Arkansas Law Review

Volume 76 | Number 3 | Article 7

December 2023

Snitches Get Stitches: An Analysis of The Eighth Circuit's But-For Causation Requirement in False Claims Act Litigation "Resulting From" Anti-Kickback Violations

Travis R. Linn

Follow this and additional works at: https://scholarworks.uark.edu/alr

Part of the Health Law and Policy Commons

Recommended Citation

Travis R. Linn, *Snitches Get Stitches: An Analysis of The Eighth Circuit's But-For Causation Requirement in False Claims Act Litigation "Resulting From" Anti-Kickback Violations*, 76 Ark. L. Rev. (2023).
Available at: https://scholarworks.uark.edu/alr/vol76/iss3/7

This Comment is brought to you for free and open access by the School of Law at ScholarWorks@UARK. It has been accepted for inclusion in Arkansas Law Review by an authorized editor of ScholarWorks@UARK. For more information, please contact scholar@uark.edu.

SNITCHES GET STITCHES: AN ANALYSIS OF THE EIGHTH CIRCUIT'S BUT-FOR CAUSATION REQUIREMENT IN FALSE CLAIMS ACT LITIGATION "RESULTING FROM" ANTI-KICKBACK VIOLATIONS

Travis R. Linn*

I. INTRODUCTION

Prosecuting healthcare fraud recovers billions in tax dollars and affects millions of Americans.[1] As of 2022, more than eighty-two million Americans were enrolled in Medicaid, and over sixty-five million were enrolled in Medicare.[2] The Congressional Budget Office projects that Medicaid will cost the federal government roughly $594 billion, and Medicare will cost roughly $826 billion.[3] Regardless of these figures, it is estimated that twenty-six million Americans remain without health insurance in the United States.[4] Though the number of uninsured individuals

---

*J.D. Candidate, University of Arkansas School of Law, 2024. Managing Editor, *Arkansas Law Review*, 2023-2024. First, I would like to thank my parents, Mark and Tammy Linn, for their unconditional love and support during my law school experience. Next, I would like to thank my Faculty Advisor and greatest mentor since starting law school – Professor Blair Bullock. I am sincerely thankful to Professor Bullock for the time and effort she gave reading (and rereading) this Note, and for her consistent advice throughout this process. Lastly, but certainly not least, I wish to thank my colleagues at the *Arkansas Law Review*. The community we built has truly changed my life, and this Note is dedicated to each of you.

1. *See Justice Department's False Claims Act Settlements and Judgments Exceed 5.6 Billion in Fiscal Year 2021*, U.S. DEP'T OF JUST., OFF. OF PUB. AFFS. (Feb. 1, 2022), [hereinafter *2021 DOJ False Claims Act Settlements & Judgments*] [https://perma.cc/4BCC-F3PX].

2. Stephanie Guinan, *Medicaid Enrollment Data: How Many People Are Signed Up?*, VALUE PENGUIN (Sept. 15, 2023), [https://perma.cc/4W7A-QDJA]; *CMS Fast Facts*, CTRS. FOR MEDICARE & MEDICAID SERVS., [https://perma.cc/8RYQ-MECG] (last visited Sept. 16,, 2023).

3. *Health Care*, CONG. BUDGET OFF., [https://perma.cc/MR73-4TGZ] (last visited Sept. 16, 2023).

4. Amanda Seitz, *Number of Uninsured Americans Drops to an All-Time Low*, PBS NEWS HOUR (Aug. 2, 2022), [https://perma.cc/EC99-WBYG].

is at an all-time low, it could be argued that every dollar misspent is money that could be used to provide healthcare for these twenty-six million Americans. Congress had this in mind when regulating government healthcare programs through legislation such as the federal Anti-Kickback Statute ("AKS").[5]

Following the expansion of Social Security in the 1960s, Congress enacted the AKS in 1972 to ensure that items and services charged to Medicaid were only those necessary to the beneficiary's health.[6] Congress sought to accomplish this in part by prohibiting medical professionals from taking personal finances into consideration when treating their patients.[7] Accordingly, the AKS is a criminal statute which prohibits the knowing and willful payments of "any remuneration" for the referral of a healthcare provider that is involved in a federal healthcare program.[8] "Any remuneration" has been interpreted by an overwhelming majority of federal circuits to include any type of kickback for the referral of medical services—both monetary and in-kind.[9] Those prosecuted for AKS violations face both civil and criminal penalties, which include up to $50,000 *per kickback* plus three times the amount of remuneration the offending physician received or gave for referrals.[10] Additionally, the AKS imposes criminal fines of more than $100,000 and up to ten years imprisonment, plus exclusion from future participation in any federal or state healthcare program.[11]

Often, the type of sensitive insider information used to uncover kickback schemes requires individuals to come forward

---

5. *See* United States v. Greber, 760 F.2d 68, 71 (3d Cir. 1985) (citing H.R. REP. NO. 95-393, pt. 2 (1977)).

6. *See* Marc Stephen Raspanti, *A Practitioner's Primer on History and Use of the Federal Anti-Kickback Statute*, PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP (Mar. 28, 2017), [https://perma.cc/JSG8-FL3P].

7. United States v. Patel, 778 F.3d 607, 612 (7th Cir. 2015); *see also Guidance on the Federal Anti-Kickback Law*, U.S. DEP'T OF HEALTH & HUM. SERVS., [https://perma.cc/E3L2-3ZAS] (last visited Sept. 16, 2023).

8. *See* 42 U.S.C. § 1320a-7b (2022); *Anti-Kickback Statute and Physician Self-Referral Laws (Stark Laws)*, AM. SOC'Y OF ANESTHESIOLOGISTS, [https://perma.cc/SCV2-5AVH] (last visited Sept. 16, 2023).

9. Benjamin C. Joseph, *Defining 'Referral' in the Anti-Kickback Statute*, AM. BAR ASS'N. (Apr. 22, 2022), [https://perma.cc/K5YM-2F8K].

10. 42 U.S.C. § 1320a-7a (2022); 31 U.S.C. § 3729 (2009); Joseph, *supra* note 9.

11. Joseph, *supra* note 9; U.S.C. § 1320a-7b(b).

and report personal knowledge of these crimes.[12] By reporting this crucial information, these whistleblowers risk employment retaliation and their professional and personal relationships. In 2010, as part of the Affordable Care Act, Congress attempted to mitigate whistleblowers' risks and incentivize the reporting of AKS violations by passing 42 U.S.C. § 1320a-7b(g).[13] This provision amended the AKS, allowing an individual to file a False Claims Act ("FCA") suit predicated on an AKS violation.[14] Because the AKS is a criminal statute, only the government may prosecute claims under it.[15] However, the FCA is a civil statute that allows private individuals to sue on behalf of the U.S. government for false claims submitted for payment under government contracts, and, if successful, these private individuals will receive a portion of the government's recovery.[16]

Congress has explicitly dictated what type of activity constitutes the submission of a "false claim" to the federal government through other federal statutes.[17] For instance, a 2010 amendment to the AKS provides the possibility for whistleblowers to recover a portion of the government's damages under the FCA which incentivizes individuals to file FCA claims based on their knowledge of AKS violations.[18] Put plainly, Congress wanted individuals to report AKS violations and used the FCA as a way to ensure private citizens could get monetary

---

12. Acting Assistant Attorney General Boyton claimed that, "Industry insiders are uniquely positioned to expose fraud and false claims and often risk their careers to bring these schemes to light." *2021 DOJ False Claims Act Settlements & Judgments*, *supra* note 1. He continued, "Our efforts to protect taxpayer funds benefit from the courageous actions of these whistleblowers, and they are justly rewarded under the False Claims Act." *Id.*

13. *See* Josh J. Leopold, *Examining Causation Standards in False Claims Act Cases Predicated on Anti-Kickback Violations*, UNIV. OF CHI. L. REV. ONLINE (Jan. 24, 2023), [https://perma.cc/LH9Q-DCDR]. The First Circuit held that "[i]n 2010, the AKS was amended to create an express link to the FCA." Guilfoile v. Shields, 913 F.3d 178, 189 (1st Cir. 2019).

14. 42 U.S.C. § 1320a-7b(g); *see also* Leopold, *supra* note 13; *Guilfoile*, 913 F.3d at 189.

15. 42 U.S.C. § 1320a-7b(g); *see also* Leopold, *supra* note 13.

16. Bryan Lemons, *An Overview of "Qui Tam" Actions*, FED. L. ENF'T TRAINING CTRS., [https://perma.cc/6XCX-EJDW] (last visited Sept. 16, 2023); *see also* 42 U.S.C. § 1320a-7b.

17. *See Guilfoile*, 913 F.3d at 189.

18. *Id.* at 189-90; Lemons, *supra* note 16; 31 U.S.C. § 3730 (2022).

damages for coming forward with knowledge of kickback crimes in healthcare.[19]

Additionally, Congress "codified the connection" between the AKS and FCA in 42 U.S.C. § 1320a-7b(g).[20] The text of the 2010 amendment reads: "a claim that includes items or services *resulting from* a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]."[21] Though Congress intended to use these words to equip plaintiffs with the ability to rely on an AKS violation as a *per se* "false" claim for purposes of FCA litigation, the question remains: what does *resulting from* really mean? More importantly, what kind of facts must be present to convince a court that an FCA claim predicated on an AKS violation is *resulting from* that violation? As of September 2022, courts do not agree on the answers to these questions. Certain courts take a strict textualist approach to interpret this clause, and others maintain a more purposivist outlook on the amendment.[22]

Considering the rivalry between textualism and purposivism is one of the most complex, long-lasting, and theoretical debates of the judiciary,[23] this Note does not attempt to resolve it. Rather, Part II of this Note will analyze three pieces of legislation and Congress's reasons for passing them: the FCA, the AKS, and a 2010 amendment to the AKS passed under the Affordable Care Act that connects the two.[24] Part III will analyze the Third and Eighth Circuits' conflicting interpretations of the 2010 amendment and why the Eighth Circuit's commitment to

---

19. *See* Jennifer A. Staman, CONG. RSCH. SERV., RS22743, HEALTH CARE FRAUD AND ABUSE LAWS AFFECTING MEDICARE AND MEDICAID: AN OVERVIEW 5 (2016); 31 U.S.C. § 3730.

20. Leopold, *supra* note 13; *see also* 42 U.S.C. § 1320a-7b(g). The First Circuit held that "[i]n 2010, the AKS was amended to create an express link to the FCA." *Guilfoile*, 913 F.3d at 189.

21. 42 U.S.C. § 1320a-7b(g) (emphasis added).

22. *See* United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 836 (8th Cir. 2022); *but see* United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 96 (3d Cir. 2018).

23. *See generally* Valerie Brannon, *Statutory Interpretation: Theories, Tools, and Trends*, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2018).

24. *See infra* Part II.

textualism has disregarded Congress's reasons for passing 42 U.S.C. § 1320a-7b(g).[25]

II. THE FALSE CLAIMS ACT, THE FEDERAL ANTI-KICKBACK STATUTE, AND THE AFFORDABLE CARE ACT: WHAT, WHEN, AND WHY

A. The False Claims Act

The FCA, colloquially known as "Lincoln's Law," was enacted in 1863 to address contractor fraud during the Civil War.[26] Under this legislation, anyone who knowingly submits false or fraudulent claims for payment or approval to the U.S. government may be held civilly liable.[27] One unique component of the FCA involves 31 U.S.C. § 3730(b), which allows for an individual to file a *qui tam* case.[28] Literally meaning "in the name of the [K]ing," *qui tam* actions grant private individuals, statutorily classified as "relators," an opportunity to file suit in the name of the U.S. government.[29] If successful, relators may receive up to thirty percent of the government's recovery.[30]

Relators file their claim *in camera*,[31] and this claim remains sealed for sixty days (even from the defendant).[32] During this sixty-day period, the United States investigates the relator's case.[33] If the government decides to intervene, they effectively

---

25. *See infra* Part III.

26. *See* Thomas C. Hill et al., *U.S. Supreme Court to Resolve a Circuit Split Involving Qui Tam Actions*, PILLSBURY LAW (July 11, 2022), [https://perma.cc/798V-K29E]; *Q&A: Whistleblowers Shine Light on Fraud*, CHUCK GRASSLEY (July 30, 2021), [https://perma.cc/R5Z6-DJZF].

27. *See* 31 U.S.C. § 3730 (2022); 42 U.S.C. § 1320a-7a (2022).

28. 31 U.S.C. § 3730.

29. Sanford M. Stein & Jan M. Geht, *Legal Ethics for Environmental Lawyers: Real Problems, New Challenges, and Old Values*, 26 WM. & MARY ENV'T L. & POL'Y REV. 729, 734 (2002).

30. *Qui Tam Lawsuits – Whistleblowers Guide & Qui Tam FAQs*, PHILLIPS & COHEN, [https://perma.cc/W5UT-P953] (last visited Sept. 16, 2023).

31. "In camera is a Latin term which literally translates to '*in chambers*' but carries the meaning 'in private'. Portions of a case held in camera are held in private before a judge where the press and the public are not allowed to take part." *In Camera*, CORNELL L. SCH. LEGAL INFO. INST., [https://perma.cc/AU84-BFJD] (last visited Sept. 16, 2023).

32. Lemons, *supra* note 16.

33. *Id.*

take the case from the relator.[34] The United States may restrict the relator's role in the case for cause, such as undue delay or repetition.[35] Considering the United States is the real party to the case, the government may also decide to settle or dismiss the case entirely, even over the objections of the relator.[36] Should the government decline to intervene after sixty days, the relator maintains responsibility for every part of litigation.[37] However, upon a showing of good cause, the United States can join the action again at any time, even if it initially declined to do so.[38] Because the government can decide to join at any time, can participate at different levels for different cases, and can end the case when it sees fit, relator participation in FCA litigation varies widely.[39] Accordingly, the court will award the relator a portion of the United States' damages—capped at thirty percent—based on their overall involvement in the case.[40]

At trial, a relator may succeed by showing that the defendant (1) had "actual knowledge" of the false nature of the claim; (2) acted in "deliberate ignorance of the truth or falsity" of the claim; or (3) acted in "reckless disregard of the truth or falsity" of the claim.[41] The relator must show one of these three elements for each allegedly "false" claim the defendant submitted to the U.S. government.[42] If the plaintiff successfully demonstrates one of these elements, the defendant will be liable for "not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of

---

34. *Id.*

35. For example, if the relator wants to put forward a different litigation strategy than the government, the government may override that strategy in a way the Department of Justice best sees fit. *Id.* If the relator continues to go against the legal strategy of the DOJ, then the DOJ may ask they are removed so long as they can provide a showing for cause. *See id.*

36. Lemons, *supra* note 16 (although the United States has the power to do this, the relator still has the right to be heard in the matter, and dismissal is subject to the relator's due process rights).

37. *Id.*

38. *Id.*

39. *Id.*

40. Though capped at thirty percent, when the government decides to intervene, relators have historically received twenty to twenty-five percent of the damages. *Id.*

41. 31 U.S.C. § 3729(b)(1)(A) (2009).

42. *See* 31 U.S.C. § 3729; Lemons, *supra* note 16.

damages which the Government sustained because of the act of that person."[43]

In sum, private individuals who wish to file suit on behalf of the government may do so under the FCA.[44] These individuals are statutorily defined as "relators," and based on their participation in the litigation, they may receive up to thirty percent of the damages recovered by the government.[45] For false claims submitted to federal healthcare programs such as Medicare and Medicaid, Congress amended the AKS in 2010 to encourage *qui tam* litigants to use their knowledge of kickbacks and file suit under the FCA by indicating that an AKS violation can provide cause for a relator's FCA case.[46]

B. Regulating Kickbacks: Where it's Been, Where it's Headed

The Copeland Act was passed in 1934 and included Congress's first attempt at regulating kickbacks.[47] As defined in this statute, kickbacks involve government contractors who induced their subcontractors to give them part of the wages paid by the government in exchange for the contractor hiring them for the job.[48] Congress realized early on that kickback schemes in government contracts were causing a significant number of issues.[49] For instance, Senator Royal Copeland (the Act's namesake), led a Senate committee investigating kickbacks on government contracts.[50] The investigation discovered that up to twenty-five percent of the federal funds paid to subcontractors were being returned by the wage earner as a kickback to the employing contractor or government official who gave them that job.[51] Congress's investigation concluded that, at times,

---

43. 31 U.S.C. § 3729(a)(G).
44. *See Qui Tam Lawsuits – Whistleblowers Guide & Qui Tam FAQs*, *supra* note 30.
45. *Id.*
46. *See Guilfoile v. Shields*, 913 F.3d 178, 189 (1st Cir. 2019).
47. 29 C.F.R. § 3.1 (2023); Raspanti, *supra* note 6.
48. Raspanti, *supra* note 6.
49. WILLIAM G. WHITTAKER, CONG. RSCH. SERV. RL94408, THE DAVIS-BACON ACT: INSTITUTIONAL EVOLUTION AND PUBLIC POLICY 10-11 (2007).
50. *Id.* at 8.
51. *Id.*

government contractors were prioritizing their personal financial interests over their obligation to fairly perform the duties of their contract with the government.[52] Since 1931, Congress has dramatically expanded its anti-kickback stance. Recently, the federal government has focused on kickback regulations for one of the most important professions involving government contracts: healthcare.[53]

1. Regulating Kickbacks in Healthcare

Following the expansion of Social Security in the 1960s, Congress enacted the AKS in 1972 to ensure that the items and services charged to Medicaid were only those necessary to sustain the beneficiary's health.[54] The statute criminalized kickbacks in connection with Medicaid payments, making it a misdemeanor for a provider to solicit, offer, or receive any (1) kickback or bribe in connection with furnishing of such items or services or making receipt of such payment, or (2) rebate of any fee or charge for referring any such individual to another person for furnishing of such items or services.[55] Federal prosecutors complained that the language of this statute was "unclear and needed clarification."[56] Due to a split in the Fifth and Seventh Circuits over the proper interpretation of the word kickback, prosecutors in those circuits struggled to win their cases and even struggled to ascertain the viability of their claims.[57]

In 1977, Congress responded to these concerns and ramped up the punitive effects of the AKS by providing that "any remuneration" by or to a healthcare professional in exchange for referrals is a felony punishable by up to five years imprisonment.[58] Congress used "any remuneration" to broaden the scope of the AKS "to *clarify* the types of financial

52. *Id.*
53. 42 U.S.C. § 1320a-7b(b) (2022).
54. *See* Raspanti, *supra* note 6.
55. 42 U.S.C. § 1320a-7b(b).
56. United States v. Greber, 760 F.2d 68, 71 (3d Cir. 1985) (quoting H.R. REP. NO. 95-393, pt. 2 (1977)).
57. Joseph, *supra* note 9.
58. *Id.* (citing Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952-01, 35958 (July 29, 1991)).

arrangements and conduct to be classified as illegal."[59] However, in its attempt to provide clarity, Congress did not include a statutory definition of "any remuneration."[60] As a result, the Third Circuit's opinion on the interpretation of "any remuneration" was decided nearly a decade after Congress amended the AKS in 1977.[61] Litigation which caused the overwhelming majority of federal circuits to adopt the Third Circuit's "any remuneration" interpretation of the 1977 amendment to the AKS provides context for which an adequate analysis of the split over the 2010 amendment's *resulting from* debate may be conducted.[62] The Third Circuit was the first circuit court to interpret "any remuneration" in *United States v. Greber*.[63]

2. *United States v. Greber*: Developing the "One Purpose" Test

Long before courts split on their interpretation of the 2010 amendment's *resulting from* provision, most every circuit agreed upon the interpretation of the 1977 amendment to the AKS, which Congress passed to expand the statute's definition of kickback to include "any remuneration."[64] The Third Circuit was the first circuit court to weigh in on the precise meaning of "any remuneration" in the 1985 case *United States v. Greber*.[65] Dr. Greber was a well-established and respected osteopathic physician, serving as president of Cardio Med, Inc.[66] Cardio Med provided diagnostic cardiac information for patients via a Holter monitor.[67] First, patients would wear the Holter monitor for a twenty-four hour period, and the information gathered by the device would be relayed to a lab technician who would then report this information back to the physician.[68] Next, Cardio Med would bill Medicare for the use of this technology.[69] Finally, when

59. *Id.*
60. *Id.*; *see also* 42 U.S.C. § 1320a-7b(b)(1).
61. *Greber*, 760 F.2d at 69-71.
62. *See id.* at 70-71.
63. *Id.* at 71.
64. *Id.*
65. *Id.*
66. *Greber*, 760 F.2d at 69-70.
67. *Id.* at 70.
68. *Id.*
69. *Id.*

payment was received from the government, a portion of that payment would be kicked back to Dr. Greber, who referred Cardio Med's Holter monitor to his patients.[70] Cardio Med labeled this payment in their records as a "consulting fee."[71] Consequently, Dr. Greber was charged with Medicare fraud under the AKS for this alleged kickback.[72]

Dr. Greber argued that payments made to physicians by Cardio Med for professional services in connection with the Holter monitor tests could not have been the basis for Medicare fraud under the 1977 version of the AKS.[73] Dr. Greber contended that Cardio Med's consulting fee was payment for these physicians' *reading* of the results of the Holter monitor devices and was therefore not a payment for their referrals, as the government alleged.[74] The Third Circuit rejected this argument, and in doing so created the one purpose test: "if *one purpose* of the payment was to induce future referrals,"[75] then this payment falls under the AKS's "any renumeration" language.[76] Because the jury found that one purpose of the payments made to physicians who used Cardio Med's Holter monitors was for their future referrals, Dr. Greber's conviction under the AKS was affirmed by the Third Circuit, and he was sentenced to six months in prison.[77] Though Dr. Greber's case may seem to have resulted in a harsh punishment for a somewhat controverted kickback, the Third Circuit set precedent to deter more serious fraud such as that seen in the Seventh Circuit case *United States v. Borrasi*.[78]

3. United States v. Borassi: The (More Obvious) One Purpose Test in Action

The defendants' behavior in *Borassi* was significantly more deplorable than Dr. Greber's, and the resulting kickback more

70. *Id*.
71. *Greber*, 760 F.2d at 70.
72. *Id.*
73. *Id.* at 69.
74. *Id*. at 70.
75. *Id*. at 69 (emphasis added).
76. *Greber*, 760 F.2d at 71-72.
77. Raspanti, *supra* note 6.
78. 639 F.3d 774, 781-82 (7th Cir. 2011).

visible. Some twenty-six years after *Greber*, a group of physicians were bribed by the psychiatric hospital Rock Creek Center L.P., and in return, these physicians would refer patients to the hospital.[79] To conceal these bribes, Rock Creek falsified administrative documents by fraudulently placing the defendant physicians on payroll.[80] These physicians would then submit fabricated time sheets to the hospital for services they did not perform.[81] At trial, the government alleged the real reason behind Rock Creek's expenditures was for patient referrals from these psychiatrists.[82] The defense primarily relied upon the fact that the physicians, at times, performed other services for the hospital.[83] However, most of these services were done so voluntarily, and the amount of work expected of similarly employed physicians was not required of the psychiatrists who provided referrals to Rock Creek.[84] The Seventh Circuit held that, even if these physicians provided additional services for the hospital, because *at least one* of the reasons for payment was to induce them to refer patients to Rock Creek, the defendants violated the AKS.[85] Thus, the Seventh Circuit adopted the Third Circuit's one purpose test from *Greber*.[86]

The one purpose test for interpreting the 1977 "any remuneration" clause was adopted by the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits.[87] While not all facts are as clear cut as those in *Borassi*, nor as difficult to judge as those in *Greber*, the one purpose test greatly increased the amount of successful AKS prosecutions.[88] Considering Congress first amended the AKS to provide the "any

79. *Id*. at 777.
80. *Id.*
81. *Id.*
82. *Id.* at 781.
83. *Borassi*, 639 F.3d at 779.
84. *Id.* at 777-80.
85. *Id.* at 782.
86. United States v. Greber, 760 F.2d 68, 69 (3d Cir. 1985); *Borassi*, 639 F.3d at 782.
87. Joseph, *supra* note 9. It is important to note that the broad interpretation of "any remuneration" applies not only to financial compensation, but in-kind kickbacks as well. For a better understanding on the types of kickbacks prosecuted under the AKS. *See* Meredith Williams, *Federal Anti-Kickback Statute*, U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. INSPECTOR GEN. (Dec. 12, 2011), [https://perma.cc/Y593-UX8T].
88. *See* Joseph, *supra* note 9.

remuneration" language in response to federal prosecutors' concerns that the AKS was not effective, the prosecutorial success of AKS violations which followed *Borassi* and *Greber* matched Congress's intentions for the amendment in the first place.[89] Importantly, though the Eighth Circuit relied upon legislative intent to adopt the Third Circuit's interpretation of "any remuneration," the Eighth Circuit's commitment to textualism has resulted in a vastly different approach for its interpretation of the 2010 amendment's *resulting from* language.[90]

a. Amending the AKS to Establish a Connection Between the AKS and the FCA

Those prosecuted for AKS violations face both civil and criminal penalties, which include up to $50,000 *per kickback* plus three times the amount of remuneration the offending physician received or gave for referrals.[91] Additionally, the AKS imposes criminal fines of up to $100,000 and up to ten years imprisonment, plus exclusion from future participation in any federal or state healthcare program.[92] With such penalties and fees, why was an amendment allowing for *private* civil action under the FCA necessary? Why was the *resulting from* language a necessary amendment to the AKS? Physicians and other healthcare professionals involved in kickbacks were already being prosecuted, so why the need for *qui tam* litigation?

Regardless of the merits of their work or the success of their prosecutions following the one purpose test, federal prosecutors are not likely to come across the type of sensitive, insider information required to bring charges under the AKS.[93] Like in *Borassi*, there are often complicated schemes in place to conceal physician kickbacks.[94] For example, if a pharmaceutical company offers physicians an all-expense paid vacation in exchange for their promise to prescribe that company's medicine,

89. *Greber*, 760 F.2d at 70-71; *see* Joseph, *supra* note 9.

90. *See* Shoemaker v. Cardiovascular Sys., Inc., 300 F. Supp. 3d 1046, 1049 (D. Minn. 2018); United States *ex rel.* Cairns v. D.S. Med. LLC., 42 F.4th 828, 834-36 (8th Cir. 2022).

91. Joseph, *supra* note 9.

92. *Id.*

93. *See 2021 DOJ False Claims Act Settlements & Judgments*, *supra* note 1.

94. *See id.*

then the AKS has been violated.[95] However, rarely are these schemes clean cut or easy-to-spot operations. There are usually no ledgers in a physician's office with transactions entitled "$50,000: kickback for patient referrals to hospital X." As a result, the types of evidence needed to file charges against—much less prove—a kickback scheme can become extremely complicated, difficult to uncover, and often require insider information.[96]

Recognizing that individual employees or patients would be the ones most likely to uncover a kickback scheme, Congress amended the AKS in 2010 to allow for FCA claims predicated on AKS violations.[97] This amendment created an avenue for individuals to be incentivized for reporting AKS violations through civil litigation.[98] 42 U.S.C. § 1320a-7b provides "a claim that includes items or services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]."[99] In other words, to encourage individuals to report AKS violations, Congress provided relators a chance to recover damages on behalf of the U.S. government for exposing AKS crimes by using the statutory scheme already in place under the FCA.[100]

Further, in hopes of strengthening potential relators' FCA civil suits,[101] Congress defined the claims submitted to the government in violation of the AKS as "false" for purposes of the FCA.[102] Congressional Records indicate that the 2010 amendment was passed to "strengthen[ ] whistleblower actions based on medical care kickbacks," and "ensure that *all* claims resulting from illegal kickbacks are considered false claims for the purpose of civil action[s]."[103] Further, the drafters of the 2010

95. *United States v. Borassi*, 639 F.3d 774, 777 (7th Cir. 2011).
96. *See 2021 DOJ False Claims Act Settlements & Judgments*, *supra* note 1.
97. *See* Guilfoile v. Shields, 913 F.3d 178, 189 (1st Cir. 2019).
98. *See* 42 U.S.C. § 1320a-7b(g) (2022); *Guilfoile*, 913 F.3d at 189.
99. *See* 42 U.S.C. § 1320a-7b(g).
100. *See Guilfoile*, 913 F.3d at 189.
101. *See id.* at 189-90.
102. For the First Circuit's argument on why AKS violations are *per se* "false" claims for FCA litigation, *see id.*
103. 155 CONG. REC. S10852, S10853-54 (October 28, 2009) (statement of Sen. Ted Kaufman) (emphasis added).

amendment intended "to strengthen the capability of the Government to detect, prosecute, and punish fraudulent activities under the [M]edicare and [M]edicaid programs,"[104] because "fraud and abuse among practitioners . . . is relatively difficult to prove and correct."[105]

One reason whistleblowers are so critical to the overall reporting process stems from the fact that there may exist some lawful basis for the "false" claims physicians submit to a beneficiary's Medicare or Medicaid policy.[106] Many times, hospitals and other medical institutions involved in kickback schemes will attempt to cover their kickbacks as legitimate payments.[107] For example, claims submitted to Medicaid might result from services legitimately needed by the beneficiary, and absent the presence of a kickback, these claims would be completely legal.[108] A patient in need of a prosthetic, for instance, would need the prosthetic regardless of whether a physician was part of a kickback scheme with the prosthetic manufacturer. However, after the AKS was amended in 2010, if medical professionals diagnosing Medicaid beneficiaries do so with knowledge of a future kickback at the time of diagnosis, or they are only prescribing the patient with certain medicine due to a referral payment program, then the resulting claim on that beneficiary's federal healthcare policy is "false" for the purposes of the FCA.[109]

As a matter of public policy, health care professionals should consider the most appropriate treatment method *without* taking into consideration personal financial interests.[110] Allowing for a doctor's judgment regarding their patients' health to be clouded by financial interest is a major concern for the well-being of the public.[111] But because the AKS is a federal criminal statute, only

---

104. H.R. REP. NO. 95-393, pt. 2, at 1 (1977).

105. *Id.* at 47.

106. *See Why is There an Anti-Kickback Law in Healthcare?*, PHILLIPS & COHEN, [https://perma.cc/V9SM-DB7M] (last visited Sept. 16, 2023).

107. *Id.*

108. *See* Leopold, *supra* note 13.

109. *See* Guilfoile v. Shields, 913 F.3d 178, 189-90 (1st Cir. 2019).

110. *See Why is There an Anti-Kickback Law in Healthcare?*, *supra* note 106.

111. *See* CONFLICT OF INTEREST IN MEDICAL RESEARCH, EDUCATION, AND PRACTICE 168-170 (Bernard Lo & Marilyn J. Field eds., 2009).

the government may prosecute under it.[112] Thus, to allow individuals to speak out against kickback schemes and encourage whistleblowers to come forward, the 2010 amendment to the AKS allowed private individuals to bring *qui tam* actions on behalf of the government by relating the AKS to the FCA.[113]

Acting Assistant Attorney General Boynton claimed "[i]ndustry insiders are uniquely positioned to expose fraud and false claims and often risk their careers to bring these schemes to light," adding "[o]ur efforts to protect taxpayer funds benefit from the courageous actions of these whistleblowers, and they are justly rewarded under the [FCA]."[114] However, individuals employed by healthcare professionals are not the only whistleblowers operating under this statutory scheme. Many physicians themselves have filed FCA claims predicated on their competitors' AKS violations, resulting in a form of market self-regulation.[115] For example, if physicians X and Y both provide medical services to the same Medicaid beneficiary, and that patient relays to physician X that physician Y is offering to waive insurance copays if she uses manufacturer Z to provide her prescription drug medication, then physician X might be able to file a *qui tam* case against physician Y and receive up to thirty percent of whatever settlement or judgments are awarded to the government. It appears Congress desired physician X to be motivated to bring an action which exposes physician Y.[116] What becomes less clear under recent precedent is whether the 2010 amendment allows physician X to do so, as his FCA claim may fail due to a disagreement of what it means for a claim to *result from* a kickback.

112. *See* 42 U.S.C. § 1320a-7b.
113. *See supra* text accompanying notes 102-04.
114. *See 2021 DOJ False Claims Act Settlements & Judgments*, *supra* note 1.
115. The relator in *Cairns* represented not only the government, but a group of physicians who noticed that something was awry regarding the defendant's medical practice. *See* United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 831 (8th Cir. 2021). This serves as a perfect example of the kind of market regulation FCA cases provide.
116. *See supra* text accompanying note 116.

III. RESULTING FROM: TEMPORAL CONNECTION, BUT-FOR CAUSATION, OR SOMEWHERE IN BETWEEN?

The Department of Justice estimates that since 1986, an average of eleven new *qui tam* cases are filed *every week*.[117] For the 2021 fiscal year, the Justice Department reported $5.6 billion in settlements and judgements under the FCA.[118] Of the $5.6 billion, $5 billion related to claims involving public health care.[119] 1.6 billion dollars of those claims arose from lawsuits filed under *qui tam* provisions of the FCA.[120] Regardless of the success of *qui tam* cases under the FCA, specifically with respect to *qui tam* litigation predicated on AKS violations, courts now disagree on what it takes for an FCA claim to *result from* a kickback.[121] The Eighth Circuit's interpretation of the statute provides that the meaning of the term *resulting from*, as used to relate an FCA claim to the AKS, requires the government to show that the alleged false claim would not have been filed but-for the illegal kickback scheme, creating a but-for causation standard for relators or other FCA plaintiffs.[122]

The Third Circuit took a much different approach and held that the *resulting from* language merely requires some sort of link between the FCA claims that the defendant submitted and the kickback scheme.[123] Further, any claims submitted to the government which were "tainted by a kickback" scheme are fraudulent for the purposes of the FCA.[124] Therefore, the defendant would be liable under the FCA because "[t]he [g]overnment does not get what it bargained for when a defendant is paid . . . for services tainted by a kickback."[125]

---

117. *See 2021 DOJ False Claims Act Settlements & Judgments*, *supra* note 1.
118. *Id.*
119. *Id.*
120. *Id.*
121. *See supra* Sections II.A, II.B.2-3.
122. United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 831 (8th Cir. 2022).
123. *Id.* at 833.
124. United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 97-98 (3d Cir. 2018).
125. *See* United States *ex rel.* Wilkins v. United Health Group, Inc., 659 F.3d 295, 314 (3d Cir. 2011); *but see* United States *ex rel.* Freedom Unlimited, Inc. v. City of Pittsburgh, 728 F. App'x. 101, 106-07 (3d Cir. 2018).

A. *Greenfield v. Medco Health*: The Third Circuit's Interpretation of Resulting From

In *Greenfield v. Medco Health*, former area vice president of Accredo, Steve Greenfield, filed a *qui tam* suit against his former employer.[126] Accredo was a specialty pharmacy that provided home care for patients with hemophilia and made donations to many charities, two of which allegedly recommended Accredo as an "approved provider" for hemophilia patients, which would constitute an illegal referral under the AKS.[127] Greenfield argued that, since some of the business derived from these referrals likely included individuals who were Medicare beneficiaries, these patients' claims to Medicare were fraudulent and thus subject not only to criminal sanctions under the AKS, but also civil liability under the FCA.[128]

However, at trial, Greenfield did not successfully link Accredo's claims for reimbursement to the kickback scheme.[129] Greenfield did not produce any evidence that a federally insured patient purchased their prescriptions because of any referral from a charity that received a donation from Accredo.[130] Thus, the district court granted summary judgment for Accredo, finding that Greenfield must provide "some evidence" that federal beneficiaries "chose Accredo because of its donations to [the charities]."[131] On appeal, the Third Circuit discussed its own precedent, reaffirming that "[w]here a statute's language is arguably not plain, we consider statutory language 'in the larger context or structure of the statute in which it is found.'"[132] Accordingly, the Third Circuit called upon legislative history to determine the appropriate ruling in this case.[133]

---

126. 880 F.3d at 92.
127. *Id.* at *91*.
128. *Id.* at 92.
129. *Id.* at 93.
130. *Id*.
131. *See* United States *ex rel.* Greenfield v. Medco Health Sys., Inc., 223 F. Supp. 3d 222, 230-31 (D.N.J. 2016).
132. United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 95 (3d Cir. 2018) (quoting United States v. Tupone, 442 F.3d 145, 151 (3d Cir. 2006)); *see also* Alli v. Decker, 650 F.3d 1007, 1012 (3d Cir. 2011) (stating the same standard).
133. *Greenfield*, 880 F.3d at 96.

Noting that Congress's purpose for the AKS amendment was to deter fraudulent reporting in federal healthcare programs, the Third Circuit held that it would be "too exacting to follow Accredo's approach, which requires a relator to prove that federal beneficiaries would not have used the relevant services absent the alleged kickback scheme."[134] Instead, the Third Circuit held that any claims made to the federal government in violation of the AKS are "tainted by the [illegal] kickback."[135] The court held that Greenfield needed to show that *just one* of the claims submitted to Medicare upon which his FCA case was filed were "exposed to a referral or recommendation of Accredo by [the charities] in violation of the [AKS]."[136] Because Greenfield was unable to make such a showing, he lost on appeal.[137] While the Third Circuit held that *some* connection which is not merely "temporal"[138] be established, this ruling is not so stringent as to shield defendants found guilty of a kickback from civil liability or prohibit well-intentioned whistleblowers from reaping the rewards of their good deeds.[139] This interpretation is similar to the one purpose test from the Third Circuit's ruling in *Greber* some thirty-three years earlier, of which an overwhelming majority of circuit courts, including the Eighth Circuit, adopted.[140] Under *Greenfield*, there must be at least one claim submitted to the government in violation of the AKS to serve as evidence that the defendant is liable under the FCA, though a but-for causation standard is not required.[141]

In sum, the Third Circuit interpreted *resulting from* to mean that claims which were related to a kickback were "tainted" and therefore fraudulent.[142] Thus, if an individual could show that a claim that was submitted to the government was related to a

134. *Id*. at 100.
135. *Id*. at 97.
136. *Id*. at 100.
137. *Id*.
138. *Greenfield*, 880 F.3d at 100.
139. *Id*. at 96-97.
140. *See* United States v. Greber, 760 F.2d 68, 69-71 (3d Cir. 1985); Joseph, *supra* note 9.
141. *Greenfield*, 880 F.3d at 98.
142. *Id*. at 100.

kickback that would violate or did violate the AKS, the individual could bring a claim under the FCA and win.

B. *Cairns v. D.S. Medical LLC*: The Eighth Circuit Splits from the Third

Though the Eighth Circuit relied on legislative intent to interpret the 1977 amendment to the AKS by adopting the Third Circuit's one purpose test, its opinion in *Cairns* juxtaposed the Third Circuit's interpretation of *resulting from* and instead relied heavily on the text of the 2010 amendment itself.[143] In the Eighth Circuit case *United States ex rel. Cairns v. D.S. Medical LLC*, Paul Cairns brought a *qui tam* case (and the government joined suit) against neurosurgeon Sonjay Fonn, who worked with D.S. Medical LLC.[144] Dr. Fonn ordered unusually high volumes of spinal implants from a company owned by his fiancée,[145] and the scheme earned the couple over $1.3 million in commissions.[146]

Additionally, Dr. Fonn was offered stock in his fiancée's implant distribution company, which turned out to be yet another lucrative investment.[147] Upon receiving such offer, the neurosurgeon ordered even more implants from the manufacturing company in which he now owned stock.[148] Cairns and the U.S. government alleged that Dr. Fonn's claims to Medicare and Medicaid were "tainted" because of the kickback scheme with his fiancée.[149] If there was any doubt that the defendant in *Greenfield* was participating in wrongdoing, no such doubt is cast here.[150] Obviously, the main issue of this case was not whether Dr. Fonn was guilty of a kickback scheme.[151] In fact, the court recognized that Dr. Fonn *was guilty* of an AKS violation.[152] Under the Third Circuit's holding in *Greenfield*,

143. 42 F.4th 828, 835-36 (8th Cir. 2022).
144. *Id.* at 831.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Cairns*, 42 F.4th at 831.
149. *Id.* at 833.
150. United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 100 (3d Cir. 2018); *compare with Cairns*, 42 F.4th at 831.
151. *See Cairns*, 42 F.4th at 833.
152. *Id.* at 831-33.

bringing a claim based on an actual AKS violation would have met the *resulting from* standard of the 2010 amendment and it is likely that the government would have won.[153]

The defendants argued, however, that the government had the burden to prove that the implants would not have been used *but-for* the alleged kickback scheme.[154] In its jury instruction, the district court adopted the government's theory, resulting in the government winning its claim.[155] On appeal, the Eighth Circuit reversed the district court's ruling.[156] The court held that the plain meaning of the term *resulting from* as used in the AKS to relate to an FCA claim required the government to show that the alleged false claim and resulting FCA litigation would not have happened *but-for* the illegal kickback scheme.[157]

The Eighth Circuit relied upon language found in the Supreme Court case *Burrage v. United States*.[158] In *Burrage*, the Court interpreted language from the Controlled Substances Act, which required prosecutors to show that a victim's "death or serious bodily injury *results from* the use of [a controlled] substance" given to the victim by the defendant.[159] The court held that, according to the plain meaning of the statute, *results from* in the Controlled Substances Act requires a but-for causation standard.[160] Using the Court's language from *Burrage*, the Eighth Circuit held that claims under the FCA should also require but-for causation.[161] Thus, Dr. Fonn was guilty of an AKS violation, but because of the court's heightened causation standard for FCA claims, Cairns was not able to win his civil action on behalf of the government.[162] The Eighth Circuit concluded that the 2010 amendment "creates a but-for causal requirement between an anti-kickback violation and the 'items or services' included in the

153. *Greenfield*, 880 F.3d at 100.
154. *Id.* at 96.
155. *Cairns*, 42 F.4th at 834.
156. *Id.* at 837.
157. *Id.* at 836.
158. *See id.* at 834.
159. Burrage v. United States, 571 U.S. 204, 209 (2014) (emphasis added).
160. *Id.* at 210-211.
161. *See* United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 835 (8th Cir. 2022); *Burrage*, 571 U.S. at 218-19.
162. *Cairns*, 42 F.4th at 836-37.

[FCA] claim."[163] Though the Eighth Circuit recognized that the 2010 amendment provides that an AKS violation "makes a claim 'false or fraudulent'" for purposes of the FCA, because the trial court did not instruct the jury with a proper but-for causation standard, the government lost on appeal.[164] Though the claim in *Cairns* involved a kickback that was in clear violation of the AKS, the Eighth Circuit's holding deters future whistleblowers from reporting violations which are more difficult to uncover.

Further, the Eighth Circuit did not analyze the crucial differences between the types of evidence used in Controlled Substances Act prosecutions and evidence used to prosecute AKS violations.[165] Most notably, the Court held in *Burrage* "where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable . . . ."[166] For charges brought under the Controlled Substances Act, prosecuting attorneys must show that the victim would not have died or been injured but-for the particular substance given to them by the defendant.[167] As a result, the differences between the Controlled Substances Act and the AKS become clear.[168] Juries hearing cases involving victims who meet a fate similar to the victim in *Burrage* often have access to forensic evidence upon which they can rely to make their conclusions.[169] However, AKS violations present vastly different evidence. Not only do the violations often include complex transactions, but many times kickbacks are given in-kind, making them even harder to uncover.[170] Unlike a body which may be examined in cases prosecuted under the Controlled Substances Act, there is little to no tangible evidence in AKS cases—other than witness testimony—upon which prosecutors may rely to file

163. *Id.* at 831.
164. *Id.* at 833, 837.
165. *Id.* at 833-34.
166. *Burrage*, 571 U.S. at 218.
167. *Id.* at 218-19.
168. *See generally* United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828 (8th Cir. 2022).
169. *See* JOSEPH PETERSON ET AL., THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS 16 (2010).
170. Leopold, *supra* note 13.

criminal charges.[171] Under the Third Circuit's holding, these witnesses are incentivized to become relators in an FCA action, thereby providing enough evidence to establish cause for prosecutors to investigate and possibly press charges.[172] Under the Eighth Circuit's interpretation of *resulting from*, no such incentive is found.[173] By contrast, the Third Circuit's holding leads to an increased amount of AKS prosecutions and an incentive for whistleblowers to come forward.[174]

In addition to the complexity of the evidence needed to establish a kickback, little evidence may be available for an FCA plaintiff to prove that a patient would not have had the same medical treatment but-for their physician's illegal kickback.[175] With patients who are beneficiaries of a government healthcare program, medical professionals must not consider their personal finances, as such consideration is a violation of the AKS.[176] Patients could legitimately need the medical services provided to them in both instances, but if the physician's financial consideration is the difference between legally permitted medical services and an illegal kickback, the case becomes difficult enough to prove absent an admission by the defendant.[177] Essentially, under the Eighth Circuit's holding in *Cairns*, defendants may enjoy a "no body, no crime" set of circumstances, as federal prosecutors do not have access to the type of sensitive, insider information required to bring these criminal suits, and whistleblowers have no incentive to speak out.[178] While but-for is a default common law test for causation, "the availability of alternative causal standards where circumstances warrant is, *no less than the but-for test itself as a default*, part of the background legal tradition against which Congress has legislated."[179] Such circumstances are here warranted, as legislative history,

171. *Id.*; *see also Cairns*, 42 F.4th at 833-34.
172. Leopold, *supra* note 13.
173. *Id.*
174. *Id.*
175. *Id.*
176. *See supra* Section II.B.1.
177. *See* Leopold, *supra* note 13; *Cairns*, 42 F.4th at 834; United States *ex rel.* Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 96 (3d Cir. 2018).
178. Leopold, *supra* note 13.
179. *See* Paroline v. United States, 572 U.S. 434, 458 (2014) (emphasis added).

evidentiary particularities, and common law precedent create an exception to the Court's *Burrage* interpretation.[180] This exception not only applies to *Cairns* but any FCA claim predicated on an AKS violation.[181]

C. *Lipman v. State of Georgia*: Georgia Court of Appeals Chooses Third Circuit Interpretation

The Court of Appeals for the State of Georgia provides insight into the way a lower court outside the jurisdiction of the Third or Eighth Circuits has interpreted the 2010 amendment to the AKS. Considering *Cairns* was decided in September 2022, there are relatively few FCA cases predicated on AKS violations that have been decided since. *Lipman v. State* provides an exception, however, as the Georgia Court of Appeals announced its ruling in February 2023, about five months after the Eighth Circuit decided *Cairns*.[182]

Adopting the Third Circuit's purposivist interpretation of the FCA, the Georgia Court of Appeals noted, "[t]he AKS is designed to prevent Medicaid fraud and 'to protect patients from doctors whose medical judgments might be clouded by improper financial considerations.'"[183] In *Lipman*, the government alleged that Atlanta Interventional Institute ("AII") and Dr. John Lipman violated the Georgia False Medicaid Claims Act ("GFMCA").[184] Dr. Lipman was CEO and medical director of AII, and the government's complaint alleged that, from July 2010 through December 2016, AII received remuneration from Merit Medical Systems, Inc.[185] In return, Dr. Lipman would ensure that AII purchased and used Merit Medical products in its uterine fibroid embolization procedures.[186]

---

180. *Id.* at 451.

181. *Cairns*, 42 F.4th at 833-34.

182. 884 S.E.2d 115, 119 (Ga. Ct. App. 2023).

183. *Id.* at 118 (quoting United States v. Patel, 778 F.3d 607, 612 (7th Cir. 2015)). The court established judicial legitimacy behind a Program Assistance Letter. *See Federal Anti-Kickback Law and Regulatory Safe Harbors*, U.S. DEP'T OF HEALTH & HUM. SERVS. OFF. INSPECTOR GEN. (Nov. 1999), [https://perma.cc/M4SA-Y5X8] (last visited Sept. 16, 2023).

184. *Lipman*, 884 S.E.2d at 116-17.

185. *Id.* at 117.

186. *Id.*

The government argued that, due to this remuneration, AII's submissions of claims to the Georgia Medicaid program for these products and procedures were "tainted" by illegal kickbacks and therefore violated the AKS.[187] Dr. Lipman argued that the plain meaning of the relevant statutes shows that a violation of the AKS, standing alone, cannot be the basis of proving a false or fraudulent claim under the GMFCA.[188] The court disagreed with Dr. Lipman's argument, holding that the definition of a false or fraudulent claim under the GMFCA mirrors the definition of a false or fraudulent claim under the federal FCA, and considering the FCA's definition includes a claim resulting from a violation of the AKS, the government's GMFCA claim was successful.[189] Additionally, the court held that "[t]he legislative history [of the FCA and the AKS] suggests that the 2010 amendment was intended to codify the link between AKS violations and false claims within the meaning of the FCA."[190] Importantly, the Court of Appeals of Georgia held that "an AKS violation that results in a federal health care payment is a *per se* false claim" for purposes of the FCA.[191] Thus, because the GMFCA mirrors the FCA, and because an AKS violation is *per se* false for the purposes of the *federal* FCA, then an AKS violation is *per se* false for purposes of the *Georgia* GMFCA.[192] This case illustrates the Georgia Court of Appeal's understanding that the 2010 amendment to the AKS created a statutory definition for one type of "false claim" for purposes of the FCA—a violation of the AKS.

The Eighth Circuit not only disagreed with the Third Circuit, but its holding proved vastly different from the Georgia Court of Appeals approach in *Lipman*.[193] Particularly, the Eighth Circuit seemed to disregard the First Circuit's *per se* argument, upon which the Georgia Court of Appeals in *Lipman* heavily relied.[194]

187. *Id.*

188. *Id.*

189. *Lipman*, 884 S.E.2d at 119.

190. *Id.* at 118 (quoting Guilfoile v. Shields, 913 F.3d 178, 189 (1st Cir. 2019)).

191. *Id.* (emphasis added).

192. *Id.*

193. United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 836 (8th Cir. 2022).

194. *See Lipman*, 884 S.E.2d at 118; Guilfoile v. Shields, 913 F.3d 178, 190 (1st Cir. 2019); United States *ex rel.* Bawduniak v. Biogen Idec Inc., No. 1:12-CV-10601-IT, 2022 WL 2438971, at *1 (D. Mass. July 5, 2022).

While outlining the requirements for successfully pleading an FCA violation, the First Circuit held "[a]n AKS violation that results in a federal health care payment is a *per se* false claim under the FCA."[195] Therefore, if there is a known AKS violation, such as in *Cairns*, then under this theory, a resulting claim under the False Claims Act would be *per se* false, and the relator would win their claim. Unlike *Cairns*, the plaintiff in this instance would be incentivized for whistleblowing by receiving a portion of the government's recovery. The Eighth Circuit's causation requirement grants no such result.[196]

In sum, the Eighth Circuit's but-for causation requirements, even if narrowly tailored to cases involving FCA claims resulting from a kickback, offends congressional reasons for the 2010 amendment to the AKS. These types of lawsuits effectively encourage companies and medical practices to vigilantly audit their departments and ensure compliance with the law.[197] The whistleblower, as the middleman, loses their incentive to report wrongdoing under the Eighth Circuit's holding. Consequently, the FCA's effectiveness in aiding the prosecution of AKS cases is drastically weakened.

D. *Bostock v. Clayton County*: Winning FCA Claims Even if But-for Causation is Adopted by the Supreme Court

The current Justices of the Supreme Court are said to be "the most conservative in 90 years."[198] Accordingly, textualist arguments dominate modern Court opinions, and the holding in *Bostock v. Clayton County* is no exception.[199] Justice Gorsuch authored the Court's opinion and succeeded Justice Scalia on the

---

195. *Bawduniak*, 2022 WL 2438971, at *1 (emphasis added).

196. *See generally Cairns*, 42 F.4th at 836-37.

197. Peter B. Hutt II, et al., *Fixing the False Claims Act, the Case for Compliance-Focused Reforms*, U.S. CHAMBER INST. FOR LEGAL REFORM, Oct. 2013, at 8.

198. Nina Totenberg, *The Supreme Court is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), [https://perma.cc/M355-J5FC].

199. Jonathan Skrmetti, *Symposium: the Triumph of Textualism: "Only the Written Word is the Law"*, SCOTUS BLOG, (June 15, 2020, 9:04 PM) [https://perma.cc/X27X-A7DQ].

bench.[200] While some claim that Justice Scalia was the Court's first textualist,[201] the six to three *Bostock* holding required all nine Justices to argue textual interpretations of Title VII one way or another.[202] In *Bostock*, the Court held that the adoption of a traditional but-for causation standard means that an employer "cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."[203] The Eighth Circuit's textualist interpretation that the words *resulting from* require but-for causation, and the Supreme Court's interpretation of but-for causation in *Bostock* allows multiple factors to be but-for causes of a claim.[204] Thus, the Eighth Circuit should have held in *Cairns* that the FCA litigation would not have been filed but-for the AKS violation, even if the defendant cited possible other reasons for the FCA litigation.[205]

Bostock provides a way for courts to maintain the spirit of the 2010 amendment to the AKS while honoring the actual words of the amendment itself. The causation standard at issue in *Bostock* was but-for, yet the Court still used congressional intent and legislative history to rule in the case.[206] With the current ideological majority of the Court, it is likely that the 2010 amendment's *resulting from* language would be interpreted as requiring a but-for causation standard.[207] However, given the Court's rationale in *Bostock*, *Cairns* still requires a different outcome. Though the facts in *Bostock* had nothing to do with healthcare fraud, referencing these facts is important to develop an understanding of the Court's but-for interpretation. The facts of *Bostock* help fully grasp the Court's holding that the defendant in a Title VII claim cannot avoid liability by simply asserting some other cause for the plaintiff's claim.

200. Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court*, NPR (Apr. 7, 2017, 5:00 AM), [https://perma.cc/TZA5-HS25].

201. *See* Judge Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 313 (2017).

202. Skrmetti, *supra* note 199.

203. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

204. *Id.* at 1745.

205. *See id.*; United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 836 (8th Cir. 2022).

206. *See Bostock*, 140 S. Ct. at 1737.

207. *Id.* at 1750.

Gerald Bostock worked as a child welfare advocate in Clayton County, Georgia for nearly a decade.[208] During this time, Mr. Bostock began playing in a recreational softball league for gay individuals.[209] Shortly after Clayton County officials learned of Mr. Bostock's involvement with the league, he was terminated for behavior "unbecoming" of a county employee.[210] Mr. Bostock sued Clayton County, alleging that the county's adverse employment action against him was a violation of Title VII of the Civil Rights Act of 1964.[211] Title VII makes it unlawful to discriminate against an individual "because of . . . sex."[212] Importantly, the Court reiterated that the text "because of" indicates a but-for causation standard for Title VII claims.[213] Clayton County argued that the text of Title VII does not include sexuality.[214] Further, the county argued that even if Title VII *did* include sexuality, Mr. Bostock failed to produce enough evidence to show that he would not have been fired but-for his sexuality.[215] Writing for the majority, Justice Gorsuch reasoned that Clayton County could not avoid liability under Title VII by claiming that some other factor contributed to Mr. Bostock's termination.[216] Further, if the plaintiff's sex was *one* but-for cause of the termination, then Title VII is implicated and the plaintiff has a cause of action.[217]

Justice Gorsuch further explained that when an employer terminates an employee who is homosexual or transgender, there are two main factors which may constitute a Title VII claim by establishing but-for causation.[218] First is the terminated employee's sex and second is the sex of which the terminated

208. *Id.* at 1737.
209. *Id.*
210. *Id.* at 1738.
211. *See Bostock*, 140 S. Ct. at 1738.
212. *Id.*
213. *Id.* at 1739.
214. *Id.* at 1746.
215. *Id.* at 1745.
216. *See Bostock*, 140 S. Ct. at 1739; Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 281-82 (2020) (discussing the Supreme Court's emphasis on formalistic textualism and semantic context in the Bostock majority opinion).
217. *See Bostock*, 140 S. Ct. at 1739.
218. *Id.* at 1742.

employee identifies.[219] For example, if a man was fired for his attraction to men, but a woman in the same workplace was also attracted to men and faced no adverse employment action, then the male employee would not have been terminated but-for his sex.[220] An employer who simply articulates other reasons for the termination does not avoid liability under Title VII even under a but-for causation standard.[221]

Importantly, the Court cites *Milner v. Department of Navy* by stating "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it."[222] Further, Justice Gorsuch wrote:

> Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?[223]

Supreme Court precedent interprets *results from* as a but-for causation standard, and it is not likely to change this precedent because the current text reads *resulting from*.[224] Though the causation standard at-issue in *Bostock* was but-for, the textualist Court still used congressional intent and legislative history to reach the case's proper conclusion.[225] Considering other courts' holdings that AKS violations are *per se* false for purposes of the FCA, congressional reasons for the 2010 amendment to the AKS, and the opportunity to establish more than one factor as the but-for cause for fraudulent claims submitted to the government, a

219. *Id.*
220. *Id.* at 1761.
221. *Id.* at 1739.
222. *Bostock*, 140 S. Ct. at 1749 (quoting Milner v. Dep't of Navy, 562 U.S. 562, 574 (2011)).
223. *Id.*
224. *See* United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828, 835 (8th Cir. 2022).
225. *See Bostock*, 140 S. Ct. at 1737.

different outcome than the Eighth Circuit reached in *Cairns* is appropriate.[226]

IV. CONCLUSION

Twenty-six million Americans have no health insurance.[227] Accordingly, every dollar misallocated to false healthcare claims and every claim wrongfully submitted on behalf of government healthcare beneficiaries represent these twenty-six million Americans, as this money could have been used to provide them healthcare.[228] Further, the billions of dollars recovered every year in healthcare fraud prosecutions represent justice for the Americans whose taxes support these programs.[229] Similarly, every AKS violation not reported, and therefore not prosecuted, represents healthcare professionals who take advantage not only of the twenty-six million uninsured Americans, but of anyone who pays federal taxes.[230]

The 2010 amendment was meant to strengthen the AKS by providing individuals with incentives for reporting AKS violations through civil litigation under the FCA.[231] Congress passed the 2010 amendment to prohibit the exact type of legal challenges presented in *Cairns*.[232] Though the increased evidentiary burden required to establish but-for causation would prove detrimental to the achievement of Congress's goal, the current Court is one of the most textualist in history.[233] It is likely that, as other federal circuits contribute to the split, the Supreme Court will interpret the *resulting from* language for purposes of the FCA as one which uniformly requires a but-for causation standard.[234]

---

226. *See* Guilfoile v. Shields, 913 F.3d 178, 190 (1st Cir. 2019).
227. *See* Seitz, *supra* note 4.
228. *Id.*; *see also* United States v. Greber, 760 F.2d 68, 71 (3d Cir. 1985).
229. *See* Seitz, *supra* note 4; *see also Greber*, 760 F.2d at 71.
230. *See* Seitz, *supra* note 4; *see also Greber*, 760 F.2d at 71.
231. *See* 42 U.S.C. § 1320a-7b(g); Leopold, *supra* note 13; *Guilfoile*, 913 F.3d at 189.
232. *See Guilfoile*, 913 F.3d at 189; 42 U.S.C. § 1320a-7b(g); United States *ex rel.* Cairns v. D.S. Med. LLC, 42 F.4th 828 (8th Cir. 2022).
233. *See* Tottenberg, *supra* note 200.
234. *See supra* text accompanying note 208.

However, the Supreme Court established that *results from* indicates but-for causation in *Burrage* when it interpreted the Controlled Substances Act.[235] Given the vast differences in the types of evidence needed to prove an AKS violation from the type of evidence required to prove a violation of the Controlled Substances Act, the Court should consider its rationale in *Bostock* and hold that, even if a but-for causation standard is warranted, the defendants of FCA cases predicated on AKS violations cannot avoid liability by simply stating reasons for the FCA claim other than their own AKS violation.[236] Even if the current textualist Court finds that *resulting from* creates a but-for causation standard, it should uphold precedent surrounding other doctrines related to these cases and find that if just a single claim was made fraudulently, then that fraud would not have presented itself to the government but-for the physician's tainted purpose. Put plainly, if the Court upholds its precedent established in *Burrage*, the Court must also uphold *Bostock* and instruct lower courts to establish but-for causation correctly by considering plaintiffs' FCA claims in a way the Eighth Circuit did not.

Much like Congress's reasons for passing a law, the text of a statute truly matters. As noted above, resolving the debate between textualism and purposivism is not at issue in this Note. Instead, given the vast importance and financial weight of government healthcare programs in the United States and the constructive notion that medical professionals should not take personal finances into consideration when evaluating a patient, the Eighth Circuit's holding in *Cairns* should not be upheld.[237] Further, while *Burrage* may be used to indicate that the *resulting from* text of the Controlled Substances Act requires but-for causation, the types of evidence involved in AKS violations serve as a basis for a different outcome than the but-for standard as applied in *Cairns*.[238] Regardless, considering the Court's current composition, it is likely that if the 2010 amendment were to reach the Court it would interpret *resulting from* to indicate a but-for causation standard for FCA claims predicated on AKS

235. *See* Burrage v. United States, 571 U.S. 204, 209 (2014).
236. *See supra* notes 166-172 and accompanying text.
237. *See supra* Section II.B.1.
238. *See supra* text accompanying note 206.

violations.[239] But if the Court were to reaffirm *Burrage*, it must also reaffirm its holding in *Bostock* to emphasize that multiple factors may constitute the but-for cause of a claim. "[T]ext matters, until it does not."[240]

---

239. *See supra* notes 226-27 and accompanying text.

240. Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy*, 38 CONST. COMM. 1, 2 (2023) (citing West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagen, J. dissenting)).