Selected Developments in Damages and Penalties Under the False Claims Act

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Since 2008, several trends have emerged in cases dealing with the calculation of damages and penalties under the False Claims Act ("FCA"). In two recent cases involving FCA liability for false claims submitted to the federal Department of Housing and Urban Development ("HUD"), New York district courts have rejected a "benefit-of-the-bargain" approach, holding instead that where funds were used in violation of program terms, the government sustained actual damages in the full amount paid on the grants. *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County, New York*, No. 06-civ-2860, 2009 U.S. Dist. LEXIS 35041 (S.D.N.Y. April 24, 2009) ("*ADC*"); *United States v. Incorporated Village of Island Park*, No. 90-cv-992, 2008 U.S. Dist. LEXIS 88677 (E.D.N.Y. Nov. 3, 2008) ("*Island Park*"). One such decision was based in part on the court's reasoning that the benefit-of-the-bargain theory is appropriately applied only in cases involving the production of a tangible structure or asset. *ADC*, 2009 U.S. Dist. LEXIS 35041 at *8.

Several recent cases have considered constitutional challenges to multiple damages under the FCA and have commonly held that FCA damages primarily serve a remedial, rather than a punitive, purpose. These cases have held that an Eighth Amendment "excessive fines" inquiry is inapposite to the FCA, or alternatively, that the inquiry should be conducted with a view to whether the total penalty imposed is "grossly disproportionate" to the offense – a standard which grants wide deference to damages calculations. *United States v. Bourseau*, 531 F.3d 1159 (9th Cir. 2008), No. 03-cv-907, 2006 U.S. Dist. LEXIS 88016 (S.D. Cal. Dec. 1, 2006); *United States ex rel. Shutt v. Community Home and Health Care Services, Inc.*, 305 Fed. Appx. 358 (9th Cir. 2008); *Island Park*, 2008 U.S. Dist. LEXIS 88677.

Interestingly, several of these recent decisions have focused on the role of FCA damages in compensating the government beyond the actual monetary harm sustained from the particular fraud. Courts have increasingly accepted that FCA multiple damages and penalties are warranted to "make the government whole" by redressing the "ancillary" costs of fraud, such as the costs of detecting, deterring and litigating fraud, along with other non-pecuniary harms such as the erosion of public confidence in government health programs. *Bourseau*, 531 F.3d 1159; *Shutt*, 305 Fed. Appx. 358; *Island Park*, 2008 U.S. Dist. LEXIS 88677. Consistent with this focus on noneconomic harms, a recent FCA case from the Southern District of Ohio concluded with the imposition of maximum civil penalties, totaling over $7 million, where the government was found to have sustained no actual economic damages. *United States v. United Technologies Corp.*, No. 3:99-cv-093, 2008 U.S. Dist. LEXIS 61199 (S.D. Ohio Aug. 1, 2008).

***United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County, New York*, No. 06-civ-2860, 2009 U.S. Dist. LEXIS 35041 (S.D.N.Y. April 24, 2009)**

The plaintiff, Anti-Discrimination Center of Metro New York ("ADC"), alleged that the defendant, Westchester County, had violated the FCA by falsely certifying compliance with conditions of payment of federal HUD funds. In order to obtain the grants, the County had been required to certify that it would implement a program to promote fair housing choice and desegregation, by identifying and studying specific factors such as racial discrimination which had led to housing segregation within the County, and by taking responsive action. The district court found that the County had made false certifications to the HUD, because, among other things, it had failed to take race into account when conducting its analyses of impediments to fair housing choice. The court granted partial summary judgment to ADC, finding that the County had fraudulently obtained over $52 million from the HUD over a six-year period. *United States ex rel. Anti-Discrimination Ctr. of Metro New York, Inc. v. Westchester County, New York*, No. 06-civ-2860, 2009 U.S. Dist. LEXIS 14399 (S.D.N.Y. Feb. 24, 2009).

Following the grant of partial summary judgment, the plaintiff moved *in limine* to exclude the issue of damages from submission to the jury. The parties agreed that, employing the standard definition of damages under the FCA, the proper measure in this case was "the amount [HUD] paid to the County because of the inaccurate certification, over and above what it would have paid if it had known of the inaccuracy." 2009 U.S. Dist. LEXIS 14399 at *3-4. However, the parties disagreed as to precisely how this amount should be calculated. The County urged the court to apply the "benefit-of-the- bargain" theory, whereby the government's damages would equal the total amount paid out on the County's false claims, minus the benefit the government received from the County's use of the grant funds. ADC contended that the government's damages simply equaled the entire amount of funds paid to the County as a result of the false claims. ADC further argued that there was no question for the jury to decide, as the amount paid to the County as a result of its false claims had been established as undisputed fact and was indicated in a document showing the amounts of the vouchers submitted to the HUD for the period in question.

The court considered other jurisdictions' treatment of the benefit-of-the-bargain theory in calculating FCA damages. Citing the D.C. Circuit's opinion in *United States v. TDC Mgmt. Corp., Inc.*, 288 F.3d 421 (D.C. Cir. 2002), the *ADC* court held that "the benefit-of-the-bargain measure of damages is most appropriately used in circumstances where the arrangement at issue is one that calls for the defendant 'to produce a tangible structure or asset of ascertainable value' for the federal government." *ADC*, 2009 U.S. Dist. LEXIS 14399 at *8 (quoting *TDC*, 288 F.3d 421, 428). In *TDC*, the D.C. Circuit affirmed the grant of summary judgment for the government, finding that the defendant TDC, which had contracted with the government to assist in carrying out a Department of Transportation (DOT) program, had misrepresented its progress and concealed deviations from core program terms in its monthly reports. The court declined to apply the benefit of the bargain theory to calculate the government's damages, holding, "Once TDC deviated from its contracted role as impartial ombudsman by seeking a financial stake in joint ventures with private investors and by charging fees for the provision of material assistance to minority entrepreneurs, the district court then could properly find that the Program no longer had any value to the government." *TDC*, 288 F.3d 421, 428. Therefore, the district court's application of a “but for” standard was appropriate, where the damages equaled the amount that the government would not have paid to TDC, but for TDC’s fraudulent statements.

In rejecting the application of the benefit-of-the-bargain theory to contexts not involving tangible goods, the *ADC* court also relied upon *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008). In *Rogan,* the defendant was found liable under the FCA for having submitted claims for payment to the Medicare and Medicaid programs, where the underlying services had been provided in violation of the Anti-Kickback Statute (AKS) and Stark laws. The Seventh Circuit held that the government had sustained damages in the full amount of claims paid for services rendered in violation of the applicable statutes, in spite of the defendant’s argument that the patients had actually received the medical care that was billed. The *Rogan* court held that “[t]he government offers a subsidy (from the patients’ perspective, a form of insurance), with conditions. When the conditions are not satisfied, nothing is due.” *ADC*, 2009 U.S. Dist. LEXIS 14399 at *5 (quoting *Rogan*, 517 F.3d 449, 453).[i]

The *ADC* court observed that, in contrast to the approaches taken in *TDC* and *Rogan*, the Fourth Circuit had applied a “benefit-of-the-bargain” type analysis in a case in which the government contract at issue involved, in part, the production of a “tangible structure.” In *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003), the defendant had contracted with the government to manage operations at a Department of Energy (DOE) site, including overseeing development of a radioactive waste storage facility; the defendant subcontracted with another company to provide employee training with respect to operation of the new facility. The Fourth Circuit affirmed the lower court’s holding that the defendant contractor was liable under the FCA for falsely certifying that it had no organizational conflicts of interest with the subcontractor chosen to implement the training. However, the circuit court held that the government was not entitled to recover the entire amount of the subcontract, because there was no evidence that the subcontractor had “failed to perform the work that it was required to perform under the subcontract or that the government did not receive the benefit of the work performed.” *Harrison*, 352 F.3d 908, 923.

In light of the above precedent, the *ADC* court concluded that the benefit-of-the-bargain theory was not the proper measure of damages, as “Westchester has identified no tangible asset or structure it provided to the United States such that this theory would be applicable; it did not have a contract with the government to build any sort of facility for the government’s use or to provide it with goods.” *ADC*, 2009 U.S. Dist. LEXIS 14399 at *9. The court therefore granted the plaintiff’s motion such that the defendant was precluded from presenting to the jury the argument that the government’s damages should be reduced by the “benefit” provided by the County to the HUD in administering grants received.

***United States v. Incorporated Village of Island Park*, No. 90-cv-992, 2008 U.S. Dist. LEXIS 88677 (E.D.N.Y. Nov. 3, 2008)**

The protracted *Island Park* litigation stemmed from a HUD grant to the Village of Island Park (“the Village”) for use in community development and housing assistance programs between 1979 and 1983. *See United States v. Incorporated Village of Island Park*, 888 F. Supp.

419 (E.D.N.Y. 1995). The government brought suit in 1990, alleging violations of the FCA and the Fair Housing Act, along with various common law claims, based on the Village's alleged misuse of the HUD funds. In a 1995 proceeding, the government was granted summary judgment against the Village, certain of its officials and resident homeowners ("the Village Defendants"), on the issues of FCA and Fair Housing Act liability. *See Id*. The district court found that the defendants had violated program terms in administering the grant for a National Housing Act Section 235 housing program, a HUD program which assists low-income home buyers by subsidizing mortgage payments and insuring mortgages against default. 888 F. Supp. 419, 432. Specifically, the defendants had manipulated the application process for Section 235 housing by preselecting recipients from among Village residents, in order to prevent an influx of non-residents and, in particular, racial minorities. In addition to violating the Section 235 program conditions, the Village's actions rendered fraudulent its numerous affirmative statements to the government that it would not discriminate against program applicants on the basis of race, and that it would make a good faith effort to award Section 235 housing to qualified minorities. The district court thus determined that "the Village's fraudulent conduct caused false claims to be presented to the government by the innocent mortgagee on behalf of purchasers who were illegally selected in violation of the [program requirements]." *Id.* at 440. The court further held that the defendants were liable under the FCA for "*each* monthly mortgage subsidy claim submitted" by the mortgagee. *Id.* at 441 (emphasis in original).

On the issue of FCA damages, the court found that the government was entitled to receive the total amount of HUD funds and Section 235 mortgage subsidies paid out on the Village's grant since March 22, 1984 (as claims relating to payments made prior to that date had been dismissed as time-barred). The court reasoned that the government had experienced, in essence, a one-hundred percent loss on funds paid into the Village's HUD programs:

> As a result of the Village Defendants' fraudulent conduct, these funds were paid by the government to attain goals in contravention of HUD's affirmative obligation to administer its programs to further the purposes of the Fair Housing Act… The limited funds that were diverted by the defendants' fraudulent course of conduct would otherwise have been available to HUD to further its goals. Accordingly, the amount of those funds is an appropriate measure of the damages sustained by the government.
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> 888 F. Supp. 419, 443.

The court further held that the defendants were liable for civil penalties for each monthly mortgage subsidy claim submitted by the mortgagee and paid by the government on behalf of participants in the Village's Section 235 program since March 22, 1984, and for "each false statement or record used to get a false or fraudulent claim paid" since that date. *Id*. The matter was referred to a magistrate judge to make factual determinations as to the exact number of monthly mortgage subsidy claims and false statements or records submitted; the magistrate judge was also to determine the precise amount of damages sustained by the government, employing the formula dictated by the court.

In 2008, the district court considered the Village's motion for reconsideration of the grant of summary judgment to the government, as well as its objections to the Report and Recommendation issued by the magistrate judge further to the court's 1995 memorandum and order. *United States v. Incorporated Village of Island Park*, No. 90-cv-992, 2008 U.S. Dist. LEXIS 88677 (E.D.N.Y. Nov. 3, 2008). After denying the motion to reconsider, the court addressed the Village's contention that it should be liable for only 44 false claims – one for each of the 44 illegally selected homeowners – rather than for the 2,121 false claims identified by the magistrate judge, which represented the number of individual checks paid by the homeowners to the mortgagee during the relevant time frame. Examining the magistrate judge's report and recommendations, the district court concluded that "when each Section 235 homeowner makes a partial mortgage payment to the mortgagee each month, he is making a claim on his own behalf upon HUD's fiscal intermediary, the mortgagee, that HUD pay the remainder of his monthly mortgage payment. A claim upon the government's fiscal intermediary is actionable in its own right under the False Claims Act." 2008 U.S. Dist. LEXIS 88677 at *16-17. The court therefore affirmed the magistrate's holding that the 2,121 partial mortgage payment checks each represented a false claim filed, and upheld the imposition of a $2,000 penalty for each claim, totaling $4,242,000.

The Village further argued that this calculation of damages violated the Excessive Fines Clause of the Eighth Amendment. In response, the court cited the Second Circuit's holding in *United States ex rel. Stevens v. State of Vermont*, 162 F.3d 195, 207 (2d Cir. 1998), that the FCA's multiple damages are not punitive but remedial in nature, and are necessary "to compensate the government for the costs, delays and inconvenience occasioned by the fraudulent claims." 2008 U.S. Dist. LEXIS 88677 at *18. The court further noted that the magistrate judge had determined as a matter of fact that the total FCA recovery awarded was remedial in purpose.

The Village also objected to the magistrate judge's method of doubling the government's damages. The single damages were determined by calculating the amount of mortgage assistance paid to the Section 235 homeowners in the Village for the period in question, March 22, 1984 through November 1985, without interest, which equaled $649,191. After doubling the damages, the magistrate judge deducted recaptured payments in the amount of $324,194, for a double damages total of $974,188. The Village contended that the recaptured payments should be deducted from the actual damages prior to doubling; as Section 235 program regulations required participating homeowners to eventually repay all or most of the mortgage assistance they received, the Village claimed that the government's damages were equal only to the time value of the HUD funds initially paid out on the mortgages, until they were repaid by the homeowners. The Village also argued that because the funds were recaptured as the result of a contractual obligation, they should not be treated as mere offsets to the damages and should therefore be deducted prior to doubling the damages. The court rejected the Village's argument, citing the Supreme Court's holding in *United States. v. Bornstein*, 423 U.S. 303, 314-15 (1976) that "For several different reasons, this make-whole purpose of the [False Claims Act] is best served by doubling the government's damages before any compensatory payments are deducted." 2008 U.S. Dist. LEXIS 88677 at *19-21.

***United States v. Bourseau*, No. 03-cv-907, 2006 U.S. Dist. LEXIS 88016 (S.D. Cal. Dec. 1, 2006), *aff'd*, 531 F.3d 1159 (9th Cir. 2008)**

The *Bourseau* litigation occasioned a more in-depth examination of constitutional issues impacting FCA damages and penalties. The Southern District of California held the *Bourseau* defendants, two individuals who operated a psychiatric hospital and their respective single-employee corporations, jointly and severally liable for Medicare fraud in violation of the FCA. Liability arose from the defendants' submission of annual cost reports for the years 1997, 1998 and 1999, in which the defendants knowingly included expenses that were not eligible for Medicare reimbursement.

Institutions that participate in Medicare receive periodic payments throughout the year from government-contracted fiscal intermediaries, based on the institutions' estimated Medicare-reimburseable costs. The annual cost report, submitted by a participating institution to its fiscal intermediary at the end of each year, is intended to present actual Medicare costs incurred that year, so that the intermediary may reconcile the payments disbursed based on estimated need with the total actual expenses eligible for reimbursement. The content of the annual cost report thus establishes whether a participating institution is owed further reimbursement from Medicare for that operating year, or whether, on the contrary, it has been overpaid and owes money to the government. Fiscal intermediaries make these initial determinations accepting at face value the information submitted by an institution in its cost report, in order to ensure that institutions are able to receive any further payment to which they are entitled as expeditiously as possible. Cost reports are later audited to determine the final amounts owed by the government or participating institution. *United States v. Bourseau*, 531 F.3d 1159 (9th Cir. 2008).

The cost reports submitted by the *Bourseau* defendants to their Medicare intermediary, Mutual of Omaha, for the years in question were found to contain expenses that were not eligible for Medicare reimbursement, such as bankruptcy legal fees and loan interest, along with fictitious costs, such as a lease that did not exist. Mutual of Omaha never audited the cost reports, and did not make any adjustments to the amount of Medicare payment received by the defendants during those years, such as by collecting any amount that had been overpaid or providing supplemental payments that may have been owed. The district court found that, by including the improper and false expenses in their cost reports, the defendants had decreased the amount they owed to Medicare by more than $5 million over the three-year period. The court initially found the defendants liable for $7,925,444 in single damages, trebled to $23,776,332, but at the government's request, it reduced this amount to $5,219,195 in single damages, trebled to $15,657,585. *See United States v. Bourseau*, No. 03-cv-907, 2006 U.S. Dist. LEXIS 88016 (S.D. Cal. Dec. 1, 2006). The government was also awarded civil penalties in the amount of $31,000.

The defendants initially objected to the damages imposed via a Rule 59(e) motion to alter or amend the judgment, arguing the damages violated the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment. 2006 U.S. Dist. LEXIS 88016 at *3. The defendants' Eighth Amendment argument relied upon *United States. v. Mackby*, 261 F.3d 821 (9th Cir. 2001) ("*Mackby I*"), in which the Ninth Circuit held that treble damages under the FCA served a punitive function and were therefore subject to the Eighth Amendment.

In considering the defendants'motion, the *Bourseau* district court observed that *Mackby I* had been superseded by the Supreme Court's ruling in *Cook County, Illinois v. United States*, 123 S. Ct. 1239 (2003), and the Ninth Circuit's subsequent holding in *Mackby II* (*United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003)). The *Bourseau* district court cited *Cook County* as establishing that, "in a False Claims Act case much of the trebled damages award serves a compensatory purpose." *Bourseau*, 2006 U.S. Dist. LEXIS 88016 at *4. It noted in particular the Supreme Court's finding that FCA damages serve to compensate the government for "ancillary costs" of fraud perpetrated against it, such as the costs of uncovering and prosecuting the fraud. *Id.*.

The court also cited *Mackby II*'s emphasis on the role of the FCA's multiple damages in redressing nonmonetary harms which accrue to the government as a result of fraud, such as loss of public confidence in the Medicare system, increased difficulty of program administration, and the misdirection of Medicare funds away from individuals in need. *Id.* at *6-7. In *Mackby II*, the Ninth Circuit held that FCA treble damages and civil penalties did not violate the Eighth Amendment where the amount of the penalty "[was] not grossly disproportional to [defendant's] level of culpability and the harm he caused." *Id.* at *6 (quoting *Mackby II*, 339 F.3d at 1017).

Employing this standard, the *Bourseau* district court held that the treble damages award of $15,657,585 was not excessive, as the majority of the award was compensatory. *Id.* at *7. The court also rejected the defendants' contention that the damages awarded violated the Fifth Amendment. "The damages award here… is not the product of a jury verdict and does not have the potentially arbitrary quality of a classic punitive damages award… Defendants do not cite, and this Court has not found, a decision holding that a trebled damage award imposed under the False Claims Act violates the *Due Process Clause*." *Id.* at *7-8.

On appeal to the Ninth Circuit, the defendants argued that the government had not sustained any damages, because it had not relied upon the defendants' annual cost reports in making Medicare payments. *Bourseau*, 531 F.3d 1159, 1171. As the defendants' institution had declared bankruptcy in 1996, Medicare had not increased its reimbursement rates during the subsequent years beyond those established by the 1996 annual cost report. However, as the appeals court pointed out, Medicare always had the option to decrease its reimbursement rates to the defendants in order to minimize the potential for overpayment; Medicare intermediaries are responsible for making such determinations, based upon information provided by participating institutions in their annual cost reports. The appeals court found:

> Appellants' inclusion of nonallowable, inflated and fictitious costs in the 1997, 1998 and 1999 cost reports impeded the intermediary's ability to determine whether maintaining the 1996 rates would result in overpayments, and therefore impeded the intermediary's ability to determine whether it should have decreased interim payments. This damaged the Medicare Trust

> Fund by causing Medicare to continue making interim payments at the 1996 rates instead of lower rates.

531 F.3d 1159, 1172.

Reasoning that, "[d]amages for a reverse false claim consist of the difference between what the defendant should have paid the government and what the defendant actually paid the government," the appeals court affirmed the lower court's finding, based upon expert witness testimony, that the defendants had received and retained overpayments from Medicare totaling $5,219,195 for the years 1997 through 1999. *Id*. The appeals court thus found no fault with the lower court's calculation of damages.

The defendants further argued on appeal that the expert witness testimony proffered by the government to determine damages was flawed. The defendants claimed that the technique employed was speculative and inaccurate, since the Medicare intermediary had never adjusted any of the defendants' cost reports. The appeals court disagreed, noting that the disputed costs had all been shown to be unallowable; as the government's expert calculated the damages by simply removing the unallowable costs from the cost reports, as an intermediary would have, the appeals court found that the determination of damages was supported by the evidence. The court further noted that, even if the defendants had opposed the intermediary's designation of any of the costs as unallowable, they would still have owed the total amount indicated, "because challenges to an intermediary's determination of liability do not postpone a provider's obligation to repay the government the amount an intermediary initially determines to be due." 531 F.3d 1159, 1173.

The appeals court likewise rejected the defendants' renewed argument that the award of treble damages violated the Eighth Amendment. Citing its prior decision in *Mackby II*, the Ninth Circuit held that, "[a]n award of treble damages and civil penalties under the FCA is, at least in part, punitive and subject to the *Eighth Amendment's* Excessive Fines Clause." *Id*. The court invoked the same proportionality test employed in *Mackby II*, taking into account the following factors: "(1) the severity of the offense and its relation to other criminal activity; (2) the maximum penalty faced; (3) the harm caused and (4) whether the defendant falls within the class of persons targeted by the applicable law." *Id.* With respect to the second factor, the appeals court observed that the district court had imposed treble damages and the maximum amount of civil penalties; yet, it also noted that the district court was under no obligation to impose less than the maximum allowable penalties, and that the FCA itself authorized the district court to treble the damages. Finding that the remainder of the factors weighed easily in favor of upholding the damages imposed, the Ninth Circuit affirmed the district court's holding that the damages and civil penalties in this case did not run afoul of the Constitution.

***United States ex rel. Shutt v. Community Home and Health Care Services, Inc.*, 305 Fed. Appx. 358 (9th Cir. 2008)**

The *Shutt* case involved another constitutional challenge to an award of FCA damages and penalties. Following the initiation of a *qui tam* action alleging Medicare fraud by the defendants, Nida Campanilla ("Campanilla") and her solely-owned nursing and home care agency, the government instituted criminal proceedings based on the same underlying facts. *See United States. ex rel. Shutt v. Community Home and Health Care Services, Inc.*, 550 F.3d 764 (9th Cir. 2008). Campanilla pled guilty to one count of health care fraud and stipulated to numerous fraudulent activities, including "making illegal payments to physicians, patients, and marketers, forging physician signatures on Medicare forms documenting the medical necessity of claimed services, submitting reimbursement claims to Medicare for home health services she knew were not medically necessary, and submitting reimbursement claims for services that were not performed as represented." *Id.* at 765. Campanilla also stipulated that her actions had cost Medicare at least $608,558.49 and agreed to make restitution of that amount. Subsequently, the government intervened in the FCA suit and was granted partial summary judgment by the district court, which directed the defendants to pay a $5,500 civil penalty, plus treble the amount of damages Campanilla had stipulated to in her criminal plea agreement. *Id.* at 766. The defendants appealed to the Ninth Circuit, claiming that the district court's holding violated the Fifth Amendment's protection against double jeopardy and the Eighth Amendment's Excessive Fines clause. 305 Fed. Appx. 358 (9th Cir. 2008).

The appeals court found that Campanilla was precluded from raising a double jeopardy objection, as she had explicitly waived her right to do so in her criminal plea agreement: "…Campanilla agreed '[n]ot to make any double jeopardy challenge to any administrative or civil forfeiture or civil fraud action arising out of the course of conduct that provides the factual basis for the [criminal] information.'" *Id.* at 360. The court cited Ninth Circuit precedent for accepting such waivers as intelligent and voluntary in the context of criminal plea bargains, noting: "Campanilla need not have been made aware of all the possible circumstances that might ensue from the waivers obtained in the plea agreement for the waivers to be knowing and voluntary." *Id.* The court further rejected Campanilla's argument that the term "civil fraud action" as it appeared in the above waiver referred only to the initiation of a lawsuit, and thus did not prevent her from objecting only to the penalties stemming from such an action; according to the court, the Federal Rules of Civil Procedure unambiguously define "civil action" as an entire legal proceeding, not merely its initiation. Finally, the court rejected the defendant health care agency's double jeopardy challenge, because the agency had not been a party to and had received no sanctions as a result of the criminal plea.

Citing *Mackby I*, *Mackby II*, and *Cook County*, the appeals court also rejected the defendants' Eighth Amendment argument. The court held that the single civil penalty of $5,500 and the treble damages of $1.8 million imposed were not "excessive" or "grossly disproportionate" to the offense. 305 Fed. Appx. 358, 360 (adopting *Mackby I* language). This assessment was based in part on the district court's finding that the actual damages sustained by the government as a result of the defendants' fraudulent conduct were substantially greater than the amount stipulated to in Campanilla's criminal plea, which served as the basis for the single damages figure, and may have even exceeded the treble damages. The court noted that this was "particularly likely once the government's costs of investigating and litigating the fraud and compensating the qui tam relator are taken into account." *Id.* at 361. It further reasoned that Campanilla's cumulative punishment leveled out well below the statutory maximum which she could have faced – up to more than $2 million in additional criminal and civil penalties, and ten years in prison. The court noted that while consideration of the maximum allowable punishment is not dispositive in an Eighth Amendment inquiry, it is instructive.

The court also underscored the remedial nature of multiple damages under the FCA. Significantly, the court held:

> Even if the district court were mistaken and a substantial portion of the judgment in this case exceeds the government's actual cost, this result is consistent with Congress's determination that making a false claim to the government is a serious offense meriting treble damages and an automatic civil monetary penalty for each false claim… Given the seriousness of the offense, the resulting non-pecuniary harm caused to the government, and the need to deter difficult-to-detect fraudulent claims, Congress's decision to impose a penalty that may sometimes substantially exceed actual damages is not unreasonable.

305 Fed. Appx. 358, 361.

Therefore, the Ninth Circuit affirmed the district court's grant of partial summary judgment and award of damages and penalties to the government.

***United States v. United Technologies Corp.*, No. 3:99-cv-093, 2008 U.S. Dist. LEXIS 61199 (S.D. Ohio Aug. 1, 2008)**

The *UTC* litigation stemmed from a series of government contracts awarded to Pratt & Whitney Aircraft Engines ("Pratt"), a division of United Technologies Corporation (UTC), for the construction of jet fighter engines supplied to the Air Force. Prior to 1982, Pratt had served as the sole supplier of these engines; however, the government decided to institute a change, effective with its order for fiscal year 1985, such that the contract to supply the engines would be split between Pratt and the General Electric Company ("GE"), based upon negotiated contract terms. In December 1982, the government presented Pratt and GE with a draft Request for Proposal covering orders for fiscal years 1985 though 1990. Pratt's senior management subsequently devised a strategy aimed at ensuring Pratt would receive the maximum amount of engine orders under the new competitive system. This entailed offering the government a much higher per-engine price for orders comprising less than 100% of the total contract, with the price increasing proportionally as the number of engines ordered decreased: "Pratt's pricing strategy was to achieve price quotes so that, in the event that Pratt's share of the production dropped from 100% to 70% there would be a resulting price increase of 10 to 15%. In the event that Pratt's share of production was reduced to 50%, there would be a resulting price increase of 20 to 25%..." 2008 U.S. Dist. LEXIS 61199 at *5.

In order to support its pricing strategy, Pratt found it necessary to manipulate its proposal by inflating engine prices while offering a drastically reduced warranty price in the event that it received 100% of the contract. In response to Pratt's initial proposal, the government engaged

Pratt in extensive “fact-finding discussions” to address deficiencies and inaccuracies perceived in its submission. Pratt revised its proposal accordingly and submitted a Best And Final Offer (BAFO) to the Air Force, which included documentation purporting to support its pricing structure. The BAFO also contained a number of certifications, in which Pratt misrepresented and concealed the origin and accuracy of its supporting data.

Pratt was awarded a 25% share of the engine production contract in the first year affected by the new competitive bidding procedure; Pratt continued to decrease its warranty prices in subsequent bidding years, receiving 46% of the contract in the second year, 44% in the third, 45% in the fourth and 64% in the fifth. The district court observed that, while Pratt’s false assertions regarding its price estimates were intended to procure 100% of the contract award, instead what occurred was that “Pratt was awarded a smaller portion of the contract at artificially inflated prices.” *Id.* at *28.

The Air Force later initiated a proceeding against Pratt before the Armed Services Board of Contract Appeals (“the Board”), alleging that Pratt had violated the Truth in Negotiations Act (TINA) by “concealing materials relevant to their estimation of the cost of performing [on the contract].” *Id.* at *21-22. In a decision later affirmed by the U.S. Court of Appeals for the Federal Circuit, the Board found that Pratt had acted in violation of the TINA but that the Air Force was not entitled to a contract price reduction, because it had not demonstrated that it had relied upon the defective cost and pricing data.

The government also filed an FCA action against Pratt, for invoices submitted on all but the first two years of the contract period. In its defense, Pratt argued, per the Federal Circuit’s ruling, that the government had not relied upon its false statements. However, the Southern District of Ohio held that “reliance is not an element of a cause of action under the False Claims Act in the Sixth Circuit.” *Id.* at *28. Instead, the court noted that the Sixth Circuit had adopted a materiality requirement for FCA claims and had further established that the “natural tendency” test was the correct standard for determining materiality. Quoting *U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt Group, Inc.*, 400 F.3d 428, 442 (6th Cir. 2005), the court noted that the natural tendency standard “focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered.” *UTC*, 2008 U.S. Dist. LEXIS 61199 at *26. The court also cited precedent that, in the context of the natural tendency test for materiality, “Evidence of the government’s actual conduct is less useful for FCA purposes than evidence of the government’s legal rights…” *Id*. (internal citation omitted). Employing this standard, the court found that Pratt’s false statements regarding its defective pricing data had “the potential effect of causing a false claim to be paid . . . Thus, the Court concludes that each invoice submitted to the Government in performance of the contract constituted a violation of the False Claims Act.” *Id.* at *28-29.

With respect to damages, the court observed that jurisdictions employing the natural tendency test for materiality have looked to “what the Government actually did” in calculating damages. Pratt argued that, during the years in question, the government actually paid out less on the contract than it would have if Pratt’s submission had in fact been calculated as it had represented. The government presented expert witness testimony claiming that it had sustained damages in the amount of $227,980,977 due to Pratt’s manipulation of the cost and pricing data.

The expert argued that Pratt's reduced warranty prices bore no relation to its engine part prices, and calculated the damages by applying the reduced total engine price to all of the engine parts on a pro-rata basis.

The court held that the expert's methodology was "facially reasonable," but that it missed the point. According to the court, the essence of the fraud lay in Pratt's attempt to force the government to award it 100% of the contract by fabricating price lists. The court further held that, while the expert's approach had demonstrated that the government may have incurred damages during the first year of the contract, during the three years at issue in the FCA case, the government had in fact suffered no damages. Therefore, the court calculated civil penalties in the amount of the statutory maximum of $10,000 per claim submitted, applied to all invoices paid by the government for the years in question, which totaled $7,090,000. *Id.* at *31-32.

Conclusion

These recent developments out of the Ninth Circuit, New York and Ohio suggest a more expansive approach in calculating damages and penalties under the FCA, limiting the application of more restrictive formulas and standards in favor of a perspective designed to account for the overall toll of fraud perpetrated against the government, in both economic and noneconomic terms. It is worth noting that these decisions have, in part, relied upon recent precedent set by the D.C. Circuit, the Second Circuit, the Sixth Circuit and the Seventh Circuit; this suggests that the trends observed in these cases may comprise part of a larger movement.

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[i] Note that the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119, signed into law on March 23, 2010, confirms *Rogan*'s and other courts' holdings that FCA liability extends to all claims for services rendered in violation of the Anti-Kickback Statute. From Section 6402: "(f) Health Care Fraud - (1) KICKBACKS- Section 1128B of the Social Security Act (42 U.S.C. 1320a-7b) is amended by adding at the end the following new subsection: [. . .] (g) In addition to the penalties provided for in this section or section 1128A, a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of subchapter III of chapter 37 of title 31, United States Code.'"