

Sixth Circuit Narrows AKS Remuneration and Causation Standards

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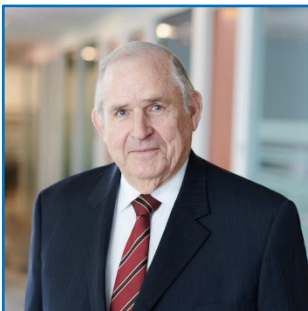
Suits must evidence that claims would not have occurred but for the alleged kickback.

Causation and remuneration elements of False Claims Act (FCA) cases based on alleged violations of the Anti-Kickback Statute (AKS) have been impacted by a recent decision by the Sixth Circuit. The case in question was brought by a *qui tam* relator (“whistleblower”), however, the DOJ declined to intervene. The Relator proceeded with the case, but a lower court granted defendants’ motion to dismiss and in March 2023, the [Sixth Circuit](#) affirmed the decision. The Court held that to claim FCA liability it was necessary to prove that the “referrals would not have been made without remuneration, and that claims would not have been submitted to the government without those referrals.” This “but-for” causation standard narrowed the interpretations of “Causation” and “Remuneration” for cases premised on alleged violations of the Anti-Kickback Statute (“AKS”) and narrowed the definition of “remuneration” to mean “payments or other transfers of value,” as opposed to “anything-of-value.”

The AKS prohibits healthcare providers from making referrals in return for remuneration, but the statute does not define remuneration. The Court interpreted the word’s standard meaning, relying on dictionary definitions from the time the AKS was originally enacted that define the word as a “form of payment.” The Court also rejected the argument that remuneration should be construed expansively because the AKS prohibits “any” remuneration and thus “anything of value in any form,” meaning any type (cash, services, goods).” Although most federal healthcare claims resulting from those unlawful referrals are automatically false or fraudulent under the civil FCA, the Court held there needs to be a causal link between the supposed remuneration and the actual submission of claims to Medicare and Medicaid.

The Sixth and Eighth Circuits endorse a “but-for” causation standard, however, the Third Circuit requires only a “link” sufficient to show the patient was “exposed” to an illegal recommendation or referral and the provider submitted a claim for reimbursement or payment. This split among the Circuit Courts leaves the issue open for possible Supreme Court review. In the meantime, defense attorneys can be expected to raise the “but-for” causation in their cases. This, in turn, is likely to have an impact on the FCA cases being brought by the DOJ predicated by violation of the AKS.

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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.