

Eighth Circuit Analyzes Scope of FCA Liability Under Anti-Kickback Statute

September 23, 2022 – FCA Now
by Scott Mah and Charles J. Pults

On July 26, 2022, the Eighth Circuit Court of Appeals issued an opinion interpreting the standard for the causal link the government must show to establish that a “false or fraudulent” claim under the False Claims Act (“FCA”) included “items or services *resulting from* a violation” of 42 U.S.C. § 1320a-7b(g), the federal anti-kickback statute. *United States ex rel. Cairns v. D.S. Med. LLC*, 2022 U.S. App. LEXIS 20584 (8th Cir. Jul. 26, 2022) (emphasis added).

In *Cairns*, the Eighth Circuit reviewed a jury verdict from the Eastern District of Missouri where a neurosurgeon named Sonjay Fonn and a medical implant company owned by his fiancée were found liable for violations of the FCA. According to the Court’s opinion, Dr. Fonn used spinal implants in his medical practice to treat degenerative-disc disease and other spinal disorders. *Id.* at *3-4. Because of the large commissions associated with each implant sold, Fonn was “in a powerful position” to impact the economic fortunes of prospective implant distributors. *Id.* at *4. Dr. Fonn chose to use implants distributed by defendant DS Medical, which was owned by his fiancée. *Id.* The arrangement resulted in commissions of more than \$1 million in a single year from one manufacturer for DS Medical, and Fonn was offered the opportunity to purchase company stock. *Id.*

Several area physicians filed a *qui tam* complaint based on Fonn’s high implant use and his financial relationship with DS Medical. *Id.* at *4-5. The Government intervened and the case proceeded to trial. *Id.* at *5. The Government’s theory of liability was that the couple and their businesses submitted false or fraudulent Medicare and Medicaid claims after having violated the anti-kickback statute. *Id.* The district court instructed the jury that the Government could establish falsity or fraud if it proved, by a preponderance of the evidence, that the defendants submitted Medicare or Medicaid claims which failed to disclose the violations of the anti-kickback statute. *Id.* The jury returned a verdict for the Government on several of the claims. *Id.*

On appeal, the defendants argued that the district court committed two reversible errors.

Related People

- Scott Mah
- Charles J. Pults

Related Capabilities

- Healthcare Enforcement & Compliance
- Government Enforcement & Corporate Investigations

Id. at *8. First, the defendants argued that the district court erred by applying a “preponderance of the evidence” standard of proof for the anti-kickback violations and should have instead applied a “proof beyond a reasonable doubt” standard. *Id.* at *9–10. While the plain text of the FCA provides that the government need only prove each “essential element” of a claim by a “preponderance of the evidence,” the defendants argued that because a violation of the anti-kickback statute – a criminal offense – normally has to be proven with proof “beyond a reasonable doubt” that the higher standard should apply to the FCA claim. *Id.* Second, the defendants argued that the district court erred in failing to provide a jury instruction on but-for causation. *Id.* at *8.

Rejecting the first argument, the Eighth Circuit affirmed the district court’s use of the “preponderance of the evidence” standard of proof. *Id.* at *9–10. The Court explained that “[t]he fact that the False Claims Act expressly provides a preponderance-of-the-evidence standard for all ‘essential elements’ leaves no doubt” that FCA violations, due to their status as civil sanctions, can be proven under the lower standard. *Id.* As such, the government may “establish an illegal kickback by a preponderance of the evidence as part of a larger False Claims Act case.” *Id.* at *10.

The Eighth Circuit then turned to the Defendants’ argument that they were entitled to a jury instruction on but-for causation. On this issue, the Court agreed with the Defendants, reversing the verdict and remanding the case for a new trial. *Id.* Explaining its reasoning, the Court found that the statutory language at issue (the 2010 amendment to the anti-kickback statute) was unambiguous, and that the issue turned on the plain meaning of the phrase “resulting from.” *Id.* at *10-11. After briefly reviewing case law acknowledging and considering the plain meaning of “resulting,” the Court determined that the statute required a showing of but-for causation. *Id.* at *11. In concrete terms, this means that a plaintiff who seeks to establish falsity or fraud based on claims “resulting from” a violation of the anti-kickback statute must show that “a defendant would not have included particular ‘items or services’ but for the illegal kickbacks.” *Id.* at *17. The court rejected the alternative constructions suggested by the Government, such as that liability could be shown by proving claims were “tainted by” or “provided in violation of” the anti-kickback statute. *Id.* at *14.

The Court concluded by explaining that its ruling was narrow and it did not imply that every case arising under the FCA requires a showing of but-for causation. *Id.* at *17.