Litigating *Qui Tam* Actions: Doctors, Double Jeopardy, Excessive Fines and The False Claims Act

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> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*
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> *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

I. United States v. Halper [1]

Irwin Halper, manager of New York City Medical Laboratories, defrauded the United States out of $585. He "upcoded" on 65 office visits, seeking $12 per claim rather than the $3 allowed. He was convicted on 65 criminal counts and sentenced to two years in prison and the payment of a $5,000 fine. Not satisfied, the government sued Halper under the False Claims Act[2], seeking twice the government's damages, $1,170, plus a civil penalty of $2,000 for each of the 65 "upcodings," or $130,000 in penalties. Thus for cheating the government out of $585, the government sought to recover $131,755 in damages, fines and penalties[3]. The government sought summary judgment based on Halper's criminal conviction.

The trial court[4] granted summary judgment, but held that imposing the full statutory amount would violate the Double Jeopardy Clause of the Fifth Amendment by punishing Halper a second time for the same conduct. Accordingly, it limited the government to double damages and costs.[5]

Still not satisfied with imprisonment, fine, double damages and costs, the government appealed to the Supreme Court. No doubt appalled by the government's overreaching, a unanimous Supreme Court, citing authority back to 1641, rejected the government's position. The Court held that the civil penalty authorized by the Act was "so extreme and so divorced from the Government's damages and expenses as to constitute punishment."

> The rule is one of reason: Where 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.

It would appear that the government's overreaching so shocked the Court that it felt compelled to invoke Constitutional protections without a full understanding of the ramifications of its holding.

II. Hudson, et al. v. United States[6]

Eight years later, the Supreme Court took another look at its ruling in *Halper*, rejecting it and its rationale[7]. In *Hudson*, the Court held in essence that the double jeopardy prohibition was limited to criminal prosecutions. Previous or future penalties, no matter how punitive in nature, did not run afoul of double jeopardy, so long as they were characterized as civil.

In *Hudson* the facts were the reverse of those in Halper. John Hudson, the Chairman of two national banks, was administratively charged by the Office of the Comptroller of the Currency ("OCC") with violating various banking statutes and regulations in connection with loans to third parties. He entered into a consent order that provided for a $16,500 assessment and agreed not to participate in the affairs of any banking institution without OCC's approval.

Three years later, he was indicted on the same transactions. The Tenth Circuit, applying Halper, held that the administrative fines were not so grossly disproportional to the proven damages as to render the sanctions "punishment" for double jeopardy purposes.

The Supreme Court granted certiorari to disavow *Halper* - holding that "*Halper's* deviation from longstanding double jeopardy principles was ill considered" and its test "has proved unworkable."

But, the Court found that "some of the ills at which *Halper* was directed are addressed by other constitutional provisions" to wit:

- the Due Process and Equal Protection Clauses - which "protect individuals from sanctions which are downright irrational,[8]" and
- the Eighth Amendment - which "protects against excessive civil fines, including forfeitures."

Thus, what was probably the real rationale for *Halper*, albeit never mentioned by the Court, appears to remain intact, *i.e.,* there are Constitutional limits to civil penalties under the False Claims Act, but the proper analysis is excessive fines not double jeopardy.

III. United States v. Bajakajian[9]

Hosep Bajakajian attempted to leave the United States for Cyprus with $357,144 in cash - without reporting it as required by 31 U.S.C. § 5316(a)(1)(A). The cash was not connected with any other crime and was to be used to pay a lawful debt.[10]

Bajakajian pleaded guilty and was sentenced to three years' probation and the maximum fine under the Sentencing Guidelines of $5,000.

However, the government also sought forfeiture of the full $357,144 - an additional "penalty" - 71 times the maximum fine in a situation where the government had suffered no monetary damage. The statute at issue, 18 U.S.C. § 982(a)(1), provides that

> The court, in imposing sentence on a person convicted of an offense in violation of . . . 5316, . . . shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

The District Court determined that Bajakajian need forfeit only $15,000 of the $357,144 at issue - because forfeiture of more than that amount would be disproportionate to Bajakajian's culpability and therefore unconstitutional under the Excessive Fines Clause of the Eighth Amendment.[11] The government appealed, the Ninth Circuit affirmed,[12] and the government sought certiorari.

The Supreme Court, in its first ever application of the Excessive Fines Clause, first decided that because the government had proceeded criminally against Bajakajian, rather than against the cash in rem, the forfeiture was punitive and thus a fine.

The Court then stated that

> The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.
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> * * *
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> Until today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.

Finally, the Court turned to the question of "how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally excessive." Recognizing that the Court should grant substantial deference to the legislature and that judicial determinations regarding the gravity of an offense will be inherently imprecise, the Court determined that the disproportionality must be "gross."

Finding that

- it was permissible to transport the cash out of the country
- the money was the proceeds of legal activity and was to be used to pay a lawful debt, and
- defendant was not in the class of persons for whom the statute was principally designed, i.e., money launderers, drug traffickers and tax evaders

the Court determined that Bajakajian had a "minimal level of culpability," and that the harm he caused was also minimal (specifically noting that "There was no fraud on the United States, and respondent caused no loss to the public fisc.").

Accordingly, the Court held that

> Comparing the gravity of respondent's crime with the $357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the gravity of his offense. It is larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government. (Footnote omitted.)

While the decision was 5-4 (with the Chief Justice and Justices Kennedy, O'Connor and Scalia dissenting) and while the Court noted that there was no harm to the public fisc, it appears that under *Bajakajian* the result in *Halper* would be the same despite *Hudson*. Only the reasoning would be different - application of the Excessive Fines Clause rather than the Double Jeopardy Clause. Thus penalties under the False Claims Act cannot be grossly disproportionate to the defendant's culpability and the harm caused the government. The government's overreaching can, at some point, run afoul of the Constitution. Bad facts can make good law.

IV. United States v. Krizek[13]

In January 1993, the government sued Dr. George O. Krizek and his wife, Blanka H. Krizek under the False Claims Act. Dr. Krizek was a psychiatrist treating patients at the Washington Hospital Center; his wife handled his billing of Medicare and Medicaid patients.

The government alleged that Dr. Krizek (1) provided medical services that were unnecessary,[14] and (2) that he "up-coded" approximately 24 percent of the bills he submitted.[15]

The Complaint sought triple the alleged actual damages of $245,392 and civil penalties for each of the 8,002 allegedly false claims - for a total of $80,756,176!

After a three-week bench trial, the court found that

> The record discloses that Dr. Krizek is a capable and competent physician. Dr. Krizek was originally trained in Prague, in what was then Czechoslovakia, at the Charles University School of Medicine. Dr. Krizek also received a medical degree from Rudolf's University, in Vienna, Austria. Dr. Krizek came to the United States in 1968, where he did a residency at Beth Israel Hospital in New York City. He arrived in the Washington, D.C. area in the early 1970's where he has been engaged in the practice of psychiatry for approximately 21 years. The trial testimony of Dr. Krizek, his colleagues at the Washington Hospital Center, as well as the testimony of a former patient, established that Dr. Krizek was providing valuable medical and psychiatric care during the period covered by the complaint. The testimony was undisputed that Dr. Krizek worked long hours on behalf of his patients, most of whom were elderly and poor.
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> Many of Dr. Krizek's patients were afflicted with horribly severe psychiatric disorders and often suffered simultaneously from other serious medical conditions.

On July 19, 1994, eighteen months after the charges were brought, the court found that the government had failed to prove that Dr. Krizek had provided medically unnecessary services. The upcoding issue revolved around whether CPT 90844 required 45-50 minutes of face time with the patient or whether time spent reviewing the patient's file, discussing the case with a colleague, writing a prescription, etc. counted. On that issue, the court found the government's interpretation "strained" and its theory of liability "unfair and unjustified."

> The system cannot be so arbitrary, so perverse, as to subject a doctor whose annual income during the relevant period averaged between $100,000 and $120,000, to potential liability in excess of 80 million dollars because telephone calls were made in one room rather than another. (Footnote omitted.)
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> Dr. Krizek is not public enemy number one. He is at worst, a psychiatrist with a small practice who keeps poor records.

The court did find, however, that Dr. Krizek's "billing practices, or at a minimum his oversight of his wife's . . . billing system, was seriously deficient," and, as Dr. Krizek admitted, some bills were improperly submitted on the presumption by his wife that he always worked at least 45 minutes on a matter. Accordingly, the court determined that Dr. Krizek would be presumed liable for bills submitted in excess of 12 visits in any one day and that his lack of supervision of the billing process was sufficient to meet the "knowing" standard of the False Claims Act.

Subsequently, a Special Master determined that there were 264 days when Dr. Krizek had submitted bills showing time in excess of nine hours, i.e., 12 45-minute visits. On those days, the doctor submitted 1,149 claims for which he was paid $47,105.39. The

court, however, decided to use a 24-hour bench mark to determine which claims violated the FCA. Eleven claims met this requirement, and the court imposed the maximum penalty of $10,000 on each of those claims for a total judgment of $157,105.39 plus $11,000 in fees to the Special Master to be paid over a six-month period.

One might well conclude that this was a classic case of the court bending (perhaps mangling) the law to achieve justice. While the decision predated *Hudson*, no *Halper* argument was realistic in the absence of a criminal conviction. The court made no mention of the Excessive Fines Clause.

The government, of course, was dissatisfied and appealed. It was thus up to the D.C. Circuit to find a way to do justice without bending the law too far out of shape.

First, the appeals court held that it was improper for the trial court to have changed its 9-hour presumption to a 24-hour presumption without having given the government an opportunity to present additional evidence. The appellate court rejected the government's contention that the trial court could not change its presumption after trial, holding only that it could not do so without giving the government the chance to adduce additional evidence.

The key aspect of the decision, however, was the meaning of the word "claim," since each false claim under the Act incurs a penalty of $5,000 to $10,000. Bills are submitted on Form HCFA 1500, each of which can include a number of patient visits, each with a CPT code. The government contended that each entry on the form was a claim - the methodology that led to its claim for $80 million in penalties. Holding that the number of claims depends "on how many times the defendants made a 'request or demand,'" the court decided that Krizek made a demand only when he submitted each HCFA 1500. The government argued that fairness required that each visit be considered a separate claim since otherwise the number of claims would be under the control of the defendant. The court responded

> . . . even if we considered fairness to be a relevant consideration in statutory construction, we would note that the government's definition of claim permitted it to seek an astronomical $81 million worth of damages for alleged actual damages of $245,392

and remanded for recalculation of the penalties. Under these circumstances, the court determined it was unnecessary to consider Dr. Krizek's Excessive Fines argument.

The court also addressed the issue of whether "gross negligence-plus" met the "knowing" requirement of the Act as the District Court had found. The court held that that was the appropriate standard, characterizing the standard as lying "on a continuum between gross negligence and intentional harm" and was "an extreme version of ordinary negligence."

Undeterred by the D.C. Circuit's characterization of its claim as "extraordinary" and "astronomical," the government returned to the District Court with seeming vigor and enthusiasm for its case. "At the first status conference the Court held on remand, the Government made demands for discovery that were staggering and uncalled for." In a series of maneuvers too complicated to explain here, the District Court concluded that now only three of the government's 8,002 allegedly false claims were proved - for a total of $30,000 - thus reducing Dr. Krizek's liability from $157,105.39 to $77,105.39.

It was now July 15, 1998 - five and one-half years after the government sought more than $80 million dollars. The trial court's last words express its feeling.

> The Government insists on pursuing a case that should long have been over. If the Court acceded to all of the Government's requests, this litigation would proceed well into the next century. The Government has won its case and gained a substantial recovery. Dr. Krizek is now retired and is no longer practicing psychiatry. Although apparently a fine physician, he is now a broken man. Not only is he out of the medical profession, but also he is suffering from the advanced stages of cancer. The Government refuses to let go of this case. When it began its case, the Government was seeking over $80 million worth of damages, a figure that the Court of Appeals declared was "astronomical." *Krizek III*, 111 F.3d at 940. Despite the fact that Dr. Krizek is incapable of paying such a sum, the Government continues to relentlessly pursue Dr. Krizek, who is at this point a broken and sick man. The Government's pursuit of Dr. Krizek is reminiscent of Inspector Javert's quest to capture Jean Valjean in Victor Hugo's Les Miserables. While the Government's vigor in pursuing violators of the law is to be commended, there comes a point when a civilized society must say enough is enough. That point has been reached in this case. (Footnote omitted.)

NOTES

1. 490 U.S. 435 (1989). Opinions below at 664 F. Supp. 852 (S.D.N.Y. 1987); 660 F. Supp. 531 (S.D.N.Y. 1987).
2. 31 U.S.C. § § 3729, et seq.
3. Had Halper been found liable after the 1986 amendments to the Act, the civil penalty would have been at least $325,000.
4. Halper appeared pro se in the district court.
5. The District Court first found that the $2,000 per claim penalty under the Act was not mandatory - noting that if it was it's application in this case would violate the Double Jeopardy Clause. It determined that a civil penalty of $2,000 on 8 of the 65 claims would reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action." The government sought reconsideration and the court reversed its holding that penalties were not mandatory, but found that the relief sought by the government would violate the Double Jeopardy Clause.
6. 522 U.S. 93 (1997). Opinions below, 92 F.3d 1026 (10th Cir. 1996); 14 F.3d 536 (10th Cir. 1994).
7. "Our reasons for so holding in large part disavow the method of analysis used in Halper." Or, as Justice Scalia concurring put it, they "put the Halper genie back in the bottle."
8. Note the limitation of the protections to individuals.
9. 118 S.Ct. 2028 (1998). Opinion below, 84 F.3d 334 (9th Cir. 1996).
10. The cash was, however, concealed in the defendant's luggage and the defendant falsely told Customs that he and his wife only had $15,000 in cash.

11. The District Court also found that the failure to report arose from "cultural differences" that resulted in a "distrust for the Government."
12. The Ninth Circuit applied a two-part test:. . . a forfeiture is constitutional if: (1) the property forfeited is an "instrumentality" of the crime committed; and (2) the value of the property is proportional to the culpability of the owner.
The Circuit Court held that since it was perfectly legal to take the cash out of the United States, the cash was not the "instrumentality" of the crime. Accordingly, no forfeiture was permitted. However, the court affirmed the $15,000 forfeiture because no cross-appeal had been taken.
13. Opinions: 1998 U.S. Dist. LEXIS 10742 (D.D.C. 1998); 111 F.3d 934 (D.C. Cir. 1997); 909 F. Supp 32 (D.D.C. 1995); 859 F. Supp. 5 (D.D.C. 1994).
14. The government contended that "some patients should have been discharged from the hospital sooner, and that others suffered from conditions which could not be ameliorated through psychotherapy sessions, or that the . . . sessions should have been abbreviated."
15. "Dr. Krizek used the CPT Code for a 45-50 minute psychotherapy session . . . when he should have billed for a 20-30 minute session . . ."