

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

What You Need to Know

Individuals and companies charged with violating the federal False Claims Act (FCA) based on Anti-Kickback Statute (AKS) violations may now have a valid defense to raise.

The FCA imposes **civil liability** on anyone who presents or conspires to "present[] ... a false or fraudulent claim" to the government. This is usually related to goods or services. The 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. 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 U.S. Court for Appeals for the Eighth Circuit, in the matter *United States ex rel. Cairns v. D.S. Med., LLC*, took a stance on the causation standard for FCA cases premised on AKS violations.

The Court's holding in *Cairns* offered up a pivotal new defense for defendants in these types of cases, rejecting the government's broad interpretation. The holding relied upon interpretation of the plain meaning of the statutory words "resulting from" in the 2010 AKS amendment. In reaching its decision, the Court considered a 2014 U.S. Supreme Court case, *Burrage v. United States*, in which the Court held that "results from" essentially establishes "a requirement of actual causality" such that, in that case, a "but-for cause of the death" had to be proven. As a result, the *Cairns* Court explained that the interpretation in *Burrage* *equally applies to* the AKS amendment. Therefore, the Court held that when a plaintiff seeks to establish falsity or fraud under the FCA premised on an AKS violation, the plaintiff must demonstrate that "but-for the illegal kickbacks", the defendant would not have included particular "items or services" in its claims to the government.

It is worth noting that this Eighth Circuit decision is the first case that has established a "but-for" causational standard as the decision creates a circuit split with the Third Circuit decision in *United States ex rel. Greenfield v. Medco Health Sols. Inc.* In *Greenfield*, the Third Circuit held that, although the AKS's "resulting from" language requires some nexus between the reimbursement claims submitted and the kickback scheme, it does not require the plaintiff show but-for causation.

How the two circuits 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 and circuit courts will adopt the *Cairns* Court's reasoning remains to be seen. However, this holding, while not controlling for other district and circuit courts, signals that courts across the United States will soon be faced with defendants' counsel advocating this defense in cases before them, forcing the courts to take a position in FCA cases based on AKS violations, and offering guidance if these courts so choose to adopt similar reasoning. It is not far-fetched in saying that such a circuit split on this issue could

eventually find itself before the U.S. Supreme Court.

Please contact the authors with questions related to the issues discussed in this Alert, or to discuss your specific circumstances.

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