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Sixth Circuit Limits False Claims Act Cases Based On Alleged Violations of the Anti-Kickback Statute

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The Sixth Circuit Court of Appeals recently issued a decision limiting the scope of the Anti-Kickback Statute (AKS) when used as a basis for a False Claims Act (FCA) case. The decision in *United States ex rel. Martin v. Hathaway*, No. 22-1463 (March 28, 2023) has the potential to begin to rein in the extremely broad reach of the AKS as a basis for FCA liability.

The case involved a hospital and an ophthalmologist accused of violating the FCA and AKS by the relators, another ophthalmologist and her husband. The relators alleged that the hospital decided not to hire the relator as an ophthalmologist in exchange for a general commitment of continued referrals from the defendant ophthalmologist, who had a long-standing relationship with the hospital. The relators claimed that this arrangement constituted illegal remuneration under the AKS, and that all claims submitted by the defendants to Medicare for services resulting from the referrals were thereby false under the FCA.

The district court dismissed the relators' complaint and the Sixth Circuit affirmed, holding that the relators failed to plead a viable theory of remuneration under the AKS, and that any alleged AKS violation caused the submission of false claims. Although courts have long held that AKS remuneration generally means anything of value, the Sixth Circuit noted first that the AKS does not actually define remuneration and applied a textualist and common-sense analysis. Looking at the common understanding of the word "remuneration" at the time the AKS was enacted, how the word was used in other statutes, and its use in context of the AKS's punitive and safe harbor provisions, the Sixth Circuit concluded that "remuneration" does not include any act that may be valuable to another, but only payments and other transfers of value. The "essence" of remuneration, for the court, was a payment or transfer of value from one to another. The court found that the hospital's decision not to hire the relator was not a transfer of value to the defendant ophthalmologist, but rather a business decision based on various factors, such as patient demand, financial viability, and community relations. The court also rejected the relators' argument that the hospital's decision conferred an indirect benefit to the

defendant ophthalmologist by eliminating potential competition.

The Sixth Circuit also held that the relators failed to show causation between the alleged remuneration and the claims submitted by the defendants. The AKS states that claims including items or services “resulting from” an AKS violation constitute false claims, but courts have been divided on what the phrase “resulting from” requires a relator to prove. The Third Circuit held in *United States ex rel. Greenfield v. Medco Health Sols., Inc.*, 880 F.3d 89 (3d Cir. 2018) that a relator need not prove that an AKS violation caused a claim to be submitted, while the Eighth Circuit in *United States ex rel. Cairns v. D.S. Medical LLC*, 42 F.4th 828 (8th Cir. 2022) held the opposite and requires relators to show but-for causation in order bring an FCA claim based on an AKS violation.

The Sixth Circuit sided with the Eighth and explained that causation under the AKS requires more than a temporal or logical connection between a referral and a claim; it requires proof that the referral would not have occurred but for the remuneration. The court found that the ordinary meaning of the phrase “resulting from” in the AKS is but-for causation, and because the text of the statute provided an answer the Sixth Circuit saw no reason to further consider legislative history or policy arguments. The court further found that the relators did not allege any facts to support a finding of causation, but instead relied on conclusory statements and speculation. The court noted that there was no evidence that the defendant ophthalmologist changed his referral patterns after the hospital's decision, or that he referred patients to the hospital solely because of his personal interest. The court also observed that there were legitimate reasons for his referrals, such as patient preference, convenience, quality of care, and availability of services.

The Sixth Circuit's decision in *Martin* is a significant step towards limiting the reach of the AKS as a predicate for FCA actions. Most courts embrace an expansive reading of “remuneration” and instead rely on the AKS's scienter requirement to limit its applicability—which often means claims survive motions to dismiss because scienter can be pleaded generally under the FCA and leads to extensive discovery to prove or disprove the defendant's state of mind. But limiting the definition of remuneration up front may subject more claims to a thorough review on a motion to dismiss. Likewise requiring a causal relationship between the alleged kickback violation and a false claim actually submitted to the Government will limit the scope of viable claims.

Vorys has extensive and nationwide FCA experience. Should you have questions about this or other FCA matters, please don't hesitate to contact your Vorys attorney.