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Fourth Circuit Finds $24 Million False Claims Act Penalty Not Excessive Even Where No Damages Proven at Trial

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In a recent **False Claims Act ("FCA")** opinion that has already been heavily criticized, the Fourth Circuit held that a $24 million penalty was not "excessive" under the Constitution even where damages were not proven at trial and where the government had paid only a total of $3.3 million for the services in question. *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, No. 12-1369 (4th Cir. Dec. 18, 2013).

The relator in the case alleged that the defendant, a Belgian shipping company, engaged in a "bid rigging scheme" designed to inflate the rates charged for the movement of U.S. military household goods between Europe and the U.S. and within Europe. Although the government intervened as to part of the case, it did not intervene with respect to the claims at issue in the Fourth Circuit's eventual decision. Rather than seeking both a fixed civil penalty for each false claim and three times the amount of actual damages, the relator chose to forgo proof of damages, and sued only for civil penalties. Unlike the District Court, which found that the constitutional threshold could not exceed $1.5 million in civil penalties, the Fourth Circuit relied on deterrence and public policy rationales to justify the $24 million award.

District Court Decision

At trial, the jury found that the defendant was liable for submitting 9,136 false invoices under its Department of Defense contract but the District Court concluded there was insufficient evidence to find that the government suffered any economic harm. Because the FCA imposes a civil penalty of not less than $5,500 and not more than $11,000 per violation as currently adjusted for inflation, a per-claim computation using the minimum penalty of $5,500 would have resulted in a $50,248,000 civil penalty. Given that no damages were proven at trial and the government paid only a total of $3.3 million for the services in question, the court held that this amount would be excessive under the Excessive Fines Clause of the Eighth Amendment.

The court also found that it lacked discretion to impose a smaller, constitutionally permissible penalty. Thus, it rejected the relator's proposal, in consultation with the government, to accept a lower amount, $24 million, because, in the court's view, it was obligated to treat each invoice as a separate false claim and impose civil penalties for each false invoice. According to the court, the FCA "does not grant the court authority to impose a total penalty below the amount derived" from the

statute itself.

Fourth Circuit Decision

On appeal, the Fourth Circuit reversed and remanded for an entry of the relator's requested award of $24 million, an amount deemed to be "consistent with the Constitution."

First, the court found that trial courts have discretion to enter a lesser penalty than the one provided for under the statute where the government or the relator elects to take a lesser judgment, as in this case. To support its rationale, the court relied on *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003) where the court approved entry of judgment on only 111 of 1,459 false claims at the government's request and on *Peterson v. Weinberger*, 508 F.2d 45, 55 (5th Cir. 1975) where the court approved entry of judgment on civil penalties for only 50 of 120 false claims "where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government." The court reasoned that trial courts "must permit the government or its assignee the freedom to navigate its FCA claims through the uncertain waters of the Eighth Amendment." Moreover, relying on *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), the court emphasized that under the FCA "each [invoice] constitutes a claim" and reasoned that although "the number of false invoices presented is hardly a perfect indicator of the relative liability that ought to attach to an FCA defendant, injustice is avoided in the particular case by the discretion accorded the government and a relator to accept reduced penalties within constitutional limits, as ultimately adjudged by the courts."

Second, the court addressed the tension between the FCA civil penalties and the Excessive Fines Clause of the Eighth Amendment, which it described as "a monster of our own creation." Although the court acknowledged that the touchstone of this constitutional inquiry is the principle of proportionality, it nonetheless found that $24 million was not an excessive fine given that the defendant was convicted of conspiring to defraud the U.S. government.

Importantly, the court held that to analyze whether a particular award of civil penalties under the FCA is "grossly" disproportionate, courts must consider not only the economic harm to the government but also the award's deterrent effect on the defendant and on others. The Fourth Circuit also disagreed with the district court's decision to award nothing at all: "[A]n award of nothing at all because the claims were so voluminous provides a perverse incentive for dishonest contractors to generate as many false claims as possible, siphoning even more resources from the government." Thus, the court concluded that the $24 million penalty "appropriately reflects the gravity of [defendant's] offenses and provides the necessary and appropriate deterrent effect going forward."

Analysis

Contrary to what government contractors had hoped, the *Bunk* decision did not provide any guidance on how to determine "excessive" fines or on how to evaluate an appropriate civil fine when there are low or no damages to the government, such as in bid rigging cases.

It appears that in *Bunk* the Fourth Circuit side-stepped core Eighth Amendment issues raised by the arguably punitive nature of FCA penalties in favor of a strict reading of the statute. Although the court recognized the principle of "proportionality" inherent in an Eighth Amendment analysis, it opened the door to the idea that even where no damages are proven at trial, the fraudulent acts themselves and the deterrent effect of the statutory penalties suffice to impose per-claim penalties.

Importantly, the court also downplayed the punitive elements that come into play when large numbers of “false invoices” are involved. The court made clear that it saw no problem with applying a per-claim penalty calculation in such cases:

“It was inevitable, we suppose, in view of the vast number of government contracts – many of prodigious size and sophistication – that we would confront FCA actions involving thousands of invoices, thus exposing culpable defendants to millions of dollars of liability for civil penalties. We are entirely comfortable with that proposition.”

Critics have pointed out that the Fourth Circuit’s approach is a deviation from Supreme Court precedent such as *United States v. Halper*, 490 U.S. 435, 446 (1989) where the Court applied the Eighth Amendment to reverse an FCA penalty that was more than 200 times the amount of the damages to the government in part because the FCA recovery did not “remotely approximate” the government’s harm.

It remains to be seen whether other circuits will follow the Fourth Circuit’s view that deterrence alone is sufficient to impose FCA statutory penalties in the absence of actual damages. It seems likely that, at the very least, this decision will incentivize other relators to take on cases where damages are difficult to prove.

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