

# PUBLICATION

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## Eighth Circuit Breaks from Third Circuit, Requiring the Government to Prove "But-For" Causation in Some Anti-Kickback Cases

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July 29, 2022

On July 26, 2022, the United States Court of Appeals for the Eighth Circuit held that "resulting from" under the 2010 amendment to the Anti-Kickback Statute (AKS)<sup>1</sup> requires the government to prove that "but-for" the illegal kickbacks, the defendants would not have included particular items or services in their claim for reimbursement. *United States ex rel. Cairns v. D.S. Medical, LLC*, 2022 WL 2930946 (8th Cir. July 26, 2022). This is the first time any court has applied the most stringent causation requirement in anti-kickback cases brought under the 2010 amendment. Given that other courts have required less stringent proof, such as "a link" and "some proof," it remains to be seen whether the Eighth Circuit's test will be followed by other courts around the country.

### Background

In *D.S. Medical*, a neurosurgeon in Missouri chose to use spinal implants distributed by a company wholly owned by his fiancée. Both the neurosurgeon and fiancée benefited from this decision: The fiancée made \$1.3 million in commissions from one manufacturer alone, and the neurosurgeon received an offer to purchase company stock from the same manufacturer.

The government brought three False Claims Act (FCA) claims against the neurosurgeon, his fiancée, and their businesses, including one under the AKS. The AKS imposes liability on anyone who solicits or receives illegal kickbacks for any "item[s] or service[s]" paid "in whole or in part" by Medicare or Medicaid. Specifically, the 2010 amendment mandates that false or fraudulent claims are those submitted to the government that "include[] items or services resulting from a[n] [anti-kickback] violation."

After the jury convicted the defendants on two of the FCA claims, the defendants appealed. One issue before the Eighth Circuit was the causation standard for proving that the defendants' items or services "resulted from" their anti-kickback violation.

### The Causation Standard for Anti-Kickback Claims

Applying statutory construction principles, the Eighth Circuit emphasized that its analysis would begin and end with the plain meaning of the unambiguous text "resulting from." Relying on *Burrage v. United States*,<sup>2</sup> where the Supreme Court concluded that the phrase "results from" required "actual causality," i.e., but-for causation, in a provision of an unrelated statute, the Eighth Circuit held that "resulting from" creates a but-for causal requirement between an anti-kickback violation and the "items or services" included in a claim for reimbursement.

Accordingly, the Eighth Circuit required the government to prove that the "defendants would not have included particular 'items or services' absent the illegal kickbacks." In reaching this conclusion, the court rejected the government's contextual arguments that relied on pre-2010 case law and legislative history, and its push for the court to adopt alternative causal standards, such as the kickback "tainted" the claims for goods or services or the violation "may have been a contributing factor."

### Implications

Since the 2010 amendment, courts across the country have been grappling with the causation standard required for the government to show that items or services at issue resulted from the anti-kickback violation. The Eighth Circuit explicitly disagreed with the Third Circuit's 2018 decision that only "a link" or "some connection" is required between the illegal kickback and claim for reimbursement. *United States ex rel. Greenfield v. Medco Health Solutions, Inc.*, 880 F.3d 89 (3d Cir. 2018). By contrast, several United States District Courts have applied a "middle of the road" approach. See e.g., *United States v. Teva Pharmaceuticals USA, Inc.*, No. 13 Civ. 3702 (CM), 2019 WL 1245656, at \*24 (S.D.N.Y. Feb. 27, 2019). It is only a matter of time until this disagreement is taken up by the Supreme Court to decide this issue definitively.

As the Eighth Circuit's decision adds to this evolving area of the law, if you have any questions about the causation analysis in AKS cases, reach out to [Ty Kelly](#), [Thomas Barnard](#), or [Annie Kenville](#).

<sup>1</sup> There are several ways to prove that a claim is "false or fraudulent" under the False Claims Act. 31 U.S.C. § 3729(a)(1). One of them, under the 2010 amendment, is to show that it "includes items or services *resulting from* a violation" of the anti-kickback statute. 42 U.S.C. § 1320a-7b(g) (emphasis added). Section 1320a-7b(g) of the False Claims Act (FCA) states that "a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim."

<sup>2</sup> 571 U.S. 204 (2014).