STRATEGIC MANAGEMENT SERVICES

Court Ruling Tightens Requirements For False Claims Act Cases Based On The Anti-Kickback Statute

Richard P. Kusserow | August 25, 2022

In 2010, Congress amended the Anti-Kickback Statute (AKS) to state that claims "resulting from" an AKS violation are "false or fraudulent" for False Claims Act (FCA) purposes. Since then, the vast majority of health sector FCA cases by the Department of Justice (DOJ) have relied upon establishing violations "resulting from" the AKS. However, the question of what exactly the "resulting from" requirement means and to what degree it gives rise to a FCA violation has been the subject of many cases. A new ruling by the Eighth Circuit Court of Appeals, in a major departure from other courts, reversed a district court decision and adopted a stricter standard of requiring proof of AKS causation for false claims. In *United States ex rel. Cairns v. D.S. Medical LLC,* the government argued that kickbacks "tainted" the neurosurgeon's choice of implants and so his claims submitted to Medicare and Medicaid were false. However, the Court ruled the government had to prove that "a defendant would not have included particular items or services *but for* the illegal kickbacks." This will be a real monkey wrench for DOJ making AKS-based FCA cases, at least in the Eighth Circuit. Additionally, it is noteworthy to point out that this decision is not consistent with the Third Circuit Court that has held a relator can show a false claim "result[ed] from" a kickback but does not require proof of a direct causal link.

By far, the major focus on health care fraud cases for the DOJ and the Department of Health and Human Services Office of Inspector General (OIG) related to situations that implicated the AKS. To really gain a sense as to how important this linkage has been, visit the OIG's Corporate Integrity Documents (CIAs) and see that the overwhelming majority of CIAs relate to AKS/FCA actions by the DOJ. With few exceptions, defendants in FCA cases relying upon the AKS would enter into settlement agreements rather than face court action where the government was seen as holding the high card. As a result of this latest ruling, defendants may view their position strengthened and be less inclined to enter what they believe to be onerous settlement terms.

This could result in more protracted negotiations, fewer settlements, and changes in their terms and conditions.

For more information on this topic, contact Richard Kusserow at rkusserow@strategicm.com.

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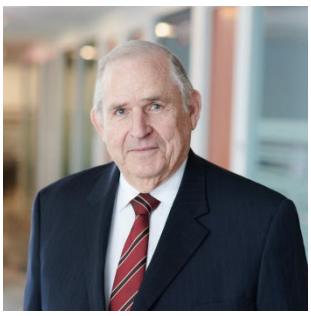

About the Author

Richard P. Kusserow established Strategic Management Services, LLC, after retiring from being the DHHS Inspector General, and has assisted over 2,000 health care organizations and entities in developing, implementing and assessing compliance programs.