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DC Circuit Adopts Pro Tanto Rule for "Common Damages" in FCA Claims Involving Multiple Defendants

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by Jack Huerter

The United States Court of Appeals for the D.C. Circuit recently considered the extent to which settlements in related False Claims Act cases must be offset against damages owed by non-settling parties – and the appropriate measure for allocating previous settlements in later related cases.

In *United States v. Honeywell Int'l Inc.*, the Department of Justice sued Honeywell for providing allegedly defective material in bulletproof vests sold to the government. *Honeywell*, No. 21-5179, 2022 U.S. App. LEXIS 24369 (D.C. Cir. Aug. 30, 2022). Honeywell was one company in a complex network of bulletproof vest suppliers, and Honeywell sold Z Shield, a zylon fiber product, to the manufacturers of the bulletproof vests. *United States v. Honeywell Int'l Inc.*, 502 F. Supp. 3d 427, 435 (D.D.C. 2020). The manufacturers in turn sold the vests to the federal government through two separate programs, the General Services Administration Multiple Award Schedule Program and the Bulletproof Vest Partnership Program. *Id.* at 435-36.

In a series of related lawsuits, DOJ alleged that Honeywell and the vest manufacturers learned during the performance period of the procurement contracts that the Z Shield material degraded under hot and humid conditions, but did not adequately disclose this alleged defect to the government. *Id.* at 461. DOJ further alleged the degradation caused the bulletproof vests to no longer meet performance standards, and that Honeywell falsely certified the vests had met those standards. *Id.* at 449.

Over the course of DOJ's lengthy litigation with both Honeywell and the manufacturers, DOJ recovered millions from settlements with bulletproof vest manufacturers and suppliers but continued to litigate its claims against Honeywell. *Id.* at 478. At summary judgment, Honeywell and DOJ agreed that those settlement payments involved "common damages," *i.e.* "damages which arise from a single, indivisible harm." *Id.* at 477. As a result, they agreed Honeywell was entitled to some credit for the settlement payments made by the vest manufacturers.

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Honeywell believed it should get full credit under the "*pro tanto* approach," in which "a non-settling defendant receives a dollar for dollar credit for all amounts paid by others in settlement of common damages." *Id.* at 281. DOJ, on the other hand, argued for the "proportionate share approach," in which "a nonsettling defendant receives, a credit for each settling defendant's proportionate share of responsibility for the total obligation, which is based on each defendant's degree of fault." *Id.*

The District Court sided with DOJ but granted Honeywell's request for interlocutory appeal.

On August 30, 2022, the D.C. Circuit reversed and adopted the *pro tanto* rule for apportioning common damages in FCA cases involving multiple defendants. The Court noted the Supreme Court's guidance that "three paramount considerations" should be considered when "choosing between the *pro tanto* and proportionate share rules… (1) consistency with relevant precedent; (2) promotion of settlement; and (3) judicial economy." *Honeywell*, 2022 U.S. App. LEXIS 24369, *19. In analyzing these considerations, the Court determined the first and third factor strongly favor the *pro tanto* approach, and explained that the *pro tanto* rule is "a better fit with the [FCA] statute and the liability rules that have been partnered with it [because] the FCA has been consistently interpreted to impose joint and several liability without a right to contribution." *Id.* at *20. This rule means that "a person who violates the FCA in a joint scheme may have to pay for all the government's trebled damages, and, even if that defendant is the least responsible party, it cannot force the other violators to pay their fair share." As a result of the Court's decision, Honeywell has been relieved of any potential obligation to pay damages because the government has already recovered the full alleged amount from other parties. *Id.*

This D.C. Circuit's decision should inform settlement strategies for clients defending FCA lawsuits when there are multiple defendants (whether in a single case or in related actions). In cases where defendants have varying degrees of culpability, the decision may cause DOJ to focus its settlement efforts on the defendants that it views as most responsible.