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District Court Holds Mandatory $50 Million False Claims Act Civil Penalty Unconstitutionally Excessive; Finds Itself Powerless To Impose Lesser Penalty

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In the latest turn in the developing caselaw on application of the Excessive Fines Clause to False Claims Act remedies, a judge on the U.S. District Court for the Eastern District of Virginia handed down a decision last week concluding that he could not impose any civil penalty in a False Claims Act ("FCA") case despite a jury finding that the defendant was liable for submitting 9,136 false claims. See United States ex rel. Bunk v. Birkart Globistics GmbH & Co., Nos. 1:02cv1168 and 1:07cv1198 (AJT/TRJ), 2012 WL 488256 (E.D. Va. Feb. 14, 2012). The *qui tam* relators had not attempted to prove actual damages to the Government at trial, and the court concluded that the Government had in fact suffered no economic harm. But the FCA would have required a civil penalty of at least $50 million. The court held that this would be unconstitutionally excessive under the Eighth Amendment—as would an alternative $24 million fine proposed by the relators and the Government. The court went on to determine that, in the face of the FCA's specification of a particular range of penalty amounts, it lacked discretion or authority to impose a lesser penalty that would fall within constitutional limits. Accordingly the court concluded that it could impose no penalty at all. Thus, the defendant was found liable but was not required to pay any damages or civil penalties.

The Decision

The relators alleged, in part, that the defendants, Gosselin Worldwide Moving N.V., its successor, and a Gosselin official (collectively "Gosselin"), had violated the FCA by filing a false Certificate of Independent Pricing ("CIPD") when Gosselin bid for a contract to transport military household goods between U.S. military installations in different countries. The relators contended the CIPD was false because Gosselin and other potential bidders had entered into a subcontract price-fixing agreement prior to bidding on the contract. *Id.* at *3. Although the relators initially alleged damages, they did not seek to prove damages at trial. *Id.* The parties stipulated that Gosselin had filed 9,136 invoices under the contract. The jury found Gosselin liable for the alleged bid-rigging. *Id.*

The FCA provides that a violator "is liable to the United States Government for a civil penalty of not less than" $5,500 and not more than $11,000, as adjusted for inflation. 31 U.S.C. § 3729. In the court's view, precedent required treating each invoice as a separate false claim and imposing a civil penalty in the statutory range for each false claim. *Id.* at *4. Because the defendant had submitted 9,136 invoices, the court found that it was obligated to assess a total civil penalty of no less than $50,248,000. *Id.*

The court then considered whether a fine in that amount would violate the Eighth Amendment's Excessive Fines Clause. In order to determine whether a penalty within this range ran afoul of the Eighth Amendment, the court looked to whether the penalty was "grossly disproportional" to any harm caused by the defendants. *Id.* The court concluded that the Government did not suffer any economic harm. *Id.* at *7. Indeed, the court found that the pricing afforded the Government under the affected contract

had been more favorable than the pricing on similar contracts in prior years. *Id.* As to non-economic harm, the court found that the plaintiffs had offered no evidence that the services provided were deficient in any way. *Id.* at *8. The court also concluded that the number of invoices alone was not reflective of the defendants' culpability. *Id.* at *9. In light of these considerations, the court concluded that the $50 million civil penalty was grossly disproportionate to any harm caused by the defendants. In post-trial briefing, the relators and the United States argued that the penalty could be reduced to $24 million, an amount they characterized as "unquestionably within the constitutional limit of the Excessive Fines Clause," by counting only a portion of the invoices. *Id.* at *14. The court rejected the motion, both because the $24 million figure, in its view, would "not result from any principled application of the FCA" and because $24 million would still be constitutionally excessive. *Id.*

Finally, the court examined whether it could impose an even smaller, constitutionally permissible penalty, but it concluded that it lacked the discretion to do so. In the court's view, the FCA "does not grant the court authority to impose a total penalty below the amount derived" from the statute itself. *Id.* at *12. Imposing a lesser penalty, the court suggested, would amount to "rewrit[ing] the FCA." *Id.*

Context and Implications

The *Bunk* court's decision is significant for several reasons. *First*, it is the latest contribution to the growing debate on whether, and if so how, the Excessive Fines Clause applies to damages and civil penalties under the FCA. The Eighth and Ninth Circuits have held that treble damages and civil penalties judgments under the FCA are punitive enough in nature to be subject to the Excessive Fines Clause. *See Hays v. Hoffman*, 325 F.3d 982, 992

(8th Cir. 2003); *United States v. Mackby*, 261 F.3d 821, 829-31 (9th Cir. 2001); *see also Daewoo Engineering & Construction Co. v. United States*, 557 F.3d 1332, 1340 (Fed. Cir. 2009) (assessing penalty imposed on fraud counterclaims under the Contract Disputes Act under Excessive Fines Clause). The Seventh Circuit, in very considered dictum, has questioned that view, *see United States v. Rogan*, 517 F.3d 449, 454 (7th Cir. 2008), and some district courts have agreed with the Seventh Circuit, *see, e.g., United States v. Karon*, 750 F. Supp.2d 480, 493 n.12 (S.D.N.Y. 2011); *United States v. Inc. Vill. of Island Park*, No. 90 Civ. 992(ILG), 2008 WL 4790724, at *6 (E.D.N.Y. Nov. 3, 2008).

Second, the *Bunk* decision is noteworthy in its rejection, at least on the facts before it, of the notion that an otherwise constitutionally excessive fine may be brought within constitutional bounds by reducing the number of false claims pursuant to the plaintiffs' effective voluntary dismissal of a portion of their case. Some other district courts have adopted just this strategy. *See, e.g., United States v. Mackby*, 221 F. Supp.2d 1106, 1110-11 (N.D. Cal. 2002), *aff'd*, 339 F.3d at 1015, 1017-18 (imposing penalty based on 111 of 8499 false claims).

Third, the decision is significant for its rejection of the notion that district courts possess authority to bring otherwise excessive FCA penalties within constitutional limits even without the plaintiffs' voluntary reduction of the universe of false claims. At least some other district courts have taken the opposite view. *See, e.g., United States v. Advance Tool Co.*, 902 F. Supp. 1011, 1018-1019 (W.D. Mo. 1995) (basing penalty on 73 instead of 686 false claims, the number of types of tools supplied rather than the number of invoices); *United States ex rel. Smith v. Gilbert Realty*, 840 F. Supp. 71, 74-75 (E.D. Mich. 1993) (basing penalty on seven false certifications rather than on 51 rent checks submitted).

Excessive Fines Clause challenges to FCA judgments typically arise in cases involving large numbers of false claims each of which involves small actual damages, for example, cases involving allegations based on technical regulatory or contractual violations where little or no harm actually occurred but where there are many claims. In such situations, relators or the Government may use the prospect of potentially massive civil penalties to exact large settlements. The *Bunk* decision demonstrates that some courts may undercut this strategy by resisting imposition of very large penalties where they are grossly disproportionate to actual harm.

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