

Third Circuit Rejects False Claims Act Theory That Anti-Kickback Violations "Taint" All Related Claims

IN SHORT

The Situation: A provision in the False Claims Act ("FCA") had clarified when Anti-Kickback Statute ("AKS") violations can make a claim false, but the provision's rule of per se falsity does not answer when a claim "result[s] from" an AKS violation.

The Development: In *Greenfield v. Medco Health Solutions*, the Third Circuit joined several other circuits in holding that relators must provide evidence of at least one false claim to prevail on summary judgment—and notably did so with an FCA theory based on AKS violations.

Looking Ahead: The Third Circuit's requirement for a concrete link between the AKS violation and resulting claim should prove helpful to defendants facing AKS-based FCA suits.

False Claims Act ("FCA") cases frequently concern violations of the Anti-Kickback Statute ("AKS"), which was amended in 2010 to explicitly state that "a claim that includes items and services resulting from a violation of [the AKS] constitutes a false or fraudulent claim for purposes of [the FCA]." This provision clarified when AKS violations can make a claim false, an issue on which courts had previously splintered. But the provision's rule of per se falsity does not answer when a claim "result[s] from" an AKS violation. The U.S. Court of Appeals for the Third Circuit addressed this important issue in *Greenfield v. Medco Health Solutions* and adopted a test that should prove helpful to FCA defendants accused of AKS violations.

Defendants in *Greenfield* are Accredo Health Group, Inc., a specialty pharmacy that provides home care for patients with hemophilia, and two affiliates (collectively, "Accredo"). Relator Steve Greenfield, a former Accredo vice president, alleged that Accredo made donations to charities that in turn recommended Accredo as an "approved vendor" or "approved provider" for hemophilia patients. The record evidence suggested that Accredo made donations to a certain New Jersey charity in part because of the business it received via the charity's recommendation. In particular, after Accredo halved its donation to the charity in 2011, Greenfield analyzed the potential "return on investment" from Accredo's donations—which led to the company doubling its donation back to the previous level in 2012.



The Third Circuit required a "link" between the alleged AKS violation and the alleged false claims.



Greenfield filed suit thereafter. The government declined to intervene. Greenfield alleged that Accredo violated the AKS by making charitable contributions in order to induce referrals or recommendations that were at least partly directed to Medicare beneficiaries, which in turn resulted in claims that violated the FCA. For purposes of summary judgment, the district court assumed the presence of an AKS violation but granted summary judgment in Accredo's favor, holding that Greenfield had not shown that federally insured patients "chose Accredo *because of* its donations" to the charity—or, in other words, that Greenfield had no evidence that the AKS violation caused the false claim. Greenfield appealed.

On appeal, the government filed a brief supporting Greenfield. Together, they argued that the district court wrongly required "proof of subjective intent," as would be needed to show why patients chose Accredo. The Third Circuit agreed this was in error. Accredo had argued that other statutes using language like the AKS—which, the Third Circuit emphasized, "does not define the term 'resulting from'"—call for but-for causation. But the Third Circuit explained that this test would be very difficult to satisfy and would likely narrow the scope of liability. Moreover, according to the court, "it would dilute the False Claims Act's requirements vis-à-vis the Anti-Kickback Statute, as direct causation would be a precondition to bringing a False Claims Act case but not an Anti-Kickback Statute case." This, the Third Circuit reasoned, would be "inconsistent with the drafters' intentions underlying both" the AKS and the FCA, both of which are meant "to reach a broad swath of 'fraud and abuse' in the federal healthcare system and 'were not drafted to cabin healthcare providers' liability for certain types of false claims or for certain types of illegal kickbacks."

Despite rejecting the district court's reasoning, the Third Circuit still required a "link" between the alleged AKS violation and the alleged false claims. The court explained that "Greenfield must prove that at least one of Accredo's claims sought reimbursement for medical care that was provided in violation of the [AKS]." Greenfield fell short of this standard. He had argued that a temporal connection between the submission of claims and the alleged scheme was sufficient at summary judgment: Accredo's charitable contributions, the charity's recommendation of Accredo, and Accredo's claims at issue "all took place in close proximity." But the Third Circuit held this was not enough. "A plaintiff cannot merely describe a

private scheme in detail but then allege that claims requesting illegal payments must have been submitted, were likely submitted, or should have been submitted to the Government" (internal quotation marks, brackets, and ellipses omitted). Nor does "the taint of a kickback render[] every reimbursement claim false." Instead, "[a] kickback does not morph into a false claim unless a particular patient is exposed to an illegal recommendation or referral *and* a provider submits a claim for reimbursement pertaining to that patient" (emphasis added). To survive summary judgment *Greenfield* was required to demonstrate that at least one of Accredo's federally insured patients viewed the charity's approved provider list or the charity referred the federally insured patients to Accredo in some other fashion.

With *Greenfield*, the Third Circuit joins several other circuits in holding that relators must provide evidence of at least one false claim to prevail on summary judgment. But *Greenfield* is notable for applying that test to a case involving AKS violations, and for rejecting the suggestion that any "taint" of a kickback makes all claims false. Although *Greenfield* rejected the district court's demanding requirement of but-for causation, the Third Circuit's need for a concrete link between the AKS violation and resulting claim should prove helpful to defendants facing AKS-based FCA suits.

TWO KEY TAKEAWAYS

1. The Third Circuit's decision in *Greenfield* is notable for rejecting the suggestion that any "taint" of a kickback makes all claims false.
2. The court's test—that relators must provide evidence of at least one false claim to prevail on summary judgment, which requires linking the claim to the alleged kickback—should prove helpful to FCA defendants accused of AKS violations.

CONTACTS



Rajeev Muttreja
New York



Toni-Ann Citera
New York



Leon F. DeJulius, Jr.
Pittsburgh



Diana L. Calla
New York

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)



[False Claims Act's "Rigorous" Materiality Standard Enforced by Second Circuit](#)



[Third Circuit Confirms Government Knowledge Can Defeat Scienter and Materiality Requirements for False Claims Act Liability](#)



[Federal Circuit Rules BPCIA Preempts State Law](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2018 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113