results," the Eighth Circuit adopted *Burrage*'s but-for causation standard for the nexus between the AKS and the FCA.[10]

More recently, the Sixth Circuit agreed. According to the court, the "ordinary meaning of 'resulting from' is but-for causation."[11] Indeed, Congress added the "resulting from" language in 2010 "against the backdrop of a handful of cases that observed similar language as requiring but-for causation," including *Burrage*.[12] Putting this together, the Sixth Circuit concluded that a but-for standard foreclosed the claims of the relators in the case at issue, because "the alleged kickback scheme did not change anything. . . . There's not one claim for reimbursement . . . in this case that would not have occurred anyway."[13] In our view, this reasoning makes sense: unless AKS noncompliance actually causes a shift in care (for which reimbursement is subsequently sought), the kickback does not *result* in anything.

On the other side, DOJ has led the charge in favor of a more lenient standard. Both in its own cases and in *amicus* briefs filed in non-intervened cases, DOJ has rejected the notion that a but-for standard governs the "resulting from" language. Because Congress did not require but-for causation to establish criminal liability under the AKS, DOJ reasons, there is "no basis to believe" that Congress "meant to require that heightened showing to impose *civil* liability under the FCA for claims rendered false by AKS violations."[14] DOJ instead proposes a different test: if the payor of a kickback *intends* to cause the provision of certain medical care that is subsequently provided, then the care "result[ed] from" the kickback, such that a claim including the care is false—"without an additional showing about what would have occurred absent the kickback."[15] In at least one *amicus* brief, DOJ has expressly contended that plaintiffs need not show *any* causal connection between a kickback and a claim to establish FCA liability premised on AKS violations.[16] Some district courts have adopted similar views.[17]

In 2018, the Third Circuit did, too. Relying chiefly on legislative history, the court rejected the but-for standard articulated in *Burrage*, because it would produce results inconsistent with the intentions of the drafters of the AKS and the FCA.[18] The panel quoted the Congressional Record for the proposition that the "resulting from" provision was enacted to avert "legal challenges that sometimes defeat legitimate enforcement efforts"—even though nothing in this passage specifically addresses the "resulting from" language.[19] In a similar vein, the court invoked the FCA's alleged purpose "to reach all fraudulent attempts to cause the government to pay ou[t] sums of money or to deliver property or services."[20] Given this legislative history, the Third Circuit opted for a standard requiring simply a "link" between the alleged kickback and a subsequent claim:[21] a relator must merely identify a patient who was "exposed to a referral or recommendation . . . in violation of the" AKS, and who later received

[6] *Cairns*, 42 F.4th at 834 (internal quotation marks omitted) (quoting *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020)).

[7] *Id.*

[8] 571 U.S. 204 (2014).

[9] *Id.* at 210–11.

[10] *Cairns*, 42 F.4th at 834.

[11] *Martin*, 63 F.4th at 1052 (citing *Burrage*, 571 U.S. at 210–11).

[12] *Id.*

[13] *Id.* at 1053.

[14] Brief for the United States as Amicus Curiae in Support of Appellants at 22, *United States ex rel. Martin v. Hathaway* (6th Cir. Sept. 13, 2022) (No. 22-1463).

[15] *Id.* at 22–23.

[16] Brief for the United States as Amicus Curiae in Support of Neither Party at 8–9, *United States ex rel. Greenfield v. Medco Health Solutions, Inc.* (3d Cir. Apr. 17, 2017) (No. 17-1152).

[17] *See*, *e.g.*, *United States ex rel. Bawduniak v. Biogen Idec, Inc.*, No. 12-cv-10601, 2018 WL 1996829, at *6 (D. Mass. Apr. 27, 2018).

[18] *Greenfield*, 880 F.3d at 96.

[19] *Id.* (internal quotation marks omitted) (quoting 155 Cong. Rec. at S10853).

[20] *Id.* (quoting S. Rep. No. 99-345 (1986)).

[21] *Id.* at 98.

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care billed to a federal healthcare program.[22] Although the Third Circuit requires proof of some type of exposure or other connection between a kickback and a claim—"temporal proximity" between a kickback scheme and the submission of claims is not enough by itself—the court rejected but-for causation as too stringent a nexus.[23]

From our perspective, the Third Circuit's approach is flawed. It relies on legislative history to evade the plain meaning of the statutory text—even though the court expressly conceded that no legislative history explains "resulting from" in the first place.[24] In such circumstances, "silence in the legislative history cannot lend any clarity."[25] And even where there *is* relevant legislative history, courts may not use it to supplant statutory text based on intuitions about what Congress may have intended. Here, as explained above, the AKS's text unambiguously requires but-for causation, as confirmed by the Supreme Court's interpretation of nearly identical language in *Burrage*.[26] But-for causation, after all, is the "default . . . rule against which Congress is normally presumed to have legislated."[27]

The Sixth and Eighth Circuits have the better of the argument in this growing circuit split. DOJ's and the Third Circuit's views ignore the statutory text and binding Supreme Court precedent in favor of legislative history that does not address the relevant causation standard.

[22] *Id.* at 100.

[23] *Id.*

[24] *Id.* at 96.

[25] *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) (Thomas, J.).

[26] *Cairns*, 42 F.4th at 834–35 (citing *Burrage*, 571 U.S. at 210–11).

[27] *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).

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