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Recent False Claims Act decisions to know

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In this post, we summarize noteworthy False Claims Act (FCA) decisions so far from 2023.

Each of the three circuit court opinions discussed here ruled in favor of the defendants on different aspects of the FCA: the Sixth Circuit addressed falsity predicated on an Anti-Kickback Statute violation, the Second Circuit analyzed the public disclosure bar, and the Ninth Circuit addressed presentment and materiality.

U.S. ex rel. Martin v. Hathaway, 63 F.4th 1043 (6th Cir. 2023)

In March, the Sixth Circuit issued an important ruling interpreting both the "remuneration" and "causation" elements of the Anti-Kickback Statute (AKS), taking a narrow approach that is good news for healthcare providers and other defendants.

This lawsuit was filed by an ophthalmologist (the relator) who alleged that a hospital decided not to hire her in favor of another independent ophthalmologist who threatened to move his referrals away from the hospital if it hired the relator and to increase his referrals if the hospital declined to hire the relator. The relator alleged that this decision violated the AKS and in turn, led to the hospital submitting false claims for payment in violation of the FCA.

First, the Sixth Circuit rejected the relator's argument that remuneration can broadly include "any act that may be valuable to another." Instead, the Sixth Circuit held that remuneration only includes "payments and other transfers of value." Under this narrower interpretation, the court held that the relator did not sufficiently plead an AKS violation because the hospital's decision not to hire the relator was not "remuneration," even if the competitor ophthalmologist benefited from that decision.

As to causation, the Sixth Circuit interpreted this to require that the relator plead that kickbacks were the but-for cause of the other provider's referrals. To reach this conclusion, the court examined closely the 2010 amendments to the AKS, which provided that claims "resulting from" violations of the AKS can be actionable under the FCA. The Sixth Circuit joins the Eighth Circuit[1] in applying this rigorous causation standard, contributing to a growing circuit split with the Third Circuit's[2] somewhat more relaxed standard.

In summary, the Sixth Circuit cautioned: "[R]eading causation too loosely or remuneration too broadly appear as opposite sides of the same problem. Much of the workaday practice of medicine might fall within an expansive interpretation of the Anti-Kickback Statute. Worse still, the statute does little to protect doctors of good intent, sweeping in the vice-ridden and virtuous alike." Instead, the court explained that its approach to both remuneration and causation "still leaves plenty of room to target genuine corruption."

Check out our previous summary of this case here.[3]

U.S. ex rel. Piacentile v. U.S. Oncology, Inc., 2023 WL 2661579 (2d Cir. Mar. 28, 2023)

In this case, the Second Circuit analyzed the pre-2010 version of the FCA's public disclosure bar and the original source exception thereto, which prevents a relator from pursuing a *qui tam* lawsuit based on information already disclosed to the public unless the relator has independent knowledge of the alleged fraud and voluntarily provided information about it to the government. The purpose of this limitation is to prevent follow-on parasitic FCA lawsuits that don't help the government prosecute more fraud.

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The District Court for the Eastern District of New York dismissed the relators' fourth amended complaint, holding it did not have jurisdiction due to the public disclosure bar, and the Second Circuit affirmed. This *qui tam* lawsuit related to allegations that pharmaceutical company Amgen paid illegal kickbacks to oncologists to get them to use Amgen's drugs over those of other manufacturers.

The district court identified three complaints that all predated the relators' filing of this lawsuit and disclosed the existence of the same kickback scheme alleged in this lawsuit. The relators argued that because none of those lawsuits identified U.S. Oncology by name, the public disclosure bar did not apply. The Second Circuit disagreed this was a requirement as long as the prior disclosure said enough about a transaction for the government to discover additional parties involved.

After holding the public disclosure bar was implicated, the Second Circuit also held that relators were not "original sources" of the allegations within the meaning of the FCA such that they could pursue their claims anyway because they did not have "direct and independent knowledge" of the information in their allegations.

The original relator in this case — a physician convicted of Medicare fraud and tax evasion who operates a *qui tam* whistleblower website — based his FCA allegations on interviews he conducted with Amgen and U.S. Oncology executives, so he only had indirect knowledge to support his allegations. Concluding the relators were not original sources, the Second Circuit affirmed that the public disclosure bar deprives federal courts of jurisdiction to hear this lawsuit and affirmed dismissal.

U.S. ex rel. Gharibian v. Valley Campus Pharmacy, Inc., 2023 WL 195514 (9th Cir. Jan. 17, 2023)

In this *qui tam* lawsuit, the relator sued multiple pharmacies alleging that they engaged in fraudulent conduct in violation of the FCA by having their employees misrepresent who their employers were when seeking prior authorizations for medications from insurers and by falsifying patient records to procure prior authorizations. The District Court for the Central District of California dismissed the complaint for failure to state a claim, and the Ninth Circuit affirmed.

First, the Ninth Circuit held that the complaint failed to adequately plead that a false claim was made to a government (and not a private) payor because the complaint merely pleaded on information and belief that the pharmacies made false and fraudulent statements to government insurers without adequately stating the factual basis for that belief.

Second, the complaint failed to allege materiality. Under the FCA, the alleged misrepresentation must be material to the government's decision to pay the claim, meaning it must have a natural tendency to influence the payment.

With regard to the relator's allegations that the pharmacies instructed their employees to misrepresent who the employer seeking the prior authorization was, the Ninth Circuit held that the complaint did not adequately allege that insurers would have refused to pay had they known the prior authorization request was coming from a pharmacy instead of a physician's office.

The relator did not have any support for her argument that the physician is required to be the one to call the payor, and indeed some Medicare regulations appear to contemplate individuals other than physicians or their representatives being the ones to obtain prior authorizations on behalf of patients.

Notes

[1] https://bit.ly/3nxn2Dg

[2] https://bit.ly/42pv5kd

[3] https://bit.ly/3pfCCUk

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