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 $1.2 billion from October 1, 1999 through September 30, 2000 in cases brought under the False Claims Act (FCA). This was the highest total ever for a one-year period, adding to the $2.8 billion recovered from 1986 to October 1999. 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.

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 .


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As originally enacted in 1863, the civil portion of the False Claims Act provided for double damages and a $2,000 per-claim penalty. These provisions remained
unchanged for more than 120 years, 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. Id. at 17. The Senate version, of course, prevailed. Pub. L. 99-562, 100 Stat. 3153.

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

   Pursuant to a statute requiring agency heads periodically to adjust civil monetary penalties for inflation, the Department of Justice recently 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).

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. The Bornstein paradigm

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 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

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 BMY-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 since unused break 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 101.

- **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.

- **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 1531.

- **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.

*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).

**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. 1973), 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. *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
deprecated 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. The 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. The 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.
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. The Boeing Company, 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" 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 (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

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 realtor 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., 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 rouge to catch a rouge.’ Cong.
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.

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., 2000 WL 1207162 (E.D. Pa. August 2000); United States ex rel. Morris v. Crist, 2000 WL 432781 (S.D. Ohio March 29, 2000); United States ex rel. Trim v. McKeen, 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., 936 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).

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, 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.\textsuperscript{31} 31 U.S.C. § 3729(a); see also United States ex rel. Atkinson v. Penn. Shipbuilding Co., 2000 WL 1207162 (E.D. Pa. August 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." \textit{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. \textit{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 following recent decisions further illustrate the sometimes inconsistent manner in which courts will apply the penalty provision of the FCA:

- In \textit{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. \textit{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.\textsuperscript{32} \textit{Id.} at 940.

- In \textit{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. \textit{Id.} at 1125. The court, relying in part on \textit{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 . . . ". \textit{Id.} at 1127 (emphasis added).

- In \textit{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." \textit{Id.} at 555. The court cited \textit{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. 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. 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. 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. 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. 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 Company, 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." 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 proceed 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.

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 333. 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.

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. 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.

d. Post-Bajakajian FCA cases

At least one court has 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. 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. Stevens, 529 U.S. 1858 (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.\textsuperscript{xxv} \emph{Id.} at 1869.

3. Discretion to reduce penalties

Notwithstanding the clear weight of authority to the contrary,\textsuperscript{xxvi} 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 \emph{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 \emph{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.” \emph{Id.} at 564. The \emph{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 \emph{Peterson} was good law and binding precedent.\textsuperscript{xxvii} \emph{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.” \emph{Id.}

In practice, the difference between the \emph{Peterson} “fair ratio” rule and \emph{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 \emph{qui tam} realtors and the government continue to tap the False Claims Act as a plentiful source of income.

\textsuperscript{i} Justice Recovers Record $1.5 Billion In Fraud Payments Highest Ever For One Year Period, Department of Justice Press Release (Nov. 2, 2000).

\textsuperscript{ii} Justice Department Recovers Over $3 Billion In Whistleblowers False Claims Act Awards And Settlements, Department of Justice Press Release (Feb. 24, 2000).

\textsuperscript{iii} 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. \emph{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,” \emph{id.}, and, in a \emph{qui tam} case, are liable for reasonable costs and attorney’s fees incurred by the relator. 31 U.S.C. \S 3730(d).
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).


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].


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).


Another commonly-cited, but not very useful, formula for FCA damages is found in United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), which basically held that the measure of damages is the amount the government would not have paid had it known the true facts.

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.


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.

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).

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).

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.
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).

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).

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).

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.

As in Gilbert Realty, the court found that it had no inherent discretion to reduce the penalty below the statutory minimum.

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).

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).

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).


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 F2d 693, 705-06 (Fed. Cir. 1975).

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).