Early Resolution of FCA Civil Damages Under the Eighth Amendment's Excessive Fines Clause? A Pending Case in Washington May Provide the Answer

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The False Claims Act authorizes civil penalties between $10,781 to $21,563 per false claim, as well as three times the amount of damages which the government sustains (*i.e.* treble damages). The Eighth Amendment provides that "[e]xcessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted." The Supreme Court of the United States has recognized that a statutory penalty constitutes a "fine" subject to Eighth Amendment review if it constitutes punishment for an offense. Accordingly, the Fourth, Seventh, Eighth, and Ninth Circuit Court of Appeals have determined that the per-claim penalty and treble damages provided for under the FCA are subject to scrutiny under the Excessive Fines Clause of the Eighth Amendment because they have a punitive purpose, at least in part. A punitive sanction violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense. Nonetheless, federal courts undertaking this Eighth Amendment analysis have generally upheld FCA per-claim penalties and treble damages.

Proportionality of a punitive sanction is determined by a variety of factors, including the reprehensibility of the defendant's conduct; the relationship between the penalty and the harm to the victim; the sanctions in other cases for comparable misconduct; the possible maximum penalty available under the FCA and other statutes; and the legislative intent for the statute. *See United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014); *United States v. Mackby*, 339 F.3d 1013, 1016-18 (9th Cir. 2003). The Supreme Court has noted that the treble damages provision of the statute has a compensatory aspect, in addition to its punitive objectives, because some amount of money beyond actual damages is "necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims." *Cook Cnty., Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003). Additionally, the treble damages provision allows the government to recover some measure of the amount it must pay to compensate relators in qui tam actions. *See United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 388 (4th Cir. 2015). In contrast, the per claim penalty is purely punitive. *Id.*

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In the context of a FCA jury trial, the jury will generally be charged with determining the measure of the damages to the government and the number of false claims. The Court will then apply the treble multiplier to the damages award and, utilizing the jury's determination of the number of false claims, determine what amount (between $10,781 to $21,563) to assess for each false claim. In cases involving the submission of hundreds or even thousands of false claims/statements (e.g., Medicare fraud claims), FCA damage awards can be daunting. As a result, Defendants may raise the Excessive Fines Clause as a defense to a massive award. However, with some exceptions, courts have generally upheld these awards, taking into account the above-mentioned factors as well as the general public interest in preventing fraud on the government.

In litigation pending in the U.S. District Court for the Eastern District of Washington, *United States of America et al v. Washington Closure Hanford LLC, et al*, the defendant contractor raised constitutional challenges to the FCA's penalties and treble damages provisions as an affirmative defense in its answer. The Government moved for summary judgment arguing that this defense was premature because the Court had not yet imposed penalties or treble damages; this constitutional challenge should instead be raised at the judgment phase. The contractor responded that courts can address the merits of such a defense based on the amount of damages sought by the Government, which in this case are in excess of $70 million. While the timing for addressing this Eighth Amendment challenge is typically at the post-trial stage, courts have not clearly addressed whether it may be considered in advance, which may provide a strategic advantage to litigants. Accordingly, the pending motion for summary judgment presents an interesting question for the trial court to resolve which may help provide further guidance for FCA litigants. FCA Now will be monitoring the Court's ruling and keep you updated with any key developments.