PENALTY POINTS, Part One

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This article is the first part of a three-part series examining the penalty provisions of the False Claims Act. Part One looks at how courts determine the dollar amount of a single penalty within the minimum to maximum statutory range. Part Two will examine how many penalties are awarded in a particular case and the factors bearing on that decision. Part Three will address constitutional issues associated with the imposition of penalties under the Act.

Why should we care about penalties under the False Claims Act? For starters, depending on the facts of the case, penalties may equal or even exceed, by far, the damages available under the Act. In some cases, penalties may be the only amounts recoverable. Accordingly, neither the Government nor a defendant can afford to ignore potential penalties when evaluating a case under the Act—penalties may be the whole ball of wax, or at least a big part of it. For taxpayers and policymakers interested in combating and deterring fraud against the United States Treasury, penalties are a critical component of the package of remedies available under the Act, especially where damages cannot be proved with sufficient certainty.

An award of penalties under the Act may be reduced or even eliminated if its imposition is found to violate the Constitution. Thus, potential constitutional issues can be an important defense or negotiating point for a defendant. Likewise, constitutional implications are an important strategic consideration for the Government in formulating a penalty request (*i.e.*, deciding how many penalties to seek and what amount to request per penalty). For relators, penalties are also of particular interest, because they count as part of the total recovery in determining the relator's share.

The total penalty awarded in a particular case is a function of three main elements: first, the amount of each individual penalty; second, how many penalties are imposed; and third, whether constitutional considerations require reduction or elimination of the total penalty that would otherwise apply. This article, Part One of three parts, will focus on the first element. It will review the Act's penalty provision, as well as other relevant statutory and regulatory provisions. Next, the article will set forth several general principles governing the award of penalties under the Act. Finally, it will discuss and comment on the factors relied upon by courts in determining the dollar amount per penalty in a particular case.

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I. THE FALSE CLAIMS ACT'S PENALTY PROVISION AND OTHER RELEVANT PROVISIONS

When the False Claims Act[1] (the Act) was originally signed into law in 1863, it provided for a penalty of $2,000 in addition to double damages.[2] Despite inflation and an exponential increase in government programs and government spending, the dollar amount of the penalty remained at its Civil War-era level for more than 120 years. In 1986, the Act was significantly amended in order 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."[3] In furtherance of these goals, the amendments included an increase from double to treble damages, as well as a long-overdue increase in the penalty amount.[4] Specifically, the Act as amended provided for a minimum penalty of $5,000 and a maximum penalty of $10,000.[5]

Unfortunately for False Claims Act violators, Congress decided not to let another century slide by before the next increase in the Act's penalties. In the 1990s, Congress passed and later amended the Federal Civil Penalties Inflation Adjustment Act of 1990,[6] requiring federal agency heads to make periodic inflationary increases to the dollar amount of civil monetary penalties within their agency's purview, including the False Claims Act.[7] The first such inflationary adjustment was required to be made by October 23, 1996; however, the Department of Justice did not increase the Act's penalties until September 29, 1999.[8] At that time, the minimum and maximum penalties were increased to $5,500 and $11,000, respectively.[9] Although inflationary adjustments are required to be made every four years,[10] no further adjustment has been made to the penalty amounts since 1999, and thus the $5,500–$11,000 range remains applicable at this time.

1. 31 U.S.C. §§ 3729, *et seq.*

2. *See* Rev. Stat. § 3490 ("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, and, in addition, double the amount of damages which the United States may have sustained . . . .") (codified at 31 U.S.C. § 231); *see also* Pub. L. 97-258, 96 Stat. 877 (1982) (re-codifying the Act at 31 U.S.C. §§ 3729, *et seq.*).

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

4. *See* S. Rep. at 17, 1986 U.S.C.C.A.N. at 5282 (noting that the penalty amount had remained unchanged since the initial enactment of the Act in 1863).

5. 31 U.S.C. § 3729(a) ("Any person who . . . [commits one of the prohibited acts] is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus [treble damages] . . . .).

6. Pub. L. 101-410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (Penalties Inflation Adjustment Act).

7. *See* note following 28 U.S.C. § 2461 (setting out text of the Penalties Inflation Adjustment Act).

8. *See* 64 Fed. Reg. 47099, 47099-100 (August 30, 1999).

9. *Id.* at 47104; 28 C.F.R. § 85.3(a)(9) (2005).

10. *See* Penalties Inflation Adjustment Act at § 4.

II. GENERAL PRINCIPLES GOVERNING THE AWARD OF PENALTIES UNDER THE ACT

A. Penalties are mandatory

As courts have interpreted and applied the Act over the years, certain general principles relevant to the assessment of penalties have emerged. Perhaps most importantly, the courts have been nearly unanimous in holding that the imposition of penalties is mandatory under the Act.[11] Indeed, the language of the statute makes clear that courts have no discretion to determine whether or not to award penalties, stating that "any person" who commits one of the enumerated acts "is liable" for an amount "not less than" the minimum statutory penalty.[12] Moreover, the courts' interpretation is clearly in accord with the legislative intent that, "The imposition of this forfeiture is automatic and mandatory for each claim which is found to be false."[13] The only exceptions to the mandatory imposition of penalties are voluntary self-disclosure[14] (which is outside the scope of this article) and constitutional considerations[15] (which will be discussed in Part Three).

In fact, it appears that only one reported case, *Peterson v. Richardson*,[16] has held that a court has discretion to assess less than one penalty per violation of the Act, at least in the absence of the Government's consent. Even in the *Peterson* case, it is somewhat unclear whether or not the Government consented to the court's reduction in

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11. *See, e.g.*, United States v. Killough, 848 F.2d 1523, 1533 (11th Cir. 1988) ("[I]mposition of forfeitures under the Act is not discretionary, but is mandatory for each claim found to be false.") (citations omitted); United States v. Diamond, 657 F. Supp. 1204, 1206 (S.D.N.Y. 1987) ("The Court ... cannot conclude from the statute or its legislative history that the Court has discretion to reduce either the number of claims upon which the forfeiture is sought or the amount of the forfeiture awards."); *see also* United States v. Hughes, 585 F.2d 284, 286 (7th Cir. 1978) (penalty provided under former 31 U.S.C. § 231 was mandatory).

12. 31 U.S.C. § 3729(a). *See also* United States ex rel. Smith v. Gilbert Realty Co., 840 F. Supp. 71, 72 (E.D. Mich. 1993) ("The key words are 'is liable' and 'not less than.' It seems plain that the Act requires a civil penalty each time the violation occurs.").

13. *See* S. Rep. No. 99-345 at 8 (discussing the 1986 amendments). *See also id.* at 17 ("The Committee reaffirms the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments.").

14. A defendant *might* be able to avoid the imposition of penalties by self-disclosing its false claims. Where a defendant makes such a disclosure in accordance with parameters set forth in the Act, "the court *may* assess *not less than* [double damages] . . . ." 31 U.S.C. § 3729(a) (emphasis added). *But see* United States ex rel. Falsetti v. Southern Bell Tel. and Tel. Co., 915 F. Supp. 308, 312 (N.D. Fla. 1996) (stating that "[b]y the omission of reference to the minimum mandatory $5,000 civil penalty, Congress meant that the exception would be a safe-haven for persons who uncover past violations and act promptly to disclose the same to Government investigators," thus suggesting that a qualifying self-disclosure would entirely preclude the imposition of penalties).

15. *See* United States v. Advance Tool Co., 902 F. Supp. 1011, 1018 (W.D. Mo. 1995), *aff'd*, 86 F.3d 1159 (8th Cir. 1996) (table) ("[T]he court rules that it lacks the discretion or inherent power under the FCA to award damages [including civil penalties] below the range set forth therein. However, in that civil penalties are indeed subject to constitutional restraints, this determination does not terminate the Court's inquiry as to the propriety of [the requested penalties] . . . .") (citation omitted).

16. In the case of *United States v. Greenberg*, 237 F. Supp. 439, 445 (S.D.N.Y. 1965), the Government apparently gave its consent for the court to award a number of penalties less than the number of false claims for which defendant had been found liable. Although the case involved 34 false claims, the Government offered three possible rationales for setting the number of penalties at 34, eight, or three, and asked that the court use its discretion in selecting one of the suggested approaches. The court awarded three forfeitures.

the number of penalties.[17] On defendant's appeal, the Fifth Circuit specifically noted that the Government had not filed a cross-appeal and thus could not be heard on the issue of penalties, and also stated that the Government had "tacitly" admitted that the district court had discretion to reduce the penalties.[18]

In any event, the district court in *Peterson*,[19] despite holding that the defendants had submitted 120 false claims, the court awarded only 50 penalties.[20] The court held that where double damages were only $31,606, the minimum $240,000 penalty award ($2,000 x 120) "would be unreasonable and not remotely related to both the actual losses and inexplicable damages incurred by the government."[21] To the extent *Peterson* can be read to suggest that, even in the absence of constitutional concerns, a court has discretion whether or not to award penalties, it has repeatedly been rejected by other courts.[22] Even defense counsel have admitted that arguments based on *Peterson* are "likely to fail in the face of the overwhelming case law to the contrary."[23] Thus, it is firmly established that the Act's penalties are mandatory.

B. Penalties must be awarded even when no damages can be proved

Likewise, it is beyond dispute that penalties must be awarded even where the Government has not proved any damages.[24] In fact, the imposition of penalties is especially appropriate in cases where the Government's injury cannot be quantified with the degree of certainty necessary to support a damage award. As the Supreme Court has recognized, the Government is injured by fraud, even where damages may be "difficult or impossible to ascertain."[25] The Act's penalty provision, like liquidated damages in

17. Peterson v. Weinberger, 370 F. Supp. 1259 (N.D. Tex. 1973), *aff'd*, 508 F.2d 45 (5th Cir. 1975).

18. 508 F.2d at 55.

19. 370 F. Supp. 1267.

20. *Id*.

21. 370 S. Supp. at 1267.

22. *See, e.g.*, *Killough*, *Diamond*, and *Advance Tool*, *supra*.

23. Michael Waldman, "Damage Control": A Defendant's Approach to the Damage and Penalty Provisions of the False Claims Act, 21 Pub. Cont. L.J. 131, 158 (Winter 1992); *see also* Gilbert Realty, 840 F. Supp. at 72 ("Defendants admit ... that the *Peterson* case is a lone wolf, and that no other case supports the proposition that the statute provides discretion to award less than the minimum $5,000 in civil penalties per violation."). Had the *Peterson* court relied upon constitutional considerations in reaching its decision, the case might have been correctly decided. *See* United States v. Halper, 490 U.S. 435, 450, 109 S.Ct. 1892, 1902 (1989) (citing *Peterson* for the proposition that, in a constitutional review of penalties imposed under the Act, the district court would properly have discretion to determine "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment"). Interestingly, although the *Peterson* court did not invoke the Double Jeopardy Clause, the Fifth Circuit's opinion does indicate that defendants had previously been prosecuted criminally in connection with the same conduct. *See* 508 F.2d at 47 and nn.. 3 & 4.

24. *See, e.g.*, United States ex rel. Bettis v. Odebrecht Contractors, 393 F.3d 1321, 1326 (D.C. Cir. 2005); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("No damages need be shown in order to recover the penalty."); *Advance Tool Co.*, 902 F. Supp. at 1017 ("[C]ivil penalties are recoverable under the FCA even in situations . . . where the United States has failed to show actual damages.").

25. Rex Trailer Co. v. United States, 350 U.S. 148, 153–54, 76 S. Ct. 219, 222 (1956) (where defendant misrepresented its eligibility to participate in veterans' program for purchase of surplus motor vehicles, Government was injured because defendant's conduct "precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation").

other contexts, performs the important function of providing some measure of recovery under these circumstances.[26]

The case of *Ab-Tech Construction, Inc. v. United States*,[27] provides an excellent example of this principle. In *Ab-Tech*, the contractor performed the work required under its contract, but had misrepresented its eligibility to participate in the Small Business Administration's 8(a) program, through which the contract was awarded. The court found that the Government did not suffer any recoverable damages, for it "got essentially what it paid for" in terms of contract performance.[28] Nevertheless, the Government was still injured in that, among other things, the defendant's misrepresentations caused the Government to pay out funds to a recipient it did not intend to benefit.[29]

As the court explained, such injuries are appropriately compensated by an award of penalties, which "are authorized by the False Claims Act to address the broad range of ancillary harms—harms apart from the fraud itself—that the Government may have suffered because of the deception practiced against it."[30] The penalties are intended to compensate the Government for the "costs of corruption."[31] Here, such costs included the added administrative burdens imposed on the Government agencies involved in looking into the contractor's conduct, the costs of the Department of Defense criminal investigation, grand jury investigation and criminal trial, and "most significantly, the societal cost associated with Ab-Tech's abuse of the section 8(a) program."[32] In recognition of the unquantifiable injuries sustained by the Government, the court set the penalty at the maximum $10,000 amount and awarded 22 penalties, for a total of $220,000. The court held that "even if the total amount demanded should exceed the Government's actual out-of-pocket costs, the figure would nevertheless be justified given that the Government is also due compensation for the very real, though largely unquantifiable, injury to the 8(a) program."[33]

Compensating the Government in cases involving such "unquantifiable" injuries is one of the most important functions of penalties under the Act, for in the absence of penalties, the Government would have no remedy at all. Thus, cases such as *Ab-Tech* illustrate why both parts of the "treble damages plus penalties" package of remedies are essential to fulfillment of the Act's purposes.

C. Courts have discretion to set the penalty amount within the statutory range

Although courts lack discretion to decide *whether* to assess a penalty for each violation of the Act, they do have discretion to determine *how much* of a penalty to impose.

26. *Id.*

27. 31 Fed. Cl. 429 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

28. *Id.* at 434.

29. *Id.* at 435.

30. *Id.* at 434–35.

31. *Id.* at 435 (quoting United States v. Halper, 490 U.S. 435, 450, 109 S. Ct. 1892, 1903 (1989)).

32. *Id.*

33. *Id.* at 435.

34. *See Hughes*, 585 F.2d at 286 (former 31 U.S.C. § 231 left the trial court "without discretion to alter the [$2,000] statutory amount").

Prior to 1986, courts were required to award a penalty of $2,000 for each violation of the Act.[34] The 1986 amendments, however, changed the penalty amount from a set sum to a range with a minimum and maximum dollar amount. Neither the amended statute itself nor the accompanying Senate Report provides any guidance as to the factors to be considered in determining where to fix the penalty in a given case. Accordingly, since 1986 courts possess discretion to determine the amount of the penalty within the statutory range.[35] Because discretion lies with the court, in the event of a jury trial, the court, not the jury, determines the number and amount of any penalties to be assessed.[36]

III. FACTORS BEARING ON THE AMOUNT OF PENALTY TO BE AWARDED IN A PARTICULAR CASE

A. Who knows?

In reviewing cases in which penalties were assessed under the Act, it is often impossible to determine what factors guided a court's discretion in determining the penalty amount. Several opinions decided shortly after the 1986 amendments simply announce the penalty amount, with little or no discussion. In the case of *Kelsoe v. Federal Crop Insurance Corporation*,[37] for example, the jury found that defendants had violated the Act by submitting false claims to the Federal Crop Insurance Corporation, and by entering into a conspiracy to submit those claims. The court awarded treble damages of $6,147 and three penalties against one pair of defendants, and treble damages of $63,600 and seven penalties against a second pair of defendants.[38] All of the penalties were set at $7,000, with the court providing no explanation whatsoever as to how it arrived at that amount.[39]

The court in the *Hill* case[40] was only slightly less laconic. That case involved false statements made in applications for federally guaranteed loans. The defendants had previously been criminally convicted for conspiring to file false statements, and the Government moved for summary judgment based on collateral estoppel.[41] In its complaint, the United States requested $30,000 in penalties, $10,000 on each of three counts.[42] In a lengthy summary judgment opinion, the court found the defendants liable under two counts of the complaint, awarding treble damages of $920,129 on

35. *See* United States v. Hill, 676 F. Supp. 1158, 1182 (N.D. Fla. 1987) ("The range in the amount of forfeitures [after the 1986 amendments] apparently reflects congressional intent to allow discretion in assessing forfeitures.").

36. *See* Cook County v. United States ex rel. Chandler, 538 U.S. 119, 132, 123 S. Ct. 1239, 1247 (2003). In fact, in order to avoid prejudicing the jury in their determination of (single) damages, plaintiffs are entitled to exclude from the jury any mention of the imposition of penalties. *See* United States v. Estate of Rogers, 2002 WL 32050124 at * 1 (E.D. Tenn. Jan. 16, 2002) (granting Government's motion *in limine*).

37. 724 F. Supp. 448 (E.D. Tex. 1988).

38. *Id.* at 454.

39. *Id.*

40. 676 F. Supp. 1158, 1182 (N.D. Fla. 1987)

41. 676 F. Supp. at 1161–62.

42. *Id.* at 1161.

one count and $767,416 on the other.[43] The court then held that the two defendants were jointly and severally liable for $10,000 in penalties (presumably awarding the statutory minimum of $5,000 for each of the two conspiracies proved).[44] As for where it came up with this amount, however, the court stated only that it was arrived at "[i]n view of the facts of this case."[45]

One reason for the *Kelsoe* and *Hill* courts' brevity on the topic of penalty amounts might have been that they were decided shortly after the 1986 amendments, when there was a lack of other judicial precedent to rely on. Even as more cases have appeared in this area, however, it remains relatively common for courts to assess penalties without articulating any reason for choosing a certain penalty amount.[46] Because they fail to identify any factors influencing the courts' exercise of discretion, these cases are of limited precedential value and provide little guidance to practitioners, except perhaps in a subsequent case involving very similar facts.

B. Nature of the defendant's conduct

Where courts have revealed their reasoning, the nature of the defendant's conduct giving rise to liability under the Act appears to be the most significant determining factor in arriving at a penalty amount. Conduct that is not unusually egregious may translate to a penalty in the lower part of the range, while more flagrant, clearly intentional violations warrant a penalty at or near the maximum. For example, in the case of *United States ex rel. Ervin and Assocs., Inc. v. Hamilton Securities Group, Inc.*,[47] the court explained that it was awarding the minimum penalty of $5,000 because liability was "predicated on a lesser degree of scienter—namely reckless disregard, rather than 'actual knowledge' or 'deliberate ignorance.'"[48] Similarly, in the case of *Lamb Engineering and Const. Co. v. United States*,[49] the court denied the Government's request for the maximum penalty and instead fixed the penalty at the $5,000 minimum.[50] Although the defendant construction contractor had submitted payment requests which falsely certified that its subcontractors had been paid, the court pointed out that "[t]he billings underlying the certification were not improper" and thus concluded that the facts were "not so egregious as to warrant the maximum."[51]

At the other end of the spectrum, in *UMC Electronics Co. v. United States*,[52] the court awarded the maximum penalty based on the fact that the defendant contractor

43. *Id.* at 1181–82.

44. *Id.* at 1182.

45. *Id.*

46. *See, e.g.*, Daff v. United States, 31 Fed. Cl. 682 (1994), *aff'd*, 78 F.3d 1566 (Fed. Cir. 1996) ($5,000); Pena v. United States Department of Agriculture, 811 F. Supp. 419 (E.D. Ark. 1992) ($5,000); United States v. Macomb Contracting Corp., 763 F. Supp. 272 (M.D. Tenn. 1990) ($10,000).

47. 370 F. Supp. 2d 18 (D.D.C. 2005).

48. *Id.* at 50.

49. 58 Fed. Cl. 106 (2003).

50. *Id.* at 112.

51. *Id.* at 112 n.4.

52. 43 Fed. Cl. 776 (1999), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001).

had knowingly attempted to charge the Government for costs it "knew it had not incurred and probably never will incur."[53] The contractor had included $223,500 worth of bogus costs in an equitable adjustment claim submitted to the Government after completion of the project.[54] Since the case involved only one false claim and the Government had not paid the claim, the Government did not seek treble damages, but only a single penalty.[55] The court found that, under the circumstances, the maximum penalty of $10,000 was warranted, describing it as a "modest amount."[56]

The case of *United States v. Bottini*,[57] likewise involved conduct which the court found to be "most opprobrious."[58] Specifically, the court found that the defendant had made two false applications for workers' compensation, claiming that he was injured on the job when he "did not in fact sustain any injury whatsoever as alleged in the [claim form]."[59] Despite its outrage at the defendant's behavior, the court chose not to award the maximum penalty, apparently finding it to be a mitigating factor that the defendant was married with two sons and "not wealthy."[60] The court split the difference and awarded two penalties of $7,500 each.[61] As *Bottini* illustrates, in addition to the defendant's conduct, courts may also consider the defendant's financial circumstances in determining an appropriate penalty amount.[62]

C. The government's costs of investigation and prosecution

Courts may also consider the Government's costs of detection, investigation and prosecution of the false claims action, and several courts have set the penalty amount at the minimum on the ground that the resulting total penalty would be sufficient to cover such costs. In *United States v. Stocker*,[63] for example, treble damages were $41,892. The court awarded 28 penalties of $5,000 each, for a total penalty of $140,000, holding

53. *Id.* at 821.

54. *Id.*

55. *Id.* at 820.

56. *Id.* at 821. *See also* Hays v. Hoffman, 325 F.3d 982, 993–94 (8th Cir. 2003) (on appeal of case involving false claims by nursing home to Medicaid, court reduced the number of false claims from 200 to 8, but allowed the maximum $10,000 penalty for each, "taking into account the district court's judgment that defendants engaged in serious misconduct"). *But see* United States v. Entin, 750 F. Supp. 512, 519–520 (S.D. Fl.. 1990) (in case involving misstatements made to obtain funds from Small Business Administration and treble damages of nearly $1.5 million, although court found that defendants' conduct was "calculated," "egregious," and "nothing short of an intentional looting of the Federal Treasury," court nevertheless awarded minimum $5,000 penalty with no discussion).

57. 19 F. Supp. 2d 632 (W.D. La. 1997), *aff'd*, 159 F.3d 1357 (5th Cir. 1998).

58. *Id.* at 641.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See also* United States v. Orrego, 2004 WL 1447954 *5 (E.D.N.Y. June 22, 2004) (where defendant prisoner filed false liens against judge, AUSA, and prison warden, court awarded $5,000 penalty based in part on the fact that defendant was "an inmate with limited resources").

63. 798 F. Supp. 531 (E.D. Wis. 1992).

that "this award should easily meet the Government's 'costs, delays and inconveniences occasioned by the fraudulent claims' in this case."[64]

There is no question that the Government's investigative and other costs are an appropriate factor for consideration in determining the penalty amount. As the Supreme Court has recognized, in cases under the Act, the Government's injury includes "not merely the amount of the fraud itself, but also ancillary costs, such as the costs of detection and investigation, that routinely attend the Government's efforts to root out deceptive practices directed at the public purse."[65] In addition, as will be discussed in Part Three of this article, where multiple proceedings raise the possibility of double jeopardy concerns, proof of the Government's investigative and other costs may be relevant to show that the penalty amount is not "punishment," but is meant to be compensatory or remedial.[66] For purposes of the current discussion, however, it is important to note that where there is only one, civil proceeding, double jeopardy is not at issue and penalties should not be limited to the Government's costs. As the Supreme Court acknowledged in *Halper*, "Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive."[67]

Because neither *Stocker* nor *Augustine* involved parallel criminal proceedings, double jeopardy concerns were not implicated. Under these circumstances, although there is no error in *considering* investigative and other costs as one factor in determining penalties, a court should not *limit* penalties to these amounts, and *Stocker* and *Augustine* should not be read to impose such limits.[68]

D. Whether plaintiff has provided reasons in support of a higher penalty

Finally, as a penalty "practice pointer," it is worth noting that, even though a court making a penalty determination is free to rely on anything already in the record from the liability phase, several courts have refused to award more than the minimum penalty unless the Government specifically articulates a reason for doing so.[69] The court in *United States v. Boutte* even went so far as to hold that unless the plaintiff presented

64. *Id.* at 535–36 (quoting United States v. Bornstein, 423 U.S. 303, 315, 93 S.C. 523, 531 (1976)); *see also* United States ex rel. Augustine v. Century Health Svcs., 136 F. Supp. 2d 876, 895 (M.D. Tenn. 2000) ("The court will impose a fine of $5,000 per false claim for a total of $100,000. This sum should sufficiently cover the Government's costs for investigating and prosecuting this action.") (citations omitted).

65. *Halper*, 490 U.S. at 445, 109 S. Ct. at 1900.

66. *See id.*

67. 490 U.S. at 450, 109 S.Ct. at 1903.

68. *See Ab-Tech*, 31 Fed. Cl. at 434–35 (penalty award was justified even if it exceeded Government's actual out-of-pocket costs because Government was also entitled to compensation for unquantifiable injuries caused by defendants fraud, such as "societal costs" and harm to the integrity of the defrauded Government program).

69. *See, e.g.*, Augustine, 136 F. Supp. 2d at 895 ("Although the Government requested the maximum civil penalty of $10,000 be imposed for each false claim, it did not present any basis for its request. The court will impose a fine of $5,000 per false claim ..."); United States v. Fiedler, 756 F. Supp. 688, 694 (E.D.N.Y. 1990) (although United States requested court to set penalties at $10,000, court awarded only $5,000 for each violation, finding that the government "has not presented any reason why the highest fine is appropriate"); cf. United States v. Stella Perez, 839 F. Supp. 92, 98 (D.P.R. 1993), rev'd on other grounds, United States v. Rivera, 55 F.3d 703 (1st Cir. 1995) (court awarded $1.86 million in treble damages (after credits) and $5,000 for each of the 20 false claims, saying only that it saw "no particular reason for awarding the higher amount").

"evidence" in support of a higher amount, the court was "only authorized to assess a $5,000 fine" for each violation.[70]

To the extent *Boutte* suggests that the imposition of any penalty amount above the minimum must be supported by some sort of additional "evidence" other than the evidence supporting liability, it appears to be wrongly decided. First, although the court cited *Fliegler*, that court's explanation for awarding the minimum penalty was that the Government did not provide any "reason" why the maximum fine was appropriate, i.e., an argument in support of the highest fine. The *Fliegler* court did not hold that additional "evidence" was required. Second, as described above, numerous courts have awarded penalties higher than the minimum based on the facts underlying the finding of liability, without requiring the plaintiff to submit additional "evidence." In any event, as these cases illustrate, the relator's counsel or Government trial attorney who seeks the imposition of a penalty greater than the minimum amount would be well advised to articulate specific reasons in support of its request.[71]

E. *Virgin Islands Housing Authority*

The case of *United States ex rel. Virgin Islands Housing Authority v. Coastal General Construction Services Corporation*[72] provides an excellent wrap-up to a discussion of penalty amounts, touching on nearly all of the points raised above.[73] First, unlike many courts, the *Virgin Islands* court provided a complete and cogent explanation of the factors bearing on its assessment of penalties. Likewise, the Government provided a detailed argument justifying its request for the maximum penalty amount, possibly learning from its earlier experiences where the minimum penalty was granted due to lack of support for such a request. The factors cited by the Government touched on both the defendant's conduct and the unquantifiable injuries recognized in cases such as *Ab-Tech*: the defendant's bad faith inflation of costs right before a planned arbitration of the dispute, the public policy goal of deterring fraud against the Government program at issue, and the fact that defendant had made numerous false statements in support of its false claim.

The court correctly noted that it had "broad discretion" in determining the appropriate penalty amount. It then went on to consider the Government's suggested factors, but also added a few factors of its own based on other relevant matters in the record before it. Although noting that the Government had sustained no actual damages, the court properly recognized that the lack of damages did not preclude assessment of a penalty. The court also considered the "ancillary costs" of fraud which have been recognized by the Supreme Court, such as expenses incurred in "detection, inves-

70. United States v. Boutte, 907 F. Supp. 239, 242 (E.D. Tex. 1995), *aff'd*, 108 F.3d 332 (5th Cir. 1997).

71. Of course, merely articulating a basis for a penalty request does not guarantee it will be granted, but at least it will not be denied for lack of trying. *See, e.g.*, Abdelkhalik v. United States, 1996 WL 41234 at * 7 (N.D. Ill. Jan. 30, 1996) (where Government argued that penalty should be $7,500 because food stamp trafficking in which defendant had engaged was the most serious offense under the food stamp regulations, court nevertheless awarded minimum $5,000 penalty because it felt that Government had not presented any "aggravating circumstances").

72. 299 F. Supp. 2d 483 (D.V.I. 2004).

73. *See id.* at 489–90.

tigation, and litigation," but noted that the Government had not presented evidence of such costs. Finally, the court took into consideration that the defendant had already been incarcerated for the same conduct, and that, in connection with defendant's incarceration, the court had waived various fines and costs "due to [defendant's] inability to pay such costs." After "balancing" all of these factors, the court concluded that the minimum penalty was appropriate, and thus awarded $5,000 for each of the ten false claims submitted by the defendant.

In sum, the opinion in *Virgin Islands,* with its careful consideration and weighing of all the relevant factors, illustrates the opposite approach from opinions which simply announce a penalty amount without a word of explanation. If courts making future penalty determinations will align themselves closer to the *Virgin Islands* end of the spectrum, then practitioners and other interested parties will be able to increase their understanding of the factors influencing a court's discretion in determining the dollar amount of penalties imposed under the Act.