Third Circuit: Proof of Kickback Scheme Alone Not Enough to Find Liability under the False Claims Act

Sara M. Lord and Samuel M. Shapiro

On January 19, 2018, in *United States ex rel. Greenfield v. Medco Health Solutions, Inc.*, the Third Circuit Court of Appeals held that the plaintiff in a False Claims Act (FCA) suit premised on violations of the Anti-Kickback Statute (AKS) must demonstrate a "link" between the alleged kickbacks and the submission of at least one claim for reimbursement.[1] The plaintiff does not need to prove that a kickback actually influenced a patient's decision-making or healthcare provider's medical judgment in order to demonstrate an AKS violation.[2] However, said the Court, in order for such AKS violations to establish liability under the FCA, the plaintiff must proffer "some record evidence that shows a link between the alleged kickbacks and the medical care received by at least one of [the] federally insured patients."[3]

Importantly, the Third Circuit's decision in *Greenfield* rejects the notion that proof of a kickback scheme automatically "taints" (*i.e.*, makes false) any claim submitted to the government for reimbursement during the pendency of the alleged scheme. The decision may prove beneficial to FCA defendants by requiring the plaintiff to point to an actual claim submitted to the government which falsely certifies compliance with the AKS.

I. Background

Qui tam relator Steve Greenfield was an area vice president of Accredo Health Group, Inc., a specialty pharmacy that provides home care for patients with hemophilia, a rare blood-clotting disorder.[4] Greenfield sued Accredo Health Group, along with its affiliates Medco Health Solutions, Inc. and Hemophilia Health Services, Inc. (collectively, the "Accredo defendants"), under the FCA, alleging that the Accredo defendants made donations to two charities – Hemophilia Services, Inc. (HSI), and Hemophilia Association of New Jersey (HANJ) – in order to induce the charities to recommend or refer their hemophiliac members to Accredo, in violation of the AKS.[5] According to Greenfield, this alleged kickback scheme resulted in an FCA violation "because at least some of the referrals or recommendations were directed to Medicare beneficiaries and because Accredo falsely certified compliance with the [AKS] while submitting Medicare claims for payment."[6] The Accredo defendants countered that Greenfield's complaint fell short of proving FCA liability because Greenfield had failed to produce any evidence that a federally-insured patient had purchased Accredo hemophilia drugs or services because of the Accredo defendants' contributions to HSI or HANJ.[7]

Greenfield decided to continue with his suit after the government declined to intervene. Yet, after the close of discovery, the District Court for the District of New Jersey denied Greenfield's summary judgment motion and granted the Accredo defendants', holding that "[a]bsent some evidence . . . [that] patients chose Accredo because of its donations to HANJ/HSI," Greenfield could not establish liability under the FCA.[8] The lower court determined that although Accredo had submitted claims

1 No. 17-1152, 2018 WL 473158, at *6 (3d. Cir. Jan. 19, 2018).
2 *Id.*
3 *Id.* at *8.
4 *Id.* at *1.
5 *Id.*
6 *Id.* at *2.
7 *Id.*
8 *U.S. ex rel. Greenfield v. Medco Health Sys. Inc.*, 223 F.Supp.3d 222, 230 (D.N.J. 2016).

for 24 federally insured patients during the relevant time period, such evidence could not, standing alone, establish a "link between defendants' 24 federally insured customers and defendants' donations to HANJ/HSI."[9]

II. The Greenfield Decision

A. Establishing a Link between AKS Violations and FCA Liability

In upholding the lower court's grant of summary judgment in favor of the Accredo defendants, the Third Circuit articulated the issue on appeal: "[W]hat 'link' is sufficient to connect an alleged kickback scheme to a subsequent claim for reimbursement: a direct causal link, no link at all, or something in between."[10] To resolve this issue, the Court first looked to the language of the AKS, noting that, as part of the Patient Protection and Affordable Care Act, the AKS had been amended in 2010 to provide that "a claim that includes items and services resulting from a violation of [the AKS] constitutes a false or fraudulent claims for purposes of [the FCA]."[11] The Court further noted that the "resulting from" language (which is not defined in the AKS) seemed to establish a "but-for" causal connection between AKS violations and FCA liability – that is, as the Accredo defendants suggested, the statute appears to require proof that a recommendation or referral to Accredo would not have taken place "but for" Accredo's charitable donations to HSI and HANJ.[12]

Yet, as the Department of Justice argued in an *amicus* brief (and as the Third Circuit ultimately held), "imposing but-for causation in this context would lead to the incongruous result whereby 'a defendant could be convicted of criminal conduct under the [AKS] for paying kickbacks to induce medical referrals, but would be insulated from civil [FCA] liability for the exact same conduct, absent additional proof that each medical decision was in fact corrupted by the kickbacks."[13] Indeed, said the Court, requiring the plaintiff in an FCA suit to prove that a kickback actually influenced a patient's or medical professional's judgment would "hamper" FCA cases premised on AKS violations and would "dilute the [FCA's] requirements vis-a –vis the [AKS], as direct causation would be a precondition to bringing a [FCA] case but not an [AKS] case."[14] Thus, the Court ruled that although a "link" is required, Greenfield did not need to prove that the recommendations and referrals made by the charities "actually caused their members to use a particular healthcare provider."[15]

B. Proving that the Link Exists

Although Greenfield was not required to prove but-for causation in order to establish an AKS violation, the Court did find that, in order to meet his burden for establishing FCA liability, "Greenfield must prove that at least one of Accredo's claims sought reimbursement for medical care that was provided in violation of the [AKS] (as a kickback renders a subsequent claim ineligible for payment)."[16] Here, like the district court, the Third Circuit disagreed with Greenfield's contention that all 24 of the Accredo defendants' claims for federally insured patients necessarily violated the FCA because all of the claims were submitted during the pendency of the alleged kickback scheme, and because each claim falsely certified compliance with the AKS.[17] In other words, even if the charitable contributions made by the Accredo defendants to HSI and HANJ constituted illegal kickbacks in violation of the AKS, the mere existence of a kickback scheme would not automatically "taint" every claim submitted to the government during the time period that the kickback scheme is alleged to have taken place.

Citing to its sister courts for the proposition that "evidence of the actual submission of a false claim" is necessary to establish liability under the FCA, the Third Circuit held that "[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[,],

9 *Id.*
10 *Greenfield,* No. 17-1152, 2018 WL 473158, at *5.
11 *Id.* (quoting 42 U.S.C. § 1320a-7b(g)).
12 *Id.*
13 *Id.* (quoting Gov't Amicus Br. at 22).
14 *Id.* at *6.
15 *Id.* at *7.
16 *Id.*
17 *Id.*

or should have been submitted to the Government."[18] Thus, the Court found, "[i]t follows that Greenfield may not prevail on summary judgment simply by demonstrating that Accredo submitted federal claims while allegedly paying kickbacks."[19] A mere hypothesis that at least some of the charities' recommendations must have been directed to at least one of the 24 Medicare beneficiaries, simply because claims for these patients were submitted during the relevant time period, is insufficient.[20] Rather, the plaintiff "must point to at least one claim that covered a patient who was recommended or referred to Accredo by HSI/HANJ" during that time.[21]

In rejecting the plaintiff's arguments and upholding summary judgment for the Accredo defendants, the Court summarized its reasoning as follows:

> 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. Even if we assume Accredo paid illegal kickbacks, that is not enough to establish that the underlying medical care to any of the 24 patients was connected to a breach of the Anti-Kickback Statute; we must have some record evidence that shows a link between the alleged kickbacks and the medical care received by at least one of Accredo's 24 federally insured patients.[22]

III. AGG Analysis

The *Greenfield* decision follows years of FCA decisions from multiple district and circuit courts requiring the plaintiff in an FCA case to demonstrate that the defendant, regardless of any alleged wrongdoing, actually submitted a false claim for payment to the government.[23] More specifically, in the context of FCA cases alleging legally false certifications (such as *Greenfield*), courts have required evidence of claims submitted to the government that falsely certify compliance with a statute, regulation, or contractual provision material to the government's decision to pay.

Relying on these prior decisions, the Third Circuit in *Greenfield* merely extends this logic to FCA cases premised on AKS violations. In doing so, the Court rejects the argument that the existence of an illegal kickback scheme taints *any* claim submitted to the government during the relevant time period, an argument that both the government and *qui tam* relators have continued to put forth in such cases. Instead, pursuant to *Greenfield*, the plaintiff in an AKS-based FCA suit must establish some link between the alleged kickbacks and either the claims presented or the underlying medical care. This rule from *Greenfield* may serve as beneficially persuasive precedent for FCA defendants alleged to have violated the AKS.

18 *Id.* (citing *U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1311 (11th Cir. 2002)).
19 *Id.* at *8.
20 *Id.*
21 *Id.*
22 *Id.*
23 *See id.* (citing *U.S. v. Kitsap Physicians Serv.*, 314 F.3d 995, 997 (9th Cir. 2002) ("It seems to be a fairly obvious notion that a False Claims Act suit ought to require a false claim. Yet, the plaintiff-appellant in this case filed his action, proceeded to summary judgment, and prosecuted this appeal without ever seeing or presenting to a court a single false claim submitted by the defendants-appellees. This flaw is fatal to a qui tam action under the False Claims Act.")).

Authors and Contributors

Sara M. Lord
Partner, DC Office
202.677.4054
sara.lord@agg.com

Samuel M. Shapiro
Associate, DC Office
202.677.4052
samuel.shapiro@agg.com

not *if*, but *how*.®

About Arnall Golden Gregory LLP

Arnall Golden Gregory (AGG), an Am Law 200 law firm with 165 attorneys in **Atlanta** and **Washington, DC**, takes a "business sensibility" approach when advising clients. AGG provides industry knowledge, attention to detail, transparency and value to help businesses and individuals achieve their definition of success. AGG's transaction, litigation, regulatory and privacy counselors serve clients in healthcare, real estate, litigation, business transactions, fintech, global commerce, government investigations and logistics and transportation. AGG subscribes to the belief "not if, but how.®"
Visit us at www.agg.com.

Atlanta Office
171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: **http://www.agg.com/subscribe/**