

# Eighth Circuit Imposes New “But-For” Causation Standard for False Claims Act Cases Premised on Anti-Kickback Violations, Causes Circuit Court Split

by Christopher D. Adams and Robert B. Hille

The federal False Claims Act (“FCA”) imposes civil liability on anyone who presents or conspires to “present[ ] ... a false or fraudulent claim” to the government.<sup>1</sup> FCA liability is usually related to the provision of goods or services that are included in the claim. The federal antikickback statute (“AKS”), which was amended in 2010, states that submitting a claim to the government that “includes items or services *resulting from* a[n] [anti-kickback] violation” makes a claim “false or fraudulent” under the FCA.<sup>2</sup> Plainly stated, the government’s broad interpretation has been that any claim submitted that violates the AKS is tantamount to committing a FCA violation.

Recently, the United States Court of Appeals for the Eighth Circuit departed from other Circuit Court’s view of FCA liability based on an AKS violation<sup>3</sup> and imposed a different causation standard for FCA cases premised on AKS violations. In *United States ex rel. Cairns v. D.S. Med., LLC*,<sup>4</sup> a neurosurgeon used certain spinal implants to treat degenerative-disc disease and other spinal disorders. The implants were made by a number of manufacturers, but the neurosurgeon chose to use only implants that were distributed by a company owned by his fiancée, resulting in millions of dollars in commissions to his fiancée’s company. The neurosurgeon was offered to purchase stock in the manufacturer and once he did, he ordered more implants.

The *Cairns* Court interpreted the plain language of the statutory words, “resulting from,” in the 2010 AKS amendment, reversed the neurosurgeon’s conviction, and remanded the case for a new trial. Agreeing with the interpretation by the United States Supreme Court in *Burrage v. United States*,<sup>5</sup> of similar statutory language, the Eighth Circuit found that the phrase, “results from,” essentially establishes “a requirement of actual causality.”



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Therefore, when the government seeks to establish falsity or fraud under the FCA premised on an AKS violation, the government must demonstrate that “*but-for* the illegal kickbacks,” the neurosurgeon would not have included particular “items or services” in his claims to the government.

While the *Cairns* decision is the first case that has established a “but-for” causal standard, the decision creates a split with our Third Circuit which has held that although the AKS’s “resulting from” language re-quires some nexus between the reimbursement claims submitted and the kickback scheme, it **does not** require the government to show but-for causation. How the two Circuits have reached different conclusions is explained in *Cairns*. The Third Circuit looked to legislative history while the Eighth Circuit relied upon the plain meaning of the statutory language to interpret the statute.

Whether other District or Circuit Courts will adopt the *Cairns* “but-for” standard for FCA liability based on an AKS violation remains to be seen. However, while not controlling on other District and Circuit Courts, savvy defense counsel will no doubt be advancing this “but-for” causality standard in other courts across the United States, forcing these courts to side with the reasoning of either the Eighth or Third Circuits. Indeed, the split in the circuit courts is real and could very well prompt the United States Supreme Court to hear an appeal to definitively resolve the discrepancy.

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**Endnotes**

<sup>1</sup>31 U.S.C. §3729(a)(1)(A), (C).

<sup>2</sup>42 U.S.C. §1320a-7b(g).

<sup>3</sup>See *United States ex rel. Greenfield v. Medco Health Solutions, Inc.*, 880 F.3d 89 (3d Cir. 2018).

<sup>4</sup>No. 20-2445, 2022 WL 2930946 (8th Cir. July 26, 2022).

<sup>5</sup>71 U.S. 204 (2014).

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