

**FCA DAMAGES AND PENALTIES:
RECENT DEVELOPMENTS AND RECURRING THEMES**

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I. INTRODUCTION

According to the Department of Justice, the United States government recovered more than \$2.1 billion from October 1, 2002 through September 30, 2003 in cases brought under the False Claims Act (FCA).¹ This was the highest total ever for a one-year period. More than \$12 billion has been recovered from 1986 to October 2003.² This steady stream of revenue flowing into the government's coffers is likely to continue apace as *qui tam* actions flourish and the False Claims Act's reach continues to expand beyond its origins as a weapon against military procurement fraud.³

The remarkable recoveries generated by the False Claims Act are attributable in part to its somewhat unique damages and penalties provisions. These provisions can yield forfeitures vastly out of proportion to the alleged violation and, because of this heightened litigation risk, tend also to force settlements in cases that defendants might otherwise litigate and win. Much of the FCA's power therefore derives from its potential for quasi-criminal sanctions that have less to do with remediation than with simple punishment.

Because of the potential for draconian sanctions under the FCA, its damages and penalties provisions are often vigorously contested. This paper surveys the evolving state of the law as courts struggle to interpret and apply these provisions to an ever-broadening range of conduct.

II. THE ACT

A. The Statutory Language

Section 3729(a) of Title 31 provides that any person who violates the False Claims Act, including by presenting a false claim for payment, making a false statement to get a false claim paid, or making a false statement to avoid an obligation to pay the government:

. . . is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . .

31 U.S.C. § 3729(a).⁴

The Act further provides that "the United States shall be required to prove . . . damages . . . by a preponderance of the evidence." 31 U.S.C. § 3731(c).

B. The Legislative History

As originally enacted in 1863, the civil portion of the False Claims Act provided for double damages and a \$2,000 per-claim penalty.⁵ These provisions remained unchanged for more than 120 years,⁶ until, in the face of widely-publicized instances of defense contract fraud in the early 1980's, Congress amended the FCA in 1986. The House and the Senate each passed their own version of amendments to the FCA, and both sought to update the Act's remedial provisions in several important respects.

1. Increased penalties

First, the \$2,000 penalty was increased, purportedly in an effort to maintain its deterrent effect which had eroded due to inflation. 132 Cong. Rec. H6479 (1986) (statements of Reps. Glickman and Brooks). The Senate proposed a \$10,000 penalty, while the House proposed a penalty ranging from a minimum of \$5,000 to a maximum of \$10,000. S. Rep. No. 99-345 at 17 (1986); H. Rep. No. 99-660 at 20 (1986). The final version of the Act adopted the House approach. Pub. L. 99-562, 100 Stat. 3153.

The Senate expressed the view that assessment of FCA penalties should be automatic and not within the discretion of the courts, stating that it was "reaffirm[ing] the apparent belief of the Act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments." S. Rep. No. 99-345 at 17.

2. Increased damages multiplier

Second, the Senate, but not the House, proposed increasing the damages multiplier from double to treble. S. Rep. 99-345 at 39. The Senate stated that its purpose was to bring the FCA in line with a recently-passed statute that provided for triple damages in fraud cases involving the Department of Defense.⁷ *Id.* at 17. The Senate version, of course, prevailed. Pub. L. 99-562, 100 Stat. 3153.⁸

3. Consequential damages

A further proposal in both the Senate and the House versions of the 1986 Amendments would have required that consequential damages be included in the calculation of actual damages sustained by the government, albeit without doubling or trebling of the consequential damages component. S. Rep. No. 99-345 at 19; H. Rep. No. 99-660 at 2. However, this approach was ultimately rejected, possibly because treble damages were viewed as sufficient to adequately compensate the

government for any indirect damages incurred. See 132 Cong. Rec. H9388 (Oct. 7, 1986) (statement of Rep. Glickman).

C. Regulatory Addendum

In 1999, pursuant to the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, which requires agency heads periodically to adjust civil monetary penalties for inflation, the Department of Justice increased the FCA penalty range to a minimum of \$5,500 and a maximum of \$11,000. 64 Fed. Reg. 47099-47104, § 85.3 (August 30, 1999). These statutes require the Department of Justice to make such inflation adjustments at least once every four years. Any increase in the FCA penalty range applies only to those violations which occur after the date the increase takes effect.⁹

D. Punitive Nature Of FCA Damages And Penalties

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000), the Supreme Court held that the post-1986 version of the FCA “imposes damages that are essentially punitive in nature.” Acknowledging that it had previously suggested, in *United States v. Bornstein*, 423 U.S. 303, 315 (1976), that the damages under the FCA were “remedial rather than punitive,” the Supreme Court reasoned that the version of the FCA at issue in *Bornstein* imposed “only” double damages and a civil penalty of \$2,000 per claim, while the current version of the FCA imposes treble damages and a civil penalty of up to \$10,000 per claim.

III. DAMAGES

A. Calculation of Damages

The FCA offers no guidance as to how damages should be measured, other than to state that one who violates the Act is liable for damages “sustain[ed] because of the act of that person” 31 U.S.C. § 3729. Following this less than illuminating legislative instruction, the courts have crafted any number of different approaches to calculating damages under the FCA.

1. From *Hess* to *Bornstein*

The Supreme Court first weighed in on the issue of how damages should be calculated under the FCA more than 60 years ago in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). The commonly-cited, but not very useful, formula for FCA damages articulated in *Hess*, is to measure the amount the government would not have paid had it known the true facts.

Thirty years later, in the leading case of *United States v. Bornstein*, 423 U.S. 303 (1976), the Supreme Court computed double damages under the pre-1986 version of the FCA in a classic “substandard product” context. The defendant in *Bornstein* was a subcontractor who delivered falsely branded electron tubes to a prime

contractor. The prime used the substandard tubes to construct radio kits which were delivered to the government. The Court ruled that “[t]he Government’s actual damages are equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality.” 423 U.S. at 317 n.13.

While the *Bornstein* “difference in market value” approach makes sense in theory for the typical substandard product case, in practice the calculation of damages under the FCA varies greatly according to the myriad types of fraud perpetrated upon the government and the extent to which proof of “market value” or other benchmarks is available.

2. **Calculation of damages in recent cases involving substandard products**

The following are examples of approaches taken in recent cases, each of which involves a substandard product of one kind or another, and each of which depart from *Bornstein* to some extent:

- **Construction defects.** *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357 (Fed. Cir. 1998) involved the construction of a flood canal which the government contended was defective in significant respects. The court agreed with defendant that, under *Bornstein*, “the normal measure of damages is the difference in value between what the government was supposed to get and what it actually got from the contractor.” *Id.* at 1372. However, because it was not possible to determine the loss in value caused by the contractor’s deficient performance, the court calculated damages on the “alternative basis” of the cost of remedying the construction defects. *Id.*
- **Failure to perform tests.** In *BMV-Combat Systems v. United States*, 44 Fed. Cl. 141 (1998), the defendant had contracted with the Army to provide self-propelled howitzers, a major component of which was a very large steel “trunnion mounting bracket” (TMB). The specifications for the TMBs included radiographic and magnetic particle tests which the defendant failed to perform. The court held that damages should include the costs of inspection and repair incurred by the government, the government’s costs in having replacement TMBs manufactured at its own facilities as a precautionary step, and the interest on premature contract payments for howitzers containing uninspected TMBs. *Id.* at 148-50.
- **Failure to perform tests.** In *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998), defendants contracted to sell Jeep brake shoe kits to the Army but failed to perform required tests on the items shipped. The government subsequently discovered that a substantial percentage of defendant’s brake shoe kits were defective and removed them from all Army Jeeps. The District Court rejected defendant’s contention that the

measure of damages should be the difference between the market value of the items delivered and the value of the items promised, and instead assessed damages at three times the full value of the contract. *Id.* at 299. The Court of Appeals upheld this ruling because "none of [the brake shoe kits] came with the quality assurance of a product that had been subjected to" the required testing. *Id.* at 304. The court also noted that this was consistent with defendant's theory of damages because the removed and unused brake shoe kits were "valueless" to the government. *Id.*

3. Calculation of damages in other contexts

The following are but a few examples of FCA damages calculations in cases involving something other than substandard products or services:

- **Defective pricing.** *United States v. Foster Wheeler Corp.*, 447 F.2d 100 (2d Cir. 1971), presented the prototypical defective pricing case. In the course of negotiating a fixed-price contract to supply military hardware, the defendant submitted information which overstated its costs. The court ruled that the proper measure of single damages in such situations is the amount the government paid less the amount the government would have paid if it had been given accurate cost and pricing information. *Id.* at 102.
- **False loan applications.** In *United States v. Hill*, 676 F. Supp. 1158 (N.D. Fla. 1987), the defendants submitted an application for a government-guaranteed loan which falsely stated that \$10,000 had been invested in the business which would benefit from the loan. The court found that because this false statement was "highly relevant to eligibility" for the loan, the defendants had caused and were therefore liable for three times the amount the government had been required to pay upon default. *Id.* at 1162.
- **Benefits claims.** In *United States v. Outland*, C.A. No. 5:00-CV-123-J, 2001 WL 1793736 (W.D. Ky. March 19, 2001), the defendant submitted six claims, for which he received a total of \$1,728, for unemployment insurance benefits to the Railroad Retirement Board while he was incarcerated. The defendant's initial application for such benefits was submitted prior to his incarceration. The court entered judgment against the defendant in the amount of \$35,184 (trebled \$1728 plus \$30,000 in penalties) plus costs – an amount more than 20 times the actual damages.
- **False progress reports.** In *United States v. TDC Mgmt. Corp., Inc.*, 288 F.3d 421 (D.C. Cir. 2002), the court affirmed the district court's finding that the defendant violated the False Claims Act by submitting progress reports with material omissions in support of its invoices for payment under a cost-reimbursement contract in which the defendant was to use its "best efforts." The court rejected the defendant's argument that the government "got what it paid for" under the "best

efforts” agreement and that, therefore, under the *Bornstein* paradigm, the government suffered no damages. The court distinguished *Bornstein*, noting that TDC was not asked to produce a “tangible structure or asset of ascertainable value.” According to the court, the value of the defendant’s “best efforts” was “vitiating” by its fraudulent concealment of material facts. The court affirmed the “but for” measure of damages, based on what the government would have paid out had it known of the information that [defendant] omitted from its monthly progress reports.”

- **Kickbacks.** *United States v. Killough*, 848 F.2d 1523 (11th Cir. 1988) concerned kickbacks to state officials administering federal hurricane relief funds. The officials approved invoices that had been inflated in order to generate funds to pay them off for awarding the lucrative contracts. The court determined that the amount of the kickbacks “was neither a floor nor a conclusive presumption of the measure of damages [but] was relevant as circumstantial evidence” and upheld a jury award which was close to that figure. *Id.* at 1532.
- **Bid-rigging.** In *Brown v. United States*, 524 F.2d 693 (Ct. Cl. 1975) the court held that the appropriate measure of damages in a bid-rigging case is “the difference between the amount the Government actually paid in reliance on the false claims and the amount it would have paid had there been fair, open and competitive bidding.” *Id.* at 706. The court rejected the government’s contention that damages should be the difference between what it paid and the contractor’s costs in performing the contract. *Id.*

4. Statistical sampling

A recent trend that raises obvious due process concerns is the use of statistical sampling methods to determine FCA damages even where that is not the only alternative. This approach relieves the government from the burden of proving damages by traditional means where it would be difficult or inconvenient to do so.

In *United States v. Cabrera-Diaz*, 106 F. Supp.2d 234 (D.P.R. 2000), the defendant billed Medicare for time that he falsely claimed to have spent rendering anesthesiology services. An HHS contractor conducted a post-payment audit of the defendant pursuant to Medicare audit guidelines by using a statistically valid random sample. The audit revealed that a large proportion of the sampled claims contained overbilling. Relying on Medicare overpayment cases, the court allowed calculation of trebled damages based on extrapolation of the random sample of audited claims. *Id.* at 240-41.

Cabrera-Diaz appears to be a departure from the traditional approach to calculating FCA damages. While there have been cases in which sampling has been used to establish damages under the FCA, they have typically involved situations in which exact calculations were impossible (rather than merely difficult), often due to the defendant’s own

misconduct. See *Brooks v. Department of Agriculture*, 841 F. Supp. 833 (N.D. Ill. 1994) (damages for redemption of food stamps at inflated rates hampered by defendant's failure to retain records of food sales); *Faulk v. United States*, 198 F.2d 169, 171 (5th Cir. 1952) (quantity of substandard milk supplied to military base proven through anecdotal evidence); see also *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997) (extrapolation of damages from sample allowed where defendant agreed to trial based on representative sample of allegedly false claims).

An attempt to extend these cases to prove the existence of false claims, rather than to prove damages, was recently rejected. In *United States ex rel. Aflatooni v. Kitsap Physicians Service*, 314 F.3d 995 (9th Cir. 2002), the Ninth Circuit rejected the relator's attempt to prove the **existence** of a false claim by offering evidence that he was told by the president of the corporate defendant that "a quarter of some 30,000 bills submitted to Medicare were altered." The relator relied primarily on *United States v. Krizek*, 192 F.3d 1024 (D.C. Cir. 1999) and other cases that allow parties to estimate total damages by extrapolation. The court distinguished these cases, however, holding that those cases allow for damages to be calculated using extrapolation only where specific examples of false claims have been identified and where the defendant has engaged in "systemic fraud."

B. Limitations on Damages

While a literal reading of the statute would indicate that any and all damages sustained by the government "because of the acts" of a FCA defendant are recoverable, it has long been held that this principle is not without limit. Thus, "consequential damages" are generally not recoverable under the FCA. This has not stopped courts, however, from camouflaging consequential damages as something different and awarding them nonetheless.

1. Background on the rule against consequential damages

In *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972), the court considered in a case of first impression whether consequential damages -- those damages which do not flow directly and immediately from the submission of a false claim or other prohibited act -- are recoverable under the FCA. The Court held that "the language of the False Claims Act does not include consequential damages resulting from delivery of defective goods." *Id.* at 1011. On this basis, the court denied the government's demand for the cost of removing and replacing defective aircraft engine bearings. The court also held, however, that such damages were recoverable under a common law breach of warranty theory.¹⁰ *Id.* at 1011-13.

It was in direct response to *Aerodex* that Congress inserted provisions in early versions of the 1986 FCA Amendments requiring inclusion of consequential damages. See S. Rep. No. 99-345 at 19. The reasons for the elimination of such a provision before final passage is somewhat of a mystery. One commentator contends that statements by

the House and Senate sponsors "indicate that consequential damages were considered recovered through the multiple damages provisions." John T. Boese, *Civil False Claims And Qui Tam Actions* at 3-42 (footnote omitted). The Department of Justice, on the other hand, has asserted that "[t]he 1986 Amendments did nothing to clarify the issue" and "[t]here is no explanation available from the legislative history to explain" why the consequential damages provisions were dropped. DOJ Civil Fraud Monograph (Nov. 1988) at 161, 162.

Whatever the reasons, the outcome is clear: Congress considered but declined to overturn the existing state of the law concerning consequential damages. It has thus become accepted that consequential damages are not recoverable under the FCA. See *BMY-Combat Systems v. United States*, 44 Fed. Cl. 141, 147-48 (1998) ("Courts utilize several methods of damage calculations intended to ensure that the government receives 'the benefit of its bargain,' being careful not to award consequential damages.") (citing *Aerodex*); *United States ex rel. Roby v. Boeing Co.*, 79 F. Supp.2d 877 (S.D. Ohio 1999) (holding consequential damages are not recoverable under the FCA and citing legislative history of FCA as support for that proposition).

This general principle, however, merely begs the question of what types of damage qualify as "consequential." As the Department of Justice has instructed its attorneys:

What is clear is that in attempting to recover damages which flow from the false claim, they should not be labeled "consequential damages." Rather, these damages should be shown to be the "natural and proximate" result of the defendant's misrepresentations.

DOJ Civil Fraud Monograph at 161 (emphasis in original). This was good advice, for it is through just such semantic shell games that courts, even while paying lip service to the *Aerodex* rule, have awarded what would otherwise seem to be "consequential damages" under the FCA.

2. Evading the rule against consequential damages

Three recent cases, two of which are cited above in section III.A.2., as well as a slightly older case, illustrate this point.

In *BMY-Combat Systems v. United States*, 44 Fed. Cl. 141, 147 (1998), the court acknowledged that courts must be "careful not to award consequential damages" under the FCA. The court went on, however, to assert that "[d]amages under the FCA are to be determined in a flexible manner" and pointed out that *Bornstein* did not mandate the use of the "diminution in value" test in all cases. *Id.* at 148. Thus, the court allowed recovery not only of the replacement value of the faulty parts, but the costs of inspection, repair and replacement, and even the interest value of premature payments resulting from fraudulent invoices. The court

drew the line, however, at recovery under the FCA of the government's administrative costs incurred in processing "requests for waivers" from product specifications "as they appear to be consequential to BMY's submission of false claims." *Id.* at 150.

United States ex rel. Roby v. Boeing Co., 79 F. Supp.2d 877 (S.D. Ohio 1999), involved a false claims action for defective transmission parts that resulted in the crash of two army helicopters. The government and relator claimed as damages the value of the helicopter and its contents. Citing *BMY-Combat Systems*, the *Roby* court held that consequential damages are not recoverable under the FCA. However, the court then proceeded to deny summary judgment because the damage to the helicopter may be recoverable as being proximately caused by the defective part. In a seemingly inconsistent holding the court concluded that "consequential damages are not recoverable under the False Claims Act. However . . . in the Sixth Circuit, . . . incidental damages are recoverable under the False Claims Act." *Id.* at 895. On appeal, the Sixth Circuit affirmed the district court's ruling, holding that "the Government's damages equal the difference between the market value of [the helicopter] as received (zero) and as promised." *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 648 (6th Cir. 2002). The Sixth Circuit did not, however, say how the market value of the helicopter as promised would be calculated.¹¹

Commercial Contractors, Inc. v. United States, 154 F.3d 1357 (Fed. Cir. 1998) presented a somewhat closer question. The court acknowledged the *Bornstein* rule but cited the Restatement of Contracts for the proposition that damages may be calculated on an alternative basis where "it is not possible for an injured party to prove the loss in value caused by the contractor's deficient performance . . ." *Id.* at 1372. The Court further found that one such alternative was "the cost of remedying defects," as long as that cost is not "clearly disproportionate to the probable loss in value caused by the defects." *Id.* Proceeding on this theory, the Court upheld the awarding of damages based on the cost of repairs and replacement work. *Id.* at 1372-75.

In *Daff v. United States*, 78 F.3d 1566 (Fed. Cir. 1996), the defendant was found to have knowingly supplied defective military hardware. The court upheld the trial court's award of treble damages based on "the costs incurred by the government in testing and repairing" the hardware that had been delivered. The court did not address, and the defendant apparently did not raise, the issue of consequential damages.

3. Consequential damages in the health care context

The danger of significant damages awards based on the indirect consequences of the submission of false claims is not limited to defense contractors accused of supplying faulty parts. The risk posed to health care contractors is demonstrated by *United States ex rel. McCoy v. California Medical Review, Inc.*, 715 F. Supp. 967 (N.D. Cal. 1989), in which a Medicare fiscal intermediary was accused of failing to properly

conduct claims reviews. The government argued that damages should include not only payments to the intermediary for reviews that were not conducted but all payments made by the government to claimants that would not have been made but for the defendant's misfeasance. *McCoy* settled before the court was forced to rule on this issue.

4. Contractual limits on consequential damages

At least one court has held that a common contractual provision designed to limit contractor's liability for consequential damages to expensive military equipment cannot operate to limit damages under the FCA. In *United States ex rel. Roby v. Boeing Co.*, 73 F. Supp.2d 897 (S.D. Ohio 1999), defendant was accused of supplying faulty parts that caused the loss of a \$10 million Army helicopter. The court rejected the defendant's claim that the so-called "High Value Items Clause"¹² common in many military procurement contracts prohibited recovery under the FCA for such damages. *Id.* at 909-911. The court was careful, however, to point out that it was not yet ruling on the "appropriateness and measure of consequential damages" under the Act.

C. Prejudgment Interest

Most courts hold that no prejudgment interest is allowable as part of the single damage calculation under the FCA. *Peterson v. Weinberger*, 508 F.2d 45, 55 (5th Cir. 1975); *United States v. McLeod*, 721 F.2d 282, 286 (9th Cir. 1983); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971); *United States v. Uzzell*, 648 F. Supp. 1362, 1368 n.6 (D.D.C. 1986). This result is consistent with *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943), in which the Supreme Court held that "the device of double damages [under the pre-1986 FCA] plus a specific sum was chosen to make sure that the government would be made completely whole." As noted above, at least one court has held that FCA damages may include "interest due to the government on contract payments made prematurely," as distinguished from prejudgment interest. *BMV-Combat Systems v. United States*, 38 Fed. Cl. 109, 126 (1997).

Apparently, the Eighth Circuit stands alone in holding that prejudgment "interest can properly be recovered as 'damage' under the" FCA. *United States v. Cooperative Grain and Supply Co.*, 476 F.2d 47, 62 (8th Cir. 1973); see also *Miller v. Federal Emergency Management Agency*, 57 F.3d 687, 689-90 (8th Cir. 1995) (affirming district court's imposition of prejudgment interest prior to multiplying damages).

The Department of Justice has acknowledged that courts generally hold that "the Government is not entitled to prejudgment interest because that loss is encompassed within the multiple damage and civil penalty provisions that were intended to make the Government completely whole." DOJ Civil Fraud Monograph (Nov. 1988) at 365-66. DOJ contends, however, that "[w]here the transaction affected by fraud contemplated the payment of interest by its terms as part of the exchange of consideration, it may be possible to argue that lost interest is properly part of the Government's damage and must be treated

separately from normal prejudgment interest.” *Id.* According to DOJ, this may explain the result in *Cooperative Grain*. *Id.*

DOJ’s analysis of the *Cooperative Grain* case, which harmonizes *Cooperative Grain* and cases disallowing prejudgment interest, appears to presume that the Eighth Circuit included interest based upon the contractual and regulatory requirements making persons who obtained government loans via fraud liable for interest and not as prejudgment interest. But this interpretation does not square with the Eighth Circuit’s subsequent decision to affirm a district court’s decision to multiply “prejudgment interest” under the FCA. *Miller*, 57 F.3d at 689-90. *Miller* suggests that the Eighth Circuit clearly stands alone in multiplying prejudgment interest under the FCA and that *Cooperative Grain* may not be harmonized with the cases disallowing prejudgment interest.

D. Indemnification

Where one or more persons have defrauded the government in violation of the FCA, each is jointly and severally liable for the resulting damages. *Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 212 (9th Cir. 1991). Because the FCA generally requires that a *qui tam* relator have first-hand knowledge of the alleged fraud, it is not uncommon for a relator to be at least partly responsible for the damage inflicted upon the government in whose name he subsequently brings suit. This raises the question whether defendants in such cases may counterclaim against the relator for indemnification and/or contribution.

As a matter of fairness, it would seem that the relator should be required to pay for his fair share of the damages through indemnification and/or contribution. See e.g. *United States v. Target Rock Corp.*, No. CV-90-4414 (E.D.N.Y. Jan. 31, 1992) (unpublished Memorandum of Decision) (FCA defendant has right to contribution against former employee for government charges of common law fraud). As a matter of policy, however, the courts have been protective of relators in this regard, allowing them to profit, at least in theory, from their own malfeasance.

For example, in *Mortgages*, the Ninth Circuit issued a writ of mandamus ordering a District Court to vacate its decision requiring *qui tam* relators to answer third-party complaints seeking indemnification and/or contribution against any recovery in favor of the United States under the FCA. *Id.* at 214. The Court found no basis in the FCA or federal common law for allowing such counter-suits, observing that “the framers of the Act recognized that wrongdoers might be rewarded under the Act, acknowledging the *qui tam* provisions are based upon the idea of ‘setting a rogue to catch a rogue.’ Cong. Globe, 37th Cong. 3d Sess. 955-56 (1863) (remarks of Sen. Howard).” 934 F.2d at 213.¹³

This principle was recently reaffirmed in *United States ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 94 Civ. 3521 (LLS) (S.D.N.Y. April 22, 1998) (unpublished Memorandum Endorsement), in which the defendants had counterclaimed for indemnification and contribution from the relator. According to the court, “[t]he current rule is that counterclaims for independent damages are allowed when they are not dependent on defendant’s

liability. However, counterclaims for contribution or indemnification are not allowed." *Id.* at 1. In dismissing the counterclaims, the court noted the "chilling effect on genuine informer's actions" if such claims were allowed. *Id.*

E. Damages Can Exceed Amount Alleged In Complaint

Damage awards are not limited to the amounts alleged in the complaint. In *United States v. Larry Reed & Sons Partnership*, 280 F.3d 1212 (8th Cir. 2002), the defendants challenged the jury's damage award because it exceeded the amount in damages alleged in the complaint. The court held that the jury's award was based on sufficient evidence presented at trial, and that "[t]he Federal Rules of Civil Procedure allow issues tried by express or implied consent of the parties . . . to be treated as though they had been raised in the pleadings." *Id.* at 1214.

IV. PENALTIES

A. Penalties Without Damages

Under one view, damage to the government need not be proven or even alleged to allow a recovery under the False Claims Act. In enacting the 1986 FCA Amendments, the Senate stated: "[F]orfeiture is automatic and mandatory for each claim which is found to be false. The United States is entitled to recover such forfeiture solely upon proof that false claims were made, without proof of any damages." S. Rep. No. 99-345 at 8. Several courts have reaffirmed this principle, including in several recent decisions. *See, e.g., United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 n.7 (4th Cir. 1999); *UMC Electronics Co. v. United States*, 43 Fed. Cl. 776, 820 (1999); *United States ex rel. Atkinson v. Penn. Shipbuilding Co.*, No. CA 94-7316, 2000 WL 1207162 (E.D. Pa. Aug. 24, 2000); *United States ex rel. Morris v. Crist*, No. C-2-99-1395, 2000 WL 432781 (S.D. Ohio Mar. 29, 2000); *United States ex rel. Trim v. McKean*, 31 F. Supp.2d 1308, 1315-16 (W.D. Okla. 1998); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp.2d 1017, 1034 (S.D. Tex. 1998).

However, other courts have held to the contrary, ruling that damages are indeed a necessary element of proof under the Act. *See, e.g., Young-Montenay, Inc. v. United States*, 15 F.3d 1040 (Fed. Cir. 1994); *United States v. United Technologies Corp.*, 51 F. Supp.2d 167, 195 (D. Conn. 1999); *United States v. Tran*, 11 F. Supp.2d 938, 941 (S.D. Tex. 1998); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 938 F. Supp. 399, 402 (S.D. Tex. 1996); *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 827 (S.D.N.Y. 1986). In addition, language in the Act itself indicates that damages are an "essential element" of an action under the FCA: "[T]he United States shall be required to prove all essential elements of the cause of action, **including damages**, by a preponderance of the evidence." 31 U.S.C. § 3731(c) (emphasis added).

In a recent case, *United States ex rel. Schell v. Battle Creek Health System*, No. 1:00-CV-143, 2004 WL 784978 (W.D. Mich. Feb 25, 2004), the court did not directly address the issue of whether proof of damages is a required element, but its holding suggests that it is. The relator alleged that the defendants overcharged the Medicare program by charging for a full multi-dose

vial of anesthetic medication when it administered only a single dose. The defendant hospital, however, was reimbursed by the Medicare program through a flat-fee payment schedule based on a patient's diagnosis and, consequently, any overcharge for medication would not impact the amount reimbursed. Without addressing whether the alleged overcharges nonetheless rendered the claims false, the court granted summary judgment for the defendant because the relator could not establish that the government paid more than it should have.

The upshot is that at least in some jurisdictions FCA defendants may be held liable for substantial penalties even where no damage has been done. Indeed, in cases where actual damage is minimal or non-existent, the FCA penalties regime can lead to sanctions that would seem in some instances to be at odds with the purposes of a purportedly non-penal statute,¹⁴ and in other instances to be downright unjust. Courts have struggled to avoid inequitable results while maintaining fidelity to the statutory scheme, sometimes by artificially manipulating the number of "claims" at issue, and sometimes by forthrightly declaring the Act unconstitutional as applied. As explained in the succeeding sections, bad or at least questionable law is the occasional result.

B. Calculating FCA Penalties

While the FCA is somewhat ambiguous as to how penalties should be tallied, a strict interpretation would require that each time a person "causes" a single false claim to be presented for payment, "causes" a single false statement or record to be made in order to get a claim paid, or otherwise violates the Act, they must be automatically penalized at least \$5,500 for each such act.¹⁵ 31 U.S.C. § 3729(a); see also *United States ex rel. Atkinson v. Penn. Shipbuilding Co.*, No. CA 94-7316, 2000 WL 1207162 (E.D. Pa. Aug. 24, 2000) (finding that "under the FCA, a government contractor is liable for every claim submitted under a contract if the contract was fraudulently obtained, even if the work is performed to government specifications and at the agreed price").

However, in order to reach a just result, courts have not hesitated to depart from this strict approach when tallying the number of "claims," "statements" or "records" to which penalties must be applied.

One such instance is the Supreme Court's decision in *Bornstein*. In that case, a subcontractor made three separately invoiced shipments of substandard parts to the prime contractor. The prime as a result submitted 35 false claims to the government. Because the defendant "caused" the submission of 35 false claims to the government, it should arguably have been liable for a penalty on each such claim. Indeed, this was the approach adopted by the trial court. 423 U.S. at 308. The Supreme Court, however, ruled that "[a] correct application of the statutory language requires . . . that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Id.* at 313. Because the defendant had "committed three acts which caused [the prime] to submit false claims to the Government," only three penalties rather than 35 were required. *Id.* This holding was no doubt driven in part by the fact that the actual damage to the government was minimal and the Court wished to avoid the difficult questions presented by an overall sanction grossly disproportionate to the harm done.

The courts have also allowed the government to seek only partial recovery. In *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003), the district court found that the defendant was entitled to none of the \$331,078 he collected as a result of his submission of 8499 false claims. Nonetheless, the government sought, and the district court awarded, only a portion of those damages and penalties for only 111 of those claims.

The following recent decisions further illustrate the sometimes inconsistent manner in which courts will apply the penalty provision of the FCA:

- In *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997), a psychiatrist was found to have submitted forms to the government that contained billing codes which misrepresented the services provided to patients. The court rejected the trial court's determination that each code on each form represented a "claim" under the Act, which would have resulted in a \$5.7 million fine. *Id.* at 939-40. Instead, the court held the even if a single form contained multiple false codes, it could constitute at most one false claim.¹⁶ *Id.* at 940.
- In *United States ex rel. Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003), the defendants, who operated nursing homes and intermediate care facilities that receive Medicaid reimbursement, improperly sought reimbursement, as "resident food," for \$6,000 worth of apples that were given to employees as gifts, and therefore not reimbursable under Medicaid. Because the agency disallowed the charges, no actual damages resulted. The relator argued, however, that because the defendants charged the apples as "resident food," and because "resident food" is reimbursed through overhead rates, hundreds of claims were "false," and that each claim was subject to a \$5,000-\$10,000 penalty. The jury agreed, finding that defendants had submitted 336 false claims, and the trial court imposed a \$5,000 penalty for each of the 336 false claims resulting in a \$1,680,000 judgment. Without deciding whether the judgment violated the Excessive Fines Clause, the court reversed the trial court judgment and instead imposed a total FCA penalty of \$80,000 for eight false claims – one claim by each of the eight facilities that sought reimbursement for the apples. In a holding with significant importance to FCA cases involving overhead rates, the court rejected the notion that a "one-time expense . . . reimbursed over hundreds or many thousands of claims for reimbursement" renders each such claim false.
- In *United States ex rel. Koch v. Koch Industries, Inc.*, 57 F. Supp.2d 1122 (N.D. Okla. 1999), the defendants were accused of understating the amount of crude oil purchased from federal and Indian leases, thus reducing royalty payments to the government. The government and the relator argued that penalties should be based on each false entry made on various documents, while the defendants contended that a penalty should be due only for each report that allegedly misrepresented the amount of oil purchased. *Id.* at 1125. The court, relying in part on *Bornstein*, rejected both of these approaches,

holding that "a penalty should be imposed in connection with *each lease* from which [defendant] allegedly took more oil than it paid for . . ." *Id.* at 1127 (emphasis added).

- In *United States ex rel. Garibaldi v. Orleans Parish School Board*, 46 F. Supp.2d 546 (E.D. La. 1999), the court acknowledged that the system for assessing penalties under the FCA "may create somewhat arbitrary results" but the jury must be instructed "to apply the statute as written." *Id.* at 555. The court cited *Bornstein* for the following rule: "It is the number of applications for funds, and not the number of coded items on each application, or the number of invoices generated by the applications, or the number of contracts the applications represent, that determines the number of claims made." *Id.* at 554.
- *United States ex rel. Trim v. McKean*, 31 F. Supp.2d 1308 (W.D. Okla. 1998), concerned a company which provided coding and billing services for groups of emergency physicians. The court stated that "[t]he gravamen of a false claim focuses on the conduct of the defendant, and inquiries into the defendant's purpose and intention in filing the requests for payment or reimbursement." *Id.* at 1315. On this basis, the court identified several categories of claims for payment which were presumptively false and instructed the parties to calculate from among the thousands of claims submitted to the government the number which should be subject to penalties. *Id.* at 1315-16.

C. Limitations on Excessive FCA Sanctions

Because the per-claim penalty provisions of the FCA apply even where there was no or very little monetary damage to the government, it is inevitable that cases will arise in which the statute requires that substantial penalties be assessed against defendants whose violations were relatively minor.¹⁷ It is in such cases that the FCA has the potential to run afoul of various constitutional protections.

1. Double jeopardy

In *United States v. Halper*, 490 U.S. 435 (1989), the Supreme Court held that the amount of civil forfeitures assessed against a FCA defendant can, when combined with prior criminal sanctions assessed for the same conduct, be so excessive as to violate the Double Jeopardy clause. *Id.* at 449-50.¹⁸ The defendant in *Halper* was convicted of submitting 65 false Medicare claims resulting in an overpayment by the government of \$585. Defendant was sentenced to two years in prison and fined \$5,000. In a subsequent civil action brought under the FCA, the government sought penalties that would have resulted in a \$130,000 civil sanction. The Supreme Court held that "[w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to

determine if the penalty sought in fact constitutes a second punishment." *Id.* at 449.

The *Halper* rule was of limited value to FCA defendants because it applied only where a criminal conviction preceded a civil action under the FCA. In any event, the Supreme Court subsequently acknowledged that *Halper* was at odds with its double jeopardy jurisprudence and abrogated it.¹⁹ But as the Court closed this door, it simultaneously confirmed the availability of another much more helpful tool for fighting disproportionate FCA sanctions: The Eighth Amendment's Excessive Fines Clause.

2. Excessive fines

a. *Hudson v. United States*

In *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488 (1997), a non-FCA case, the Court reconsidered its holding in *Halper* and repudiated the rule that it had established. According to *Hudson*, the proper question is not whether a civil sanction is so grossly disproportionate to the harm caused so as to constitute "punishment," but rather whether Congress intended the sanctions to be criminal or civil and, if so, whether "the clearest proof" indicated the sanctions were so punitive in form (not in application) as to render them criminal despite that congressional intent. 118 S.Ct. at 493. The various factors applied in *Hudson* to answer these questions leave little doubt that the FCA does not on its face provide for "criminal" sanctions. *See id.* *Hudson* therefore eliminated the Double Jeopardy Clause as a viable weapon against unreasonable FCA sanctions.

The Court's opinion in *Hudson*, however, endorsed a much more powerful means by which FCA defendants may contest unfair penalties. "[I]t should be noted," the Court said, "that some of the ills at which *Halper* was directed are addressed by other constitutional provisions. The Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational. The Eight Amendment protects against excessive civil fines, including forfeitures." *Id.* at 495.

Among these alternatives, the Excessive Fines Clause appears to offer the best hope of preventing unreasonable civil sanctions under the FCA.²⁰ Even before the Supreme Court made its observations in *Hudson*, two district courts had already used the Excessive Fines Clause to limit FCA penalties.

b. Pre-*Hudson* district court decisions

In *United States ex rel. Smith v. Gilbert Realty Co., Inc.*, 840 F. Supp. 71 (E.D. Mich. 1993) the defendant was found liable for treble damages of \$4,890 resulting from 58 separate violations of the Act. Defendant sought to avoid the minimum \$290,000 fine mandated by the FCA by arguing that such a penalty was prohibited by the Excessive Fines Clause.²¹ The court agreed. Relying on several Supreme Court

precedents, the court found that the Excessive Fines clause was applicable because the \$290,000 fine "appeared to qualify as punishment, given its proportional relationship to the [damages], and the relator makes no claim that it constitutes compensation." *Id.* at 74. In determining whether and how much of the penalty was excessive, the court noted that the ratio of the penalty to single damages (1:178) "suggests that some portion of the penalty is excessive." *Id.* The court then examined "the nature of the conduct" at issue and concluded that because seven false certifications each "clearly warrant[ed] imposition of the \$5,000 civil penalty" but the other 51 violations consisted simply of cashing checks, "any civil penalty above \$35,000 is excessive and violates the Eighth Amendment of the United States Constitution." *Id.* at 75.

The defendant in *United States v. Advance Tool Co.*, 902 F. Supp. 1011 (W.D. Mo. 1995), sold misbranded and defective tools to the government and submitted 686 false invoices. The court ruled that, in light of defendant's conduct, the required \$3,430,000 penalty was "unconstitutionally excessive under the Eighth Amendment."²² *Id.* at 1018. The court continued: "This finding is based upon Plaintiff's inability to prove actual damages at trial, the government's poor investigative procedures, and its confusing regulatory and contractual purchasing arrangements which virtually encourage the type of conduct at issue here." *Id.* The court proceeded to base the amount of the penalty on the number of different types of tools supplied, rather than the number of invoices submitted.

c. *United States v. Bajakajian*

A recent decision by the Supreme Court interpreting the Excessive Fines Clause in a different context appears to confirm its applicability to unreasonable False Claims Act penalties. In *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (1998), the Court for the first time undertook a detailed analysis of the Excessive Fines Clause. Bajakajian plead guilty to failure to report the export of more than \$10,000 in currency, but challenged the required forfeiture of the entire \$357,144 involved. The Court determined that such a forfeiture was both a "fine" and was "excessive" within the meaning of the Eighth Amendment. The analytical framework applied by the Court is instructive.²³

First, the Court held that a penalty must be considered a "fine" if it constitutes a "punishment." *Id.* at 327. The Court further ruled that a penalty qualifies as a punishment if it serves any punitive purpose, including deterrence. *Id.* at 328. Because it would seem difficult to argue that the \$5,000 to \$10,000 per-claim penalties under the FCA are purely remedial, such sanctions should qualify as "fines" within the meaning of the Excessive Fines Clause. *Id.*

Second, in evaluating whether the forfeiture at issue in *Bajakajian* was "excessive," the Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportionate to the gravity of a

defendant's offense." *Id.* at 334. While this will necessarily lead to a fact-specific case-by-case analysis, given the history of FCA penalties litigation, it is not difficult to imagine the FCA case in which such a standard could be met. *See, e.g., United States v. Halper*, 490 U.S. 435 (1989).

Interestingly, one of the factors the Court looked to in *Bajakajian* was the disparity between the forfeiture at issue and the maximum criminal fine imposed by the trial court under the Federal Sentencing Guidelines.²⁴ *Id.* at 340. However, the Court also noted that in *Bajakajian's* case "[t]here was no fraud on the United States, and respondent caused no loss to the public fisc." *Id.* at 338-39.²⁵

d. Post-*Bajakajian* FCA cases

Several courts have already applied the excessive fines reasoning of *Bajakajian* in the False Claims Act context. In *United States v. Byrd*, 100 F. Supp.2d 342 (E.D.N.C. 2000) the defendant redeemed illegally accepted food stamp coupons on 264 occasions, for a total of \$85,012 in false claims. Following his conviction for food stamp fraud, the government filed an FCA action. The court adopted the *Bajakajian* standard to analyze the applicable FCA penalties, but found that a total fine of \$1.3 million was not grossly disproportionate to the gravity of the offense. *Id.* at 345.

In *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003), the court upheld a \$729,454.92 judgment against the defendant, which included treble damages of \$174,454.92 and civil penalties of \$550,000 (9.5 times the single damage amount). Following *Bajakajian*, the court held that the judgment was not excessive because had the government sought damages and penalties for all of the false claims proven, the defendant would have faced a maximum judgment of close to \$86 million, including \$993,234 in treble damages. The court also reasoned that although the Supreme Court recently noted that the treble damages and \$10,000 penalty for each false claim under the current version of the FCA are essentially punitive, the earlier version of the FCA's double damages and \$2,000 per false claim penalty were considered remedial. Consequently, "at least some portion" of the judgment over and above the actual damages was remedial. The court also rejected the relator's argument that the government suffered no harm since the patients received the physical therapy for which the government paid.

In *United States v. Cabrera-Diaz*, 106 F. Supp.2d 234 (D.P.R. 2000) the court refused to impose civil penalties that would have amounted to at least \$2.275 million for false Medicare billing. The court deemed this amount excessive and assessed no penalty at all, even though it awarded \$1.34 million in treble damages. However, the court inexplicably cited *Halper* rather than *Bajakajian* (or the Excessive Fines Clause) for the proposition that courts have discretion to limit "excessive" penalties. *Id.* at 241.

Lest there be any doubt, the Supreme Court bolstered the argument for applying the *Bajakajian* standard in FCA cases when it determined in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) that the FCA is a punitive statute. In *Stevens*, the Supreme Court held that States are not subject to FCA liability because States are not “persons” under the FCA. As one of three reasons supporting this holding, the Court concluded that the FCA’s imposition of treble damages and fines of \$10,000 “are essentially punitive in nature” and thus cannot be applied to States.²⁶ *Id.* at 784.

Although the Supreme Court has declined to establish a bright-line standard for when punitive damage awards cross over the line and are unconstitutional, it recently stated that “in practice, few awards exceeding a single digit ratio between punitive and compensatory damages . . . will satisfy due process.” *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003).

3. Discretion to reduce penalties

Notwithstanding the clear weight of authority to the contrary,²⁷ courts in at least the Fifth and Eleventh Circuits apparently do have discretion to reduce the amount of FCA penalties below the statutory minimum without any finding of unconstitutionality.

In *United States ex rel. Garibaldi v. Orleans Parish School Board*, 46 F. Supp.2d 546 (E.D. La. 1999), the court relied on the following unequivocal language in *Peterson v. Weinberger*, 508 F.2d 45, 55 (5th Cir. 1975): “[T]he court may exercise discretion where the imposition of forfeitures [under the FCA] might prove excessive and out of proportion to the damages sustained by the Government. The forfeiture should reflect a fair ratio to damages to insure that the Government completely recoups its losses.” *Id.* at 564. The *Garibaldi* court acknowledged that the 1986 Amendments “may have been an attempt to remove any discretion from the trial judge, with the exception of deciding where within the \$5,000 to \$10,000 range the penalty should fall” but nonetheless concluded that *Peterson* was good law and binding precedent.²⁸ *Id.* at 565. On this basis, the district court concluded that a fine of \$30,000,000 “against a public school district responsible for educating children, many of them poor . . . is excessive.” *Id.*

In practice, the difference between the *Peterson* “fair ratio” rule and *Bajakajian*’s “grossly disproportionate” standard may ultimately be one more of form than of substance. Nonetheless, for the moment at least, FCA defendants may credibly argue in some judicial districts that the trial court has inherent discretion to depart from the FCA’s penalty scheme.

V. CONCLUSION

The inflexible and severe remedial provisions of the False Claim Act have created tension in the case law as courts strive to reach just results despite a statute that sometimes dictates irrational outcomes. In some instances, such as those involving consequential damages, courts will evade limitations on FCA recoveries to give the government its due. In other cases, courts will abandon the literal statutory mandate in order to avoid draconian sanctions disproportionate to the harm inflicted. Courts and litigants will undoubtedly continue to confront these issues as *qui tam* relators and the government continue to tap the False Claims Act as a plentiful source of income.

ENDNOTES

- ¹ *Justice Dept. Civil Fraud Recoveries Total \$2.1 Billion for FY 2003[;] False Claims Act Recoveries Exceed \$12 Billion Since 1986*, Department of Justice Press Release (Nov. 10, 2003).
- ² *Id.*
- ³ A total of 326 *qui tam* cases were filed in 2003, a slight increase from 2002. Source: Department of Justice.
- ⁴ Section 3729(a) allows for a reduction of the damages multiplier from treble to double where the defendant promptly provides information concerning the violation to the government; no criminal, civil or administrative proceeding had commenced at the time the defendant presented such information to the government; and the defendant cooperates in any government investigation of the violation. *Id.* Those who violate the Act are also "liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages," *id.*, and, in a *qui tam* case, are liable for reasonable costs and attorney's fees incurred by the relator. 31 U.S.C. § 3730(d).
- ⁵ The text of the original statute provided that anyone violating the Act "shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit . . ." Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863).
- ⁶ See 31 U.S.C. § 3729 (1983):
- A person . . . is liable to the United States Government for a civil penalty of \$2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person -- [knowingly submits a false claim or otherwise violates the Act].
- ⁷ Department of Defense Reauthorization Act, P.L. 99-145, 99 Stat. 583 (1985).
- ⁸ Prior to the 1986 Amendments, the Supreme Court held that multiple damages under the FCA "are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims." *United States v. Bornstein*, 423 U.S. 303, 315 (1976).
- ⁹ See 28 U.S.C. § 2461 note (Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410; Debt Collection Improvement Act of 1996, Pub. L. No. 104-134). The Acts provide a formula, based on the Consumer Price Index, for calculating the required adjustments. The Acts also provide certain "rounding" rules. For penalties greater than \$1,000 but less than or equal to \$10,000, adjusted penalties are rounded to the nearest multiple of \$1,000. For penalties greater than \$10,000 but less than or equal to \$100,000, the adjusted penalties are rounded to the nearest multiple of \$5,000. For purposes of determining which rounding rule to apply, however, the Acts are silent as to whether you use the "original" penalty figure or the "current" (previously-adjusted) penalty

figure. The decision regarding which rounding rule to apply can have a significant impact on the resulting penalty. For example, if the FCA's current maximum penalty of \$11,000 (originally \$10,000) was adjusted in 2004, the maximum penalty would be \$12,397, which would either be either rounded down to **\$10,000** or \$12,000, depending on the rule applied.

- ¹⁰ *But see United States v. Ekelman & Associates, Inc.*, 532 F.2d 545, 551 (6th Cir. 1976) (government permitted to recover expenses incurred to maintain and repair foreclosed property it held because of false statements by mortgage applicants), in which the court made a dubious effort to distinguish *Aerodex*.
- ¹¹ The Sixth Circuit also stated that "FCA damages typically are liberally calculated to ensure that they afford the government complete indemnity for the injuries done it." *United States ex rel. Roby*, 302 F.3d at 646 (internal quotations omitted).
- ¹² See 48 C.F.R. § 46.800 et seq. (1999).
- ¹³ See also *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 831 (9th Cir. 1993); *United States ex rel. Mikes v. Strauss*, 931 F. Supp. 248, 261-62 (S.D.N.Y. 1996); *United States ex rel. Newsham v. Lockheed Missiles and Space Company, Inc.*, 779 F. Supp. 1252 (N.D. Cal. 1991); *United States v. Kennedy*, 431 F. Supp. 877, 878 (C.D. Cal. 1977); *United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 74 F. Supp. 763 (S.D.N.Y. 1947).
- ¹⁴ Prior to the Supreme Court's ruling in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000), which held that the FCA's damages and penalties "are essentially punitive in nature," the courts were inconsistent in their characterization of the Act in this regard. See, e.g., *BMV-Combat Systems v. United States*, 44 Fed. Cl. 141, 150 (1998) (penalty provisions compensate government for harms ancillary to the fraud itself); *United States ex rel. Long v. SCS Bus. & Tech. Inst.*, 999 F. Supp. 78, 86 (D.D.C. 1998) (treble damages provisions are remedial and not punitive); *United States ex rel. Chandler v. Hektoen Inst. for Med. Research*, 35 F. Supp.2d 1078, 1086 (N.D. Ill. 1999) (treble damages provisions more compensatory than punitive); *United States ex rel. Graber v. City of New York*, 8 F. Supp.2d 343, 348 (S.D.N.Y. 1998) (although FCA is a "remedial" statute it also is punitive in nature).

The holding in *Stevens* that the FCA is a punitive statute supports an argument that courts should be lenient in assessing FCA liability. Prior to *Stevens*, the court in *United States v. Southern Maryland Home Health Services, Inc.*, 95 F. Supp.2d 465 (D. Md. 2000), noted the pending *Stevens* decision and held that FCA damages of \$1 million were punitive when the actual loss was only \$59,320. Because the FCA damages were punitive, the court ruled that an employer is not liable for its employee's submission of false claims unless "some degree of culpability, other than simply employing the malefactor, is ascribable to the employer." *Id.* at 466.

- ¹⁵ The courts do, of course, have full discretion to set a penalty anywhere from \$5,500 to \$11,000 and will look to any number of factors in making this determination. See e.g., *United States v. Bottini*, 19 F. Supp.2d 632, 641 (W.D. La. 1997) (individual defendant who was "not wealthy" but whose "conduct was most opprobrious" assessed penalty of \$7,500 each on two false claims).

- ¹⁶ In a subsequent decision in the same case the Court of Appeals confronted the difficult exercise of determining exactly how many false invoices were submitted where the relevant records were both voluminous and ambiguous. *United States v. Krizek*, 192 F.3d 1024 (D.C. Cir. 1999).
- ¹⁷ Indeed, it is entirely possible that the FCA may call for "civil" penalties that are far greater than the fine which would be required under the fraud provisions of the Federal Sentencing Guidelines.
- ¹⁸ *But see United States v. Byrd*, 100 F. Supp.2d 342 (E.D.N.C. 2000) (holding that that criminal conviction for illegal acquisition of food stamps and False Claims Act penalties for improperly redeeming food stamps did not constitute double jeopardy because they are separate laws, violated by separate acts and with separate penalties).
- ¹⁹ However, in *United States v. Sazama*, 88 F. Supp.2d 1270 (D. Utah 2000), the government sought a single \$10,000 FCA penalty less the amount of restitution already paid by the defendant in a previous criminal proceeding. The *Sazama* court assumed the application of the *Halper* rule for the sake of argument and held that the government's request for a civil FCA penalty did not constitute a second punishment. *Id.* at 1274. *But see United States v. Lamanna*, 114 F. Supp.2d 193 (W.D.N.Y. 2000) (recognizing the abrogation of *Halper*).
- ²⁰ The Eighth Amendment states: "Excessive bail shall not be required, **nor excessive fines imposed**, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII (emphasis added).
- ²¹ The defendant also argued that the court had discretion to diverge from the minimum \$5,000 per-violation penalty and that the \$290,000 minimum fine was contrary to the Due Process Clause. The court soundly rejected both of these arguments.
- ²² As in *Gilbert Realty*, the court found that it had no inherent discretion to reduce the penalty below the statutory minimum.
- ²³ While the forfeiture in *Bajakajian* arose in the criminal context, the Court has previously held that the Excessive Fines Clause applies to civil sanctions as well. *See Austin v. United States*, 509 U.S. 602 (1993) (civil in rem forfeiture).
- ²⁴ *See also United States v. 3814 NW Thurman Street, Portland, Oregon*, 164 F.3d 1191 (9th Cir. 1999) (applying the standard in *Bajakajian* and finding that a \$200,000 forfeiture was grossly disproportionate to the maximum criminal fine of \$5000 and thus unconstitutional).
- ²⁵ It should also be noted that *Bajakajian* was a 5-to-4 decision. The dissenting Justices found the majority's decision "disturbing both for its specific holding and for the broader upheaval it foreshadows." *Id.* at 2041 (Kennedy, J. dissenting).
- ²⁶ *See also United States ex rel. Chandler v. The Hektoen Institute for Medical Research*, 118 F. Supp.2d 902 (N.D. Ill. 2000) (following *Stevens* and finding that FCA damages are punitive); *United States ex rel. Dunleavy v. County of Delaware*, 2000 WL 1522854 (E.D. Pa. Oct. 12, 2000) (same).

²⁷ See e.g., *United States v. Killough*, 848 F.2d 1523, 1533 (11th Cir. 1988); *United States v. Hughes*, 585 F.2d 284, 286 (7th Cir. 1978); *Brown v. United States*, 524 F.2d 693, 705-06 (Fed. Cir. 1975).

²⁸ If that is the case, then *Peterson* is binding precedent in the Eleventh Circuit as well. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (decisions of Fifth Circuit prior to October 1, 1981 are binding precedent in the Eleventh Circuit).