PENALTY POINTS, PART TWO: Number of Penalties

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This article is the second part of a three-part series examining the penalty provisions of the False Claims Act. This part will examine the principles governing how many penalties are awarded in a particular case. Part One reviewed the factors employed by courts in determining the dollar amount of the penalty within the statutory range. Part Three will address Constitutional issues associated with the imposition of penalties under the Act.

How does a court decide how many penalties to award in a False Claims Act case? Although the statute and legislative history provide little direction, the Supreme Court's decisions in *United States ex rel. Marcus v. Hess* and *United States v. Bornstein* have established several guiding principles, discussed in detail in this article. The numerous lower court cases applying these principles provide helpful insight into how the number of penalties is likely to be calculated in a wide variety of factual contexts.

One line of lower court cases, however, contravenes both the general principles set forth by the Supreme Court and the structure and purpose of the Act itself. This line of precedent suggests that where a defendant has created false "records or statements" in support of false claims, the number of penalties awarded should be based only on the number of false "claims" and that no penalties should be assessed for the separate false "records or statements." Courts should reject this line of precedent and instead properly assess penalties for false "records or statements," which constitute separate and independent violations of the Act.

I. STATUTE AND LEGISLATIVE HISTORY PROVIDE LITTLE GUIDANCE AS TO NUMBER OF PENALTIES

The language of the False Claims Act provides no specific instruction as to how to determine the appropriate number of penalties in a particular case, stating only that "Any person who . . . [commits any violation listed in 31 U.S.C. § 3729(a)(1)–(7)] is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . ."[1] The pre-1986 version of the statute was also silent on this point, providing that "Any person . . . who shall do or commit any of the acts prohibited . . . shall forfeit and pay to the United States the sum of two thousand dollars

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1. 31 U.S.C. § 3729. As noted in Part One of this article, the penalty range was increased to $5,500 to $11,000 in 1999. *See* 64 Fed. Reg. 47099, 47104 (August 30, 1999); 28 C.F.R. § 85.3(a)(9) (2005).

. . . ."[2] Likewise, the legislative history of the Act offers "little guidance" as to how to determine the proper number of forfeitures.[3]

II. SUPREME COURT DECISIONS PARTIALLY FILL THE LEGISLATIVE VOID

A. *United States ex rel. Marcus v. Hess*: Multiple Penalties Permissible

In *United States ex rel. Marcus v. Hess*,[4] the Supreme Court began to fill the void left by Congress, establishing that where multiple violations of the Act have occurred, multiple penalties must be assessed. Although the indefinite statutory language and lack of legislative history left room for an argument that only one penalty could be assessed for each action brought under the Act, the Court soundly rejected this "single penalty" reading.

The defendants in *Hess* had engaged in collusive bidding on 56 separate P.W.A. contracts, but argued that only a single $2,000 forfeiture should be imposed "for all the acts done."[5] The Supreme Court rejected this argument, holding that a separate forfeiture should be awarded for each of the separate contracts, because the fraud as to each separate contract was clearly "individualized."[6] The Court also reasoned that to impose only one penalty in the case of multiple false claims would in effect reduce the penalty for each additional false claim. Noting that the assessment of only one $2,000 forfeiture would have amounted to about $30.00 for each of the 56 contracts at issue, the Court stated "we cannot suppose that Congress meant thus to reduce the damages recoverable for respondents' fraud and thereby allow them to spread the burden progressively thinner over projects each of which individually increased their profit."[7] Instead, the Court assessed the full $2,000 forfeiture for each of the 56 contracts.

2. *See* Rev. Stat. § 3490 (codified at 31 U.S.C. § 231); *see also* P.L. 97-258 (Sept. 13, 1982) (re-codifying Act at 31 U.S.C. §§ 3729, *et seq*.).

3. *See* United States v. Bornstein, 423 U.S. 303, 309, 96 S.Ct. 523, 528 (1976), commenting on the legislative history of the original Act. The Senate Report on the 1986 amendments also said little on the topic of the number of forfeitures, although it did acknowledge that the original Act had been interpreted to provide for the imposition of multiple penalties for multiple false claims. S. Rep. No. 99-345, at 8 (July 28, 1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273 (stating that existing law provided for a $2,000 forfeiture for "each false claim submitted" and that penalty was automatic and mandatory for "each claim which is found to be false").

4. 317 U.S. 537, 63 S.Ct. 379 (1943).

5. 317 U.S. at 552, 63 S.Ct. at 388.

6. *Id.* ("The incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office.") (citations omitted).

7. *Id.*

B. *United States v. Bornstein*

1. One Penalty Per "Payment Demand" Submitted By Defendant

After *Hess*, courts continued to reject the "one penalty" approach,[8] and the imposition of multiple penalties is now commonplace under the Act. In cases where the defendant is the person or entity that directly submitted false claims for payment to the Government, the calculation of the number of penalties is often straightforward.[9] For example, as the Supreme Court recognized thirty years after *Hess*, "[i]n cases involving prime contractors the number of imposable forfeitures has generally been set at the number of individual false payment demands that the contractor has made upon the Government."[10] This approach is consonant with the Court's holdings that a claim against the government "'normally connotes a demand for money or for some transfer of property.'"[11] as well as the current definition of "claim" in 31 U.S.C. § 3729(c) as a "request or demand . . . for money or property."

The following cases provide examples of straightforward, undisputed multiple penalty awards. In each case, the defendant was the entity or person directly submitting a "claim" or "payment demand" to the United States, and the number of penalties was equal to the number of claims or payment demands submitted:

- 88 forfeitures of $2,000 imposed for each of 72 HUD purchase orders prepared on the basis of collusive bids and for each of 16 false invoices submitted to HUD[12]

- 9 forfeitures of $2,000 imposed for each of nine false quarterly reports submitted to Federal Public Housing Authority which included overcharges for butane gas not actually supplied to housing project[13]

- 2 penalties of $5,000 imposed for each of two food stamp redemption certificates presented to the United States' bank which falsely certified that food stamps had been exchanged for eligible food[14]

8. *See, e.g.*, Lamb Engineering and Const. Co. v. United States, 58 Fed. Cl. 106, 111 (2003) (court rejected defendant's argument that his conduct should be "treated as a single violation" for penalty purposes, instead awarding four penalties based on finding that each of four false progress payment certifications was a "separate and independent act"); United States v. American Packing Corp., 125 F. Supp. 788, 790 (D.N.J. 1954) (court considered whether to award just one penalty for a fraudulent scheme to deliver inferior meat products to the United States, but held that if false claims were presented for each of the 98 contracts involved, the Government would be entitled to 98 separate forfeitures of $2,000 each).

9. *But see* Section III.B., *infra*, examining cases where defendant has both submitted false claims and made false statements or records in support of false claims.

10. United States v. Bornstein, 423 U.S. 303, 309 n.4, 96 S.Ct. 523, 528 n.4 (1976).

11. *Id.* (citing United States v. McNinch, 356 U.S. 595, 599, 78 S.Ct. 950, 952 (1958) (quoting United States v. Tieger, 234 F.2d 589, 591 (3d Cir. 1956))).

12. United States v. Cripps, 460 F. Supp. 969, 977 (E.D. Mich. 1978).

13. United States v. Gardner, 73 F. Supp. 644, 648 (N.D. Ala. 1947).

14. Abdelkhalik v. United States, 1996 WL 41234 at *7 (N.D. Ill., Jan. 30, 1996).

- 2 penalties of $7,500 imposed for each of two false CA-1 forms claiming worker's compensation benefits under the Federal Employees Compensation Act[15]

- 264 penalties of $5,000 imposed for each occasion on which defendant illegally redeemed food stamp coupons at a financial institution after withdrawing from the food stamp program[16]

- 3 forfeitures of $2,000 imposed for each of three invoices submitted to Navy for non-conforming aircraft engine bearings[17]

- 18 forfeitures of $2,000 imposed for each of eighteen false invoices submitted to Medicaid program[18]

- 2 forfeitures of $2,000 imposed for each of two false payrolls submitted to United States for construction work on National Guard Armory project[19]

- 12 forfeitures of $2,000 imposed for each of twelve checks drawn on the United States Treasury; defendant contractor forged endorsement of payee and then presented checks for payment[20]

In many other post-*Hess* cases, however, calculating the number of penalties was not so straightforward. One recurring question was how to count penalties where the defendant was someone other than the party who actually submitted the false claims to the United States: should the number of penalties still be based on the number of false claims submitted, or should some other measure be used? A second question left unaddressed in *Hess* was whether the number of penalties should be limited to "one per contract" or "one per project," as with the 56 penalties for 56 contracts in *Hess*, or whether this rule did not always apply. The Supreme Court addressed both of these issues in *United States v. Bornstein*.[21]

2. Penalties to Be Based Upon the Specific Conduct of the Person From Whom the Government Seeks to Collect Penalties

The defendant in *Bornstein* was a subcontractor who contracted to supply electron tubes to be incorporated into radio kits. The subcontractor provided tubes which were falsely marked to make them appear as though they were of the quality required by the contract. The subcontractor supplied the contractor with three separately invoiced

15. United States v. Bottini, 19 F. Supp. 2d 632, 642 (W.D. La. 1997), aff'd, 159 F.3d 1357 (5th Cir. 1998).

16. United States v. Byrd, 100 F. Supp. 2d 342, 343–46 (E.D.N.C. 2000).

17. United States v. Aerodex, Inc., 469 F.2d 1003, 1011 (5th Cir. 1973).

18. United States v. Jacobson, 467 F. Supp. 507, 508 (S.D.N.Y. 1979).

19. United States v. Sanders, 194 F. Supp. 955, 956 (E.D. Ark. 1961).

20. United States v. Silver, 384 F. Supp. 617, 620 (E.D.N.Y. 1974), aff'd, 515 F.2d 505 (2d Cir. 1975).

21. 423 U.S. 303, 96 S.Ct. 523 (1976).

shipments of falsely-marked tubes. The contractor incorporated the falsely-marked tubes into radio kits, for which it sent 35 invoices to the United States.

The Government argued that 35 forfeitures should be imposed, one for each of the 35 invoices which the subcontractor had "caused" the contractor to submit to the United States. The defendant argued that since only one subcontract was involved, only one forfeiture should be assessed. The district court agreed with the Government, awarding 35 forfeitures. On appeal, however, the circuit court agreed with the defendant, and awarded just one forfeiture.

The Court accepted neither of these approaches, instead awarding three forfeitures, based on the three shipments of falsely-marked tubes which the subcontractor sent to the contractor. The Court declined to base the forfeiture award on the 35 invoices sent by the contractor to the Government on the ground that such an approach "fails to distinguish between the acts committed by [the subcontractor] and the acts committed by [the contractor]."[22] As the Court explained, the subcontractor did not "cause" the contractor to submit 35 invoices, or indeed any particular number of invoices. Thus, an award of 35 forfeitures would be inappropriate because the fact that the contractor chose to submit 35 invoices instead of some other number was "completely fortuitous and beyond [the subcontractor's] knowledge or control."[23]

Finding that the Act "penalizes a person for his own acts, and not for the acts of someone else," the Court held that the correct application of the statute required that "the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures."[24] Here, the Court found that the subcontractor had committed three acts which caused the contractor to submit false claims: sending the three separate shipments of falsely-labeled tubes. If the subcontractor had not shipped these tubes, then the contractor would not have submitted false claims. When it sent the three shipments of tubes, the subcontractor knew that the contractor would incorporate them into radio kits to be sent to the Government, and that the contractor would seek payment from the Government. Accordingly, the Court awarded three forfeitures of $2,000 each.

In addition to applying *Bornstein* as written, lower courts have also adopted a sort of inverse-*Bornstein* rule, *i.e.*, if the defendant *did* have "knowledge or control" of how many payment demands were being submitted to the Government (in contrast to the *Bornstein* subcontractor, who did not), then that number of payment demands is an appropriate basis for a penalty award. In *United States v. Ehrlich*,[25] for example, the defendant supplied false and inflated construction information to his mortgagee. The mortgagee then presented 76 monthly vouchers to HUD which were false because they were based on the false, inflated cost information provided by the defendant. Defendant claimed that he "did but one act, inflating construction costs, that caused false claims to be filed," and that he should therefore be liable for only one forfeiture.[26] The

22. 423 U.S. at 312, 96 S. Ct. at 529.

23. *Id.*

24. 423 U.S. at 313, 96 S. Ct. at 529.

25. 643 F.2d 634 (9th Cir. 1981).

26. *Id.* at 637.

court, however, found that the defendant knew that a false claim would be submitted each month, and that he could have prevented the filing of additional false claims but instead "did nothing and gained a continuing benefit."[27] Concluding that the defendant had "knowledge and control of the situation," the court awarded 76 forfeitures, based on the 76 monthly vouchers submitted to HUD by the mortgagee.[28] The court held that "In the absence of such knowledge, using the number of claims to determine the number of forfeitures would be arbitrary. Where such knowledge is present, however, it is consistent with the purposes of the Act to impose forfeitures based on the number of claims."[29]

3. No "One Penalty Per Contract" Rule

The *Bornstein* case also is also noteworthy in that it rejected a *per se* "one per contract" approach to counting penalties. This approach had been urged by the *Bornstein* defendant and adopted by the Third Circuit, which relied on its own previous opinion in *United States v. Rohleder.*[30] In *Rohleder*, the court had based its forfeiture award on the number of subcontracts at issue, citing the *Hess* Court's award of 56 penalties for 56 subcontracts.[31]

The *Bornstein* Court clarified that *Hess* "in no way stands for the proposition that the number of forfeitures is inevitably measured by the number of contracts involved in a case," and emphasized that the Act "focuses on false claims, not on contracts."[32] In *Bornstein*, it was not the subcontractor's entry into the subcontract which caused the false claims. Rather, it was the subcontractor's conduct in shipping falsely marked tubes to the contractor that caused the contractor to submit false claims. The Court held that the number of forfeitures should be based on the number of acts that caused false claims to be filed, *i.e.*, the number of shipments sent by the subcontractor, not the number of contracts. As a further reason for rejecting the "one per contract" approach, the Court pointed out that "[t]o equate the number of forfeitures with the number of contracts would in a case such as this result almost always in but a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed . . . . Such a limitation would, in the language of the Government's brief, convert 'the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud.'"[33]

27. *Id.*

28. *Id.* at 638.

29. *Id.; see also* United States ex rel. Fahner v. Alaska, 591 F. Supp. 794, 800-02 (N.D. Ill. 1984) (imposition of 551 forfeitures ($1,102,000) was appropriate because doctor knew he was submitting 551 false claims to Medicaid); United States v. Zan Machine Co., 803 F. Supp. 620, 625 (E.D.N.Y. 1992) ("[W]hile there is some dispute as to who prepared the false certifications, there is no dispute that Zan presented them to the Government 'to get a false or fraudulent claim paid or approved.' Imposing the civil penalty against Zan eight times, for each false certification . . . presented, penalizes Zan solely for *its own wrongful acts*, as *Bornstein* enunciates.").

30. 157 F.2d 126 (3d Cir. 1946).

31. *Id.* at 130–31 (limiting award to 16 forfeitures, the number of subcontracts between defendant and prime contractor for the Navy, even though defendants engaged in separate collusive bidding process for each of 90 underlying purchase orders).

32. 423 U.S. at 311, 96 S. Ct. at 528–29.

33. 423 U.S. at 311, 96 S. Ct. at 529.

Numerous courts, both before and after *Bornstein*, have similarly rejected defendants' suggestions of a "one per contract" or "one per project" approach to counting penalties, and have instead based the number of penalties on the number of invoices, vouchers, bills, or purchase orders submitted to the Government.

- 22 penalties awarded for 21 false payment vouchers and 1 claim for additional compensation failing to disclose prohibited business relationship which were presented to Small Business Administration, not just one penalty for the one contract involved[34]

- 14 penalties awarded for each of 14 false purchase orders based on collusive bidding which were submitted to HUD for residential repair work, not just one penalty for each "project" or "house" involved[35]

- 54 penalties awarded against subcontractor for 33 invoices submitted to Air Force by one prime contractor and 21 invoices submitted to Air Force by another prime contractor for work on airplane parts contract, not just two penalties for each of the two subcontracts[36]

III. LOWER COURT DECISIONS SUGGEST FURTHER RULES GOVERNING NUMBER OF PENALTIES

A. One Penalty For Each Separate Conspiracy

Lower court opinions also suggest several principles governing how to calculate the number of penalties under the Act with respect to issues left undecided by *Hess* and *Bornstein*. For example, where one or more conspiracies have been proved under the Act,[37] lower courts have imposed one penalty for each separate conspiracy, in addition to any penalties assessed for the underlying submission of false claims. Examples of penalties assessed in cases involving conspiracies under the Act include:

- 4 forfeitures of $2,000 imposed—one for each of three false claims submitted to the Small Business Administration for the release of funds from an advance payment account, and one for conspiracy to submit such false claims[38]

34. Ab-Tech Construction, Inc. v. United States, 31 Fed. Cl. 429, 435 (1994) ("[E]ach separate submission seeking payment from the Government is a claim for purposes of the False Claims Act, even when such submissions are made pursuant to one overall contract.") (citations omitted), aff'd, 57 F.3d 1084 (Fed. Cir. 1995).

35. Brown v. United States, 524 F.2d 693, 705–06 (Ct. Cl. 1976) ("Plaintiff was paid by HUD, not for each house he worked on, but for each purchase order submitted for processing. Therefore, each purchase order must be regarded as a separate claim . . . .").

36. United States v. Ueber, 299 F.2d 310, 313-14 (6th Cir. 1962) ("Plaintiff's complaint did not charge that the entering into subcontracts with Kaiser and Chase in any way violated § 231. . . . The vouchers submitted to the United States to obtain payments under such contracts made up the acts which offended the False Claims Act.").

37. 31 U.S.C. § 3729(a)(3) imposes liability on any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Similarly, the previous version of the Act imposed liability on anyone who "enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." 31 U.S.C. § 231.

38. United States v. Uzzell, 648 F. Supp. 1362, 1368 (D.D.C. 1986).

- 10 penalties of $7,000 imposed—one for each of eight false claims submitted to the Federal Crop Insurance Corporation and one for each of two separate conspiracies to submit such false claims[39]

- 4 penalties of $5,000 imposed—one for each of three false requests for payment submitted to EPA for asbestos abatement work that had not actually been done or did not involve asbestos and one for conspiracy to submit such false claims[40]

Assessing a separate penalty for each conspiracy in addition to any false claims accords with the construction and purpose of the Act. The Act separately prohibits both submitting false claims, 31 U.S.C. § 3729(a)(1), and conspiring to submit false claims, § 3729(a)(3), and thus either of these prohibited acts alone is sufficient to support the imposition of a penalty. It would be anomalous not to assess a separate penalty for a conspiracy just because the defendant had also submitted false claims.

B. No Penalty for False Records or Statements?

In another series of cases, lower courts have held that the number of penalties should be limited to the number of "claims" or "payment demands" submitted by the defendant, even when the defendant has also made separate false statements in support of those claims or demands.[41]

In short, although almost every case in the line of cases described below directly or indirectly relied on *Hess* in support of the conclusion that the number of penalties should not be tied to the number of false records and statements supporting a false claim or payment demand, the *Hess* case did not in fact address that issue. The penalties awarded in these cases were as follows:

39. Kelsoe v. Federal Crop Insurance Corp., 724 F. Supp. 448, 453–54 (E.D. Tex. 1988).

40. United States v. Peters, 927 F. Supp. 363 (D. Neb. 1996), aff'd, 110 F.3d 616 (8th Cir. 1997).

41. These cases are presented in chronological order to emphasize that each subsequent case relied upon and cited the previous cases, and that nearly every case either incorrectly cited, or relied upon another case which incorrectly cited, the holding in *United States ex rel. Marcus v. Hess*. The pattern started with *United States v. Rohleder*, *infra*, in which the Third Circuit suggested that the *Hess* Court had rejected the United States' position that the number of penalties should be based on the "many hundreds of false forms" submitted in connection with the 56 fraudulent contracts at issue in that *Hess*.

Whether the number of penalties should be based upon the "hundreds of false forms," however, was not addressed by the Supreme Court in *Hess*. To the contrary, the *Hess* Court explicitly noted that, although the United States had argued at the district court level that a separate forfeiture "should be exacted for every form submitted by respondents in the course of their enterprise," the United States was not appealing the district court's finding that only one forfeiture should be awarded for each separate P.W.A. project. *Hess*, 317 U.S. at 552, 63 S.Ct. at 388.

In *Bornstein*, the Supreme Court further clarified exactly what was and was not decided in *Hess*. In overruling the Third Circuit, the Court noted that in support of its decision at the appellate level, the Third Circuit had relied primarily on its previous holding in *Rohleder*, and that *Rohleder* purported to rely on *Hess*. *Bornstein*, 423 U.S. at 310, 96 S. Ct. at 528. The Court then pointed out that in *Hess*, "no party argued in this Court that more than 56 forfeitures should have been imposed. . . ." *Id.* The *Bornstein* Court also stated that the *Hess* Court had merely approved the 56 forfeitures awarded by the district court, which had explicitly found that "in each project there was a single, false, or fraudulent claim." *Id.* (quoting *Hess* district court opinion).

- 16 penalties awarded, not 106, where in connection with 16 subcontracts with Navy contractor, subcontractor submitted for approval 90 purchase orders which were the product of collusive bidding directed by subcontractor[42]

- 10 penalties awarded, not 140, where defendant submitted 10 monthly vouchers with 130 schedules attached; vouchers sought reimbursement for rental payments on vehicles, and attached schedules for each of the 130 vehicles "contained false statements as to the ownership and valuation of the vehicles"[43]

- 8 penalties awarded, where defendant submitted 8 payment vouchers, even though payment vouchers also had several false invoices attached which falsely described the misbranded regulators supplied[44]

- 10 penalties awarded, not 15, where defendant submitted 10 false payment applications, even though payment applications had five additional documents attached which the court had found to be fraudulent[45]

- 5 penalties awarded, not 16, where defendant submitted five consolidated billings, even though billings were supported by eleven invoices used to calculate billing amounts[46]

- number of penalties would be based upon number of leases referenced in monthly reports which falsely reported prices and amounts of oil taken under leases, no separate penalties would be assessed for individual false run tickets, tank strapping reports and meter prover reports which supported monthly reports[47]

Two additional cases relying on this same line of precedent held that the number of penalties should be limited to the number of forms or invoices presented, even if each form or invoices contained numerous individual fraudulent line items.[48]

Arguably, a rule has evolved from these lower court decisions: the number of penalties must be based only upon the number of false "claims" or "payment demands," and any additional false "records or statements" should be disregarded for purposes of

42. United States v. Rohleder, 157 F.2d 126, 130–31 (3d Cir. 1946) (citing *Hess*).

43. United States v. Grannis, 172 F.2d 507, 515–16 (4th Cir. 1949) (citing *Hess* and *Rohleder*).

44. United States v. National Wholesalers, 236 F.2d 944, 950–51 (9th Cir. 1956) (no cases cited).

45. United States v. Woodbury, 359 F.2d 370, 377–78 (9th Cir.1966) (citing *National Wholesalers*, *Grannis*, *Rohleder,* and *Hess*).

46. Miller v. United States, 550 F.2d 17, 23–24 (Ct. Cl. 1977) (citing *Woodbury* and *Bornstein*).

47. United States v. Koch Industries, Inc., 57 F. Supp. 2d 1122, 1124-27 (N.D. Okla. 1999) (citing *Hess* and *Bornstein*).

48. United States v. Krizek, 111 F.3d 938-40 (D.C. Cir. 1997) (citing *Bornstein*, *Hess*, *Grannis*, *Miller*, and *Woodbury*) (penalty award should be based upon each HCFA-1500 form submitted to Medicare, not on each individual false CPT code listed on the form, even though magistrate found that the CPT code, not the HCFA-1500, was the basic accounting unit used by the Government in paying claims); Cantrell v. New York University, 326 F. Supp. 2d 468, 469–70 (S.D.N.Y. 2004) (citing *Krizek*) (number of penalties would be calculated based on number of invoices submitted to Medicare, even though each invoice contained numerous individual "upcoded" items).

counting penalties.[49] Such a rule, however, ignores the plain language of the Act. Making false records or statement in support of a false claim is a separate and independent violation of the Act. The Act separately prohibits *both* "present[ing], or caus[ing] to be presented . . . a false or fraudulent claim," 31 U.S.C. § 3729(a)(1), *and* "mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved," § 3729(a)(2).[50] Committing either of these prohibited acts alone is sufficient to warrant imposition of a penalty (as is committing any one of the other enumerated prohibited acts). Where a defendant has both submitted false claims and created false statements or records in support of those claims, therefore, the number of penalties should be based upon both violations,[51] just as a separate penalty is assessed for each conspiracy in cases where a defendant has both submitted false claims and conspired to submit those claims.[52] To simply ignore the false statements and records for penalty purposes improperly fails to give effect to all of the provisions of the Act.

Moreover, a false claim supported by false documentation is likely more difficult, costly, and time-consuming to detect; assessing penalties for the additional violation of creating false records and statements therefore serves the Act's purpose to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government," and to "make the statute a more useful tool against fraud in modern times."[53] Assessing separate penalties for false records or statements made in support of false claims, rather than simply ignoring such violations of the Act for penalty purposes, is also in accord with the direction of the Supreme Court in *Bornstein* that "the focus in each case [must] be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures," and that the number of penalties should not simply be limited to the number of contracts or false claims at issue. The defendant who both submits false claims and also creates false records, statements or documents to support or conceal those claims has committed more acts in violation of the statute than the defendant who has only submitted a false claim. Likewise, the defendant who creates tens or hundreds of false documents in support of his false claims has committed more acts in violation of the statute than the defendant who has created only one or two false records or statements. In accordance with *Bornstein*, the number of penalties assessed should reflect the different acts committed by such de-

49. One court recently summarized the rule as follows: "[s]eparate penalties are to be assessed for each request for payment, rather than for each false statement." United States ex rel. Augustine v. Century Health Services, 136 F. Supp. 2d 876, 895 (M.D. Tenn. 2000) (20 penalties awarded, even though court explicitly found defendant liable for both 20 false claims and 22 false statements) (citing *Krizek*), aff'd, 289 F.3d 409 (6th Cir. 2002).

50. Likewise the previous version of the Act, although not divided into subsections, prohibited both presenting a false claim and making or using a "false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for purposes of getting a false claim paid or approved. 31 U.S.C. § 231.

51. Of course, additional penalties should be assessed for false records or statements only when the United States is pursuing a claim under § 3729(a)(2). It should be noted that it is not always clear from the opinions cited above whether or not the United States had separately alleged the making of false statements in addition to false claims, especially under the previous Act, where reference is usually just made to the entire section.

52. *See* Section III.A., *supra*.

53. S. Rep. No. 99-345, at 1–2 (July 28, 1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

fendants, and should not arbitrarily treat them identically, especially in contravention of the Act's plain statutory language.

The case of *United States v. Board of Education of the City of Union City*[54] provides a rare example of a court explicitly assessing separate penalties for violations of sections 3729(a)(1), (a)(2), and (a)(3). *Union City* involved a public school construction project. The court assessed sixteen separate penalties based upon: nine false "claims" under 3729(a)(1), such as false change orders and grant offers; six false "records or statements," under 3729(a)(2), namely five quarterly reports and one interim report; and one penalty for conspiring to defraud the United States, under 3729(a)(3). Unlike the cases discussed above, however, it appears that *Union City* did not involve a situation where one or many false claims were each supported by several "false records and statements." Instead, it is not clear what connection, if any, the quarterly and interim reports, *i.e.*, the "records and statements" for which the *Union City* court assessed penalties had to the false "claims" for which it assessed penalties. The "records and statements" appear to have been independent from the particular "claims" the Court found to be false. Thus, although Union City is noteworthy for recognizing that "[i]n determining the appropriate number of penalties, if any, that may be imposed against defendants, . . . each separate violation which occurred must be accounted for,"[55] it did not address the issue of whether separate penalties can be assessed for both a false claim and any "records or statements" made to get that same false claim paid.

The case of *United States ex rel. Virgin Islands Housing Authority v. Coastal General Construction Services Corp.*,[56] provides an example where a court properly assessed penalties based on ten false records or statements made in support of a single false claim, although it might have reached the right result for the wrong reason. In *Virgin Islands*, the court found the defendant liable under § 3729(a)(1) for submitting an arbitration demand containing false costs.[57] It also found the defendant liable under § 3729(a)(2) for making ten false statements in support of the arbitration demand.[58]

The Government argued that each false record or statement used to support the false arbitration claim warranted a separate penalty, while the defendant argued that there was "only one claim and not ten."[59] Although the court awarded ten penalties as requested by the Government, it is not clear whether it awarded these penalties based on the § 3729(a)(2) violation. The court titled its discussion of this issue "Penalties of $5,000 on William Koenig for *each* of the ten false records he used to support the Donoe claim,"[60] thus suggesting it was going to award the penalties based on the ten false records or statements submitted in violation of § 3729(a)(2). In the text however, the court, citing *Bornstein*, seemed to conclude that the number of penalties

54. 697 F. Supp. 167, 175–77 (D.N.J. 1988)

55. *Id.* at 174.

56. 299 F. Supp. 2d 483 (D.V.I. 2004).

57. *Id.* at 487.

58. *Id.* at 487–88.

59. *Id.* at 488.

60. *Id.*

had to be based upon the number of "false payment demands."[61] It held that the ten false subcontracting bills submitted in support of the one arbitration claim were each "false payment demands," and further stated that "there were ten fraudulent acts which caused [the arbitration] claim to be false." This language suggests that the court may have assessed the ten penalties in connection with the § 3729(a)(1) violation, either viewing the false subcontracting bills as separate false claims in their own right, or as having "caused" the submission of false claims.[62]

Whether the *Virgin Islands* court thought it was imposing ten penalties because there were ten false "claims" or ten false "records or statements," at least it did not fall into the trap of simply collapsing the ten false subcontracting bills into the single arbitration demand and awarding one penalty, as did the courts in the line of precedent discussed above. In fact, the *Virgin Islands* court did just the opposite: it correctly assessed ten penalties based on the ten false subcontracting bills, but then forgot to assess an additional penalty for the arbitration demand itself. An analysis that was truly faithful to both *Bornstein* and the language, structure and purposes of the Act would have yielded *eleven* penalties: one for the single arbitration demand which was a false "claim" under § 3729(a)(1), and ten additional penalties for the ten separate false statements made in support of the arbitration demand, which were separate false "records or statements" under § 3729(a)(2).

The ever-lengthening line of cases failing to assess separate penalties for false "records or statements" creates a loophole for those who have been found liable under the Act, one that Congress never intended. These cases are irreconcilable with the language and purposes of the Act, as well as established Supreme Court precedent. Courts should assess penalties for both false "claims" *and* false "records or statements" made in support of suchclaims, which plainly constitute separate and independent violations of the Act.

61. *Id.* at 488–89.

62. *Id.*