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Prioritizing Patients or Impropriety?: Why the 8th Circuit's *Cairns* Decision sets a Dangerous Precedent Jeopardizing Patient Protection and Government Investment in Federal Programs

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In July 2022, the 8th Circuit entered its decision in *United States ex rel. Cairns v. D.S. Medical LLC*, establishing an exceptionally strict causation standard for plaintiffs alleging a False Claims Act ("FCA") claim through an Anti-Kickback Statute ("AKS") violation.[1] A plaintiff must establish a causal link by showing that the defendant "would not have submitted claims for particular items or services to Medicare or Medicaid absent the illegal kickbacks."[2] The decision diverts from the 3rd Circuit's holding in *United States ex rel. Greenfield v. Medco Health Solutions Inc.*, in which a plaintiff must demonstrate causation that is reasonable, linking at least one submitted claim to fraudulent activity.[3] The *Cairns* decision could create a more convoluted causation standard in AKS-based FCA claims, enabling defendants in violation of the FCA to escape responsibility and continue their practices.

The increased burden that the 8th Circuit's decision places on plaintiffs could benefit from review by the United States Supreme Court. The causation standard clashes with Congress's purpose in enacting the FCA and AKS. The FCA, 31 U.S.C. § 3729, was enacted by Congress in 1863 to combat contractors' supply of fraudulent goods to the Union Army during the Civil War.[4] The FCA includes a qui tam provision that enables private citizens to file a civil action against anyone suspected of submitting a false claim for payment to the federal government.[5] Additionally, Congress's

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[1] United States ex rel. Cairns v. D.S. Med. LLC, 42 F.4th 828, 836 (8th Cir. 2022); Kevin M. McGinty & Rachel E. Yount, *Eighth Circuit Adopts Stricter But-For Causation Standard for False Claims Act Claims Based on Anti-Kickback Violations*, THE NAT. L. REV. (Aug. 18, 2022), https://www.natlawreview.com/article/eighth-circuit-adopts-stricter-causation-standard-false-claims-act-claimsbased-anti.

[2] *Id.*

[3] United States ex rel. Greenfield v. Medco Health Sols., Inc., 880 F.3d 89, 99 (3d Cir. 2018).

[4] 31 U.S.C. § 3729.

[5] *Id.*

1972 enactment of the AKS, 42 U.S.C. § 1320a-7b, prioritized health care patients by deterring the fraudulent misuse of government funds acquired through participation in federal health care programs.[6] Given the recent recovery rates by the government and the continuous expansion of the health care field,[7] the 8th Circuit's ruling creates exceptional concerns in maintaining sufficient monitoring procedures and undermining the authority of the FCA and AKS.[8]

The 8th Circuit's decision predominantly relies on *Burrage v. United States,*[9] yet acknowledges that its ruling should be narrowly applied to AKS-related FCA cases.[10] The court uses *Burrage* to understand the AKS's statutory language and finds that "resulting from" indicates a "harm [that] would not have occurred . . . but for the defendant's conduct."[11] This is distinct from the 3rd Circuit's *Greensfield* decision, which also applies *Burrage*.[12] The 3rd Circuit balances a but-for analytical interpretation against a variety of alternative considerations and major policy implications.[13] The FCA's purpose and strong concern for incongruous results that could lead to a violation under the AKS but not the FCA could both seriously confuse courts and parties and undermine the FCA's authority.[14]

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[6] 42 U.S.C. § 1320a-7b; Tycko & Zavareei Whistleblower Practice Group, *What is the Anti-Kickback Statute?*, THE NAT. L. REV. (Jan. 11, 2023), https://www.natlawreview.com/what-anti-kickbackstatute (referring to how penalties may include prosecution of criminal conduct that knowingly and willfully involves the use of kickbacks, or "remuneration" which can be categorized as any "money, fees commission, credit, gift, gratuity, thing of value, or compensation of any kind").

[7] Press Release, U.S. Dep't of Just., *Justice Department Recovers Over $2.2 Billion From False Claims Act Cases in Fiscal Year 2020* (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-departmentrecovers-over-22-billion-false-claims-act-cases-fiscal-year-2020. In the 2020 fiscal year, of the Department of Justice's recorded $2.2 billion recovered in fraudulently obtained funds, $1.8 billion was collected from health care industry-related matters alone.

[8] Ryan Nunn, et al., *A Dozen Facts About the Economics of the US Health-Care System*, BROOKINGS (Mar. 10, 2020), https://www.brookings.edu/research/a-dozen-facts-about-the-economics-of-the-u-s-health-care-system/ (showing the continued expansion of the health care industry in relation to increased cost and lowered quality).

[9] Burrage v. United States, 571 U.S. 204, 216-17 (2014).

[10] *Cairns*, 42 F.4th. at 836.

[11] *Burrage*, 571 U.S. at 204.

[12] *Greensfield*, 880 F.3d. at 96-97.

[13] *Id.*

[14] *Id.*

Furthermore, there is significant binding case law that ardently supports the 3rd Circuit's analysis, lending credence to the argument that the 8th Circuit's decision is overly-narrow. The Supreme Court's 2014 ruling in *Lexmark International, Inc. v. Static Control Components, Inc.* reasoned[15] that "the circumstances are few in which a federal court properly can decline to hear a case in which a plaintiff that is an intended beneficiary of a federal statute alleges a wrong covered by that statute."[16] Therefore, a plaintiff still has significant responsibility to demonstrate a causal link between a conduct violation, while being checked for introducing frivolous or unmerited claims. Similar to the 3rd Circuit's holding, there is no undue burden to either party as the defendant still has the opportunity to demonstrate legitimate conduct through discovery.

Moreover, the 8th Circuit too abruptly dismisses congressional intent, ignoring impactful historical policy trends. The FCA's qui tam provision avoids monetary losses due to fraud by "strengthen[ing] the tools available to combat those who seek to pilfer Government funds."[17] The 3rd Circuit's decision maintains protection of government investment in federal policies that improves consumer access to care and quality of life. The 8th Circuit's

[15] Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118, 136-37 (2014) (holding that a plaintiff sufficiently alleges a claim for false advertising that falls within the zone of interests under the Lanham Act when it can be shown that an alleged injury to a commercial interest in reputation or sales has been proximately caused as a result of the defendant's misrepresentations).

[16] *Supreme Court Resolves Circuit Split on Standing in Lanham Act False Advertising Case*, PROSKAUER (Mar. 25, 2014), https://www.proskauer.com/alert/supreme-court-resolves-circuit-split-on-standing-in-lanham-act-false-advertising-cases; *see also* Monette Davis, *Applying Twombly/Iqbal on Removal*, A.B.A. (Apr. 30, 2020), https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/applying-twombly-iqbal-on-removal/ (discussing the plausibility standard established by the *Twombly* and *Iqbal* (often grouped together as "*Twombly*") cases which required plaintiffs to demonstrate a link between a violation and a defendant's conduct based on a plausible, and not merely conceivable, factual showing).

[17] Lamar Smith, et al. *False Claims Act Correction Act of 2009*, U.S. GOV'T PUBL'G OFF. (May 5, 2009), https://www.govinfo.gov/content/pkg/CRPT-111hrpt97/html/CRPT-111hrpt97.htm.

ruling could lead to disenfranchised plaintiffs and enables defendants to escape responsibility for their actions and fragment health care delivery.[18]

Correcting the 8th Circuit's ruling preserves the goals of the FCA and AKS, meets health care's interest in protecting consumers and patients, and promotes efficient use of government funds. Supreme Court review would clarify the confusion; resolution is necessary to maintain promotion of government interests, congressional policy decisions, and private citizen inquiries, and to bolster the authority and coordination of the FCA and AKS.

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[18] Valerie Bauman, *Pharma Pay-For-Delay Deals Called 'Cost of Doing Business'*, BL (Feb. 10, 2020), https://news.bloomberglaw.com/pharma-and-life-sciences/pharma-pay-for-delay-settlements-cost-of-doing-business (compare to similar concerns related to the outcome of *FTC v. Actavis*, where critics have argued that courts do not properly apply the ruling, allowing pharmaceutical companies to apply "sound" reasoning to get away with anti-competitive conduct).