

# Court declines to dismiss FCA suit alleging vascular clinic chain violated AKS

By Murad Hussain, Esq., and Elliot S. Rosenwald, Esq., Arnold & Porter\*

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On March 1, in three consolidated and intervened False Claims Act (FCA) cases, Judge G. Murray Snow of the U.S. District Court for the District of Arizona denied the defendants' motions to dismiss the United States' claims that a nationwide chain of outpatient vascular clinics (Modern Vascular) violated the Anti-Kickback Statute (AKS) when allocating clinic equity interests to physician investors based on referral volumes.<sup>1</sup>

The United States' complaint-in-intervention, filed in December 2022, alleges that Modern Vascular and its founder violated the AKS and, in turn, the FCA.

*The government alleges that the defendants offered financial incentives to physicians who successfully enticed other physicians to refer patients for treatment at Modern Vascular office-based labs.*

The AKS prohibits, *inter alia*, knowingly and willfully offering or paying remuneration to induce the referral of services that will be reimbursed by various federal healthcare programs (here, Medicare and Tricare). The AKS further provides that a claim submitted to the government for a service "resulting" from an AKS violation constitutes a "false or fraudulent claim" for FCA purposes.

According to the suit, the defendants operated a franchise model with numerous office-based labs (OBLs) providing vascular intervention treatments for peripheral arterial disease. Relying extensively on internal corporate strategy documents and communications, the government alleges that the defendants offered financial incentives — primarily low-cost equity interests in its OBL franchises — to physicians who successfully enticed other physicians to refer patients for treatment at Modern Vascular OBLs.

The government also alleges that the defendants used referral rates to calibrate the OBL equity stakes offered (up to 2%), and that they conditioned shareholder status on continued referral generation. The government further contends that such conduct falls outside the AKS' regulatory safe harbor for "small entity" investments.

In addition, the OBLs also allegedly pressured their employed physicians to perform increasing numbers of invasive interventional procedures on referred patients.

The defendants sought dismissal on several grounds, each of which the district court rejected. First, the court concluded that the government sufficiently pled FCA *scienter*, by plausibly alleging that the defendants "were knowingly and/or willingly reimbursing their physician-investors based on the number of referrals to the OBLs credited to those investors."

Citing the seminal analysis in *Hanlester Network v. Shalala*,<sup>2</sup> the district court explained that if "equity ownerships were openly available to purchase and dividend payments were made based purely on percentage of ownership and were not related to credits for referrals," then merely encouraging a physician-investor to refer patients to the practice would simply create a permissible opportunity to profit "indirectly" from referrals.

By contrast, the court explained, the government accused the defendants of going a step further: the opportunity to invest in each OBL supposedly rested on an agreement to refer federal healthcare beneficiaries, with the number of available shares allegedly depending on the volume of referred business, and with non-referring partners allegedly being pressured to leave.

Additionally, the court noted the government's allegations that Modern Vascular's controlling owner was aware of the relevant AKS requirements and that he supposedly took specific actions to conceal non-compliant conduct.

Second, the court held that the government sufficiently pled "causation" under the FCA, whether under the "temporal relationship-plus" standard used in the Ninth Circuit (and similar to that used in other circuits),<sup>3</sup> or under the "but-for" causation standard that has emerged in the Sixth Circuit<sup>4</sup> and Eighth Circuit.<sup>5</sup>

The defendants had argued that OBL investors were not the physicians who treated the referred patients, and because the treating physicians had exercised their independent medical judgment in providing OBL services, this broke the causal chain between any allegedly improper remuneration paid to physician-investors and the actual claim submissions by treating physicians.

The court concluded that the AKS does not require that kickbacks must actually "corrupt" any treating physician's clinical judgment,

and that the statutory text is triggered whenever remuneration is offered to induce the recipient (here, the physician-investors) to “arrange for” federal healthcare services.

The court thus found that the complaint alleged “more than a mere temporal relationship between the alleged kickback scheme and the submission of allegedly tainted claims,” because the defendants allegedly structured their equity allocations to induce investors to “arrange for” federally reimbursed OBL services, and the government also alleged specific instances when physician-investors received financial benefits for patients whom the physician-investors themselves had referred.

Next, the court held that even under the stricter “but-for” causation standard, the complaint plausibly alleged that specific federal claims would not have been submitted but for the referral-based equity allocations. The court also applied Ninth Circuit precedent to reject the defendants’ arguments for lack of particularity under Federal Rule of Civil Procedure 9(b) and for dismissal of the government’s alternative common-law claims.

According to case filings, Medicare suspended payments to the defendants in February 2023, just two months after the government

intervened in the suit, and in May 2023, one of Modern Vascular’s OBL management entities declared bankruptcy.

Regardless of whether the government’s allegations are accurate, this litigation and other similar recent FCA cases (as well as the authors’ own experience counseling interventional cardiology and radiology practices across the country) confirm that private investment in OBL practices remains under fierce government scrutiny, and that the consequences for healthcare providers’ perceived non-compliance with the AKS can be swift and severe — even without any determination of liability or guilt.

#### Notes:

<sup>1</sup> See *U.S. ex rel. Radhakrishnan, et al. v. Gampel, et al.*, No. 20-CV-176, 2024 WL 894671 (D. Ariz. Mar. 1, 2024).

<sup>2</sup> 51 F.3d 1390 (9th Cir. 1995).

<sup>3</sup> <https://bit.ly/49z2QTu>

<sup>4</sup> <https://bit.ly/49G9Dus>

<sup>5</sup> <https://bit.ly/43XK9rv>

#### About the authors



**Murad Hussain (L)** is a partner in **Arnold & Porter’s** white collar defense and investigations practice. He represents clients in all stages of criminal health care fraud prosecutions, False Claims Act litigation, Centers for Medicare & Medicaid Services administrative proceedings, and related internal and government investigations. He also serves as an adjunct professor of trial practice at the Georgetown University Law Center. He can be reached at [Murad.Hussain@arnoldporter.com](mailto:Murad.Hussain@arnoldporter.com). **Elliot S. Rosenwald (R)**, a firm associate, practices in government enforcement actions, internal investigations and commercial litigation. He can be reached at [elliot.rosenwald@arnoldporter.com](mailto:elliot.rosenwald@arnoldporter.com). Both authors are based in Washington, D.C. This article was originally published March 12, 2024, on the firm’s website. Republished with permission.

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