

## OVERVIEW OF DAMAGES UNDER THE FALSE CLAIMS ACT

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The False Claims Act ("FCA" or "the Act") provides that a person who violates the Act "is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . ." 31 U.S.C. § 3729(a).<sup>1</sup>

### A. CALCULATING SINGLE DAMAGES

The measure of single damages (subject to trebling under the Act) is generally the amount of additional money the United States had to pay as a result of the false statement or claim. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States v. Woodbury*, 359 F.2d 370, 379 (9<sup>th</sup> Cir. 1966). But the precise method of determining the amount of the Government's overpayment varies depending on the type of case.<sup>2</sup>

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1 Proof of damages is not required for liability under the Act. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 n.7 (4<sup>th</sup> Cir. 1999); *United States v. Advance Tool Co.*, 902 F. Supp. 1011, 1018 (W.D. Mo 1995); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 1017, 1047-1049 (S.D. Tex. 1998).

2 "No single rule can be, or should be, stated for the determination of damages under the Act . . . . Fraudulent interference with the government's activities damages the government in numerous ways that vary from case to case. Accordingly, the committee believes that the courts should remain free to fashion measures of damages on a case by case basis. The Committee intends that the courts should be guided only by the principles that the United States' damages should be liberally measured to effectuate the remedial purposes of the Act, and that the United States should be afforded a full and complete recovery of all its damages." S.Rep. No. 615, 96th Cong., 2d Sess. at 4.

## 1. Overbilling/Failure to Deliver

A common type of False Claims Act case involves overbilling by a contractor for goods or services provided to the Government. In such cases, the measure of damages is relatively straightforward. Courts have simply looked at the additional amount paid beyond what should have been paid for the products or services provided (an "out-of-pocket" type analysis) to determine the Government's damages. See e.g. *United States v. Halper*, 490 U.S. 435 (1989) (in case where doctor upcoded charges for office visits by patients, measure of damages the additional amount billed beyond the amount properly due for the services rendered); *United States v. Grannis*, 172 F.2d 507 (4<sup>th</sup> Cir. 1949) (false costs included in invoice on cost-plus contract the measure of damages).

## 2. Substandard Products

In *United States v. Bornstein*, 423 U.S. 303 (1976), the Court endorsed the benefit-of-the-bargain rule as one possible method of calculating damages in the context of substandard products sold to the Government. The defendant in *Bornstein* was a subcontractor who supplied substandard radio tubes, which were then included in radios sold to the Government. The Supreme Court held that "[t]he Government's actual damages are equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality." *Id.* at 317 n.13.

Cases interpreting *Bornstein's* benefit-of-the-bargain rule have held the difference in value can amount to as much as the full contract value or even the replacement cost of the product in question.

In *United States v. Aerodex*, 469 F.2d 1003 (5<sup>th</sup> Cir. 1973), the measure of damages was the full amount of the contract. The defendant in *Aerodex* had delivered falsely denominated aircraft engine bearings to the Navy. Upon discovering the problem, the Government removed and replaced the bearings with the correct bearings. The Fifth Circuit thus awarded the total contract price of \$27,000 as damages, holding that "[t]he Government paid \$27,000 for bearings it did

not receive." *Id.* at 1011. The market value of the falsely labeled bearings was implicitly assumed to be zero.

In *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6<sup>th</sup> Cir. 2002), the benefit-of-the-bargain (or diminution-in-value) rule was effectively interpreted to permit recovery of replacement costs. In *Roby*, a subcontractor delivered a defective gear to defendant Boeing, which included the part in a helicopter delivered to the Army, and the helicopter subsequently crashed. Boeing argued that it should only be liable for the value of the defective gear or, at most, the \$4.1 million it was paid by the Government for the helicopter. *Id.* at 646. The Sixth Circuit disagreed, noting that the part was "flight critical." *Id.* at 647. In this context, the Government's damages equaled "the difference between the market value of [the helicopter] as received (zero) and as promised." *Id.* at 648. While the Government was not entitled to damages based on the value of a new helicopter, it was entitled to the value of a remanufactured helicopter that met contract specifications.<sup>3</sup>

A similar result obtained in *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357 (Fed. Cir. 1998). In *Commercial*, the defendant constructed a flood canal that was substantially defective, but it was not possible to determine the actual loss in value of the product supplied. In this context, the Court held that the Government could recover the replacement cost of the channel, so long as it could establish the defective work undermined the channel's structural integrity or the cost of repair was "not clearly disproportionate to the probable loss in value caused by the defects in question." *Id.* at 1373.

### **3. Failure to Test**

When the fraud at issue involves a failure to test, the measure of damages can range from zero to replacement cost, depending on the facts of the case.

In *United States v. Collyer Insulated Wire Co.*, 94

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<sup>3</sup> The court noted that the crash of the helicopter and its contents caused a loss of "at least \$10 million." *Id.* at 640.

F. Supp. 493, 496 (D.R.I. 1950), the defendant delivered wire to the United States that had not been tested to the proper specifications, and 51% did not, in fact, meet specifications. *Id.* at 498. The government used the wire, however, and "there were no complaints relative to the cable." *Id.* at 498. In this context, the court awarded only nominal damages.<sup>4</sup>

In *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6<sup>th</sup> Cir. 1998), the defendants failed to perform tests of brake shoe kits delivered to the Army. Subsequent testing by the Government indicated that more than 60% of the kits did not meet contract specifications. *Id.* at 302. In light of these facts, in combination with the Government's decision not to use the brake shoes after discovering the lack of testing, the court deemed the brake shoe kits valueless and awarded the full contract amount as single damages. *Id.* at 304-305.

In *BMV-Combat Systems v. United States*, 44 Fed. Cl. 141 (1998), the defendant failed to perform adequate tests on mounting brackets for howitzers delivered to the Army. The damages awarded by the court included costs of inspection and repair, costs of having replacement brackets manufactured as a precautionary measure, and interest on progress payments for howitzers whose brackets had not been inspected. *Id.* at 148-150.

#### **4. False Certification of Entitlement to Payment**

When false statements are made to qualify for program payments (e.g., loan guarantees, unemployment insurance, etc.), the measure of damages is "the amount that [the United States] paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." *United States v. Woodbury*, 359 F.2d 370, 379 (9<sup>th</sup> Cir. 1966). Cases applying this standard, however, have varied between those applying a "but for" theory of damages and those requiring more direct causation between the fraud and the Government's damages.

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<sup>4</sup> Notably, \$210,000 in penalties also were awarded. *Id.*

For example, in *United States v. Ekelman & Associates, Inc.*, 532 F.2d 545 (6<sup>th</sup> Cir. 1976), the Court applied the "but for" standard to a case involving false statements regarding creditworthiness on a loan application to obtain loan guarantees. The measure of damages applied by the Court included the guarantee amount along with the costs of maintaining and repairing the defaulted property until resold. *Id.* at 551.

By contrast, in *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977), the defendant falsely represented to the Government that certain real property serving as collateral for an SBA-guaranteed loan met the Federal Housing Administration standards for plumbing, heating and electrical systems. The loan later went into default due to the financial condition of the mortgagor. The court measured damages by the difference between the true value of the collateral and the value of the collateral as represented on the loan application. The court did not award the full guarantee payment as damages. The explanation given by the court was that "the same loss would have been suffered by the government had the certifications been accurate and truthful." *Id.*

In *United States v. First National Bank of Cicero*, 957 F.2d 1362 (7<sup>th</sup> cir. 1992), however, the Seventh Circuit Court of Appeals specifically rejected the Third Circuit's reasoning in *Hibbs*. In the Seventh Circuit's view, the Third Circuit's assumption that "the same loss would have been suffered" if the representations had been truthful was simply incorrect. *Id.* at 1374 n. 12 (quoting *United States v. Hill*, 676 F. Supp. 1158, 1162 (N.D. Fla. 1987)). The district court's unchallenged holding in *Hibbs* was that the Government would not have insured the mortgage had it not been for the false certifications. *Id.* If the representations had been accurate, the Government, in reality, "would not have lost any money." *Id.* See also *United States v. TDC Mgmt. Corp., Inc.*, 288 F.3d 421, 428 (D.C. Cir. 2002) (upholding the district court's use of a "but for" measure of damages).

## **5. False Progress Reports**

Defendants frequently contend that the only damage to the United States in premature progress payment

cases is the time value of money. At least one circuit, however, disagrees. In *Young-Montenay, Inc. v. United States*, 15 F.3d 1040 (Fed. Cir. 1994), the defendant made false statements in order to accelerate payments before they would otherwise have been due under the contract. The Federal Circuit held that the measure of single damages was the amount paid prematurely, since "the government was denied the use of the overpaid money" and since, because of the overpayment, "the contractor had less incentive to complete the project in a timely or satisfactory manner." *Id.* at 1043 n.3. *But see United States v. American Precision Products Corp.*, 115 F. Supp. 823, 828 (D.N.J. 1953) (holding government does not suffer damage if it ultimately receives the item for which it has paid; time value of money not considered).

## **6. Bid-rigging**

The "measure of damages under the False Claims Act in cases involving collusive bidding is the difference between what the Government actually paid out to the contractor and what it would have paid for the same work in the competitive market." *United States v. Cripps*, 460 F. Supp. 969, 976 (E.D. Mich. 1978) (competitive price based on actual cost and not including defendant's profit margin); *Brown v. United States*, 524 F.2d 693, 706 (Ct. Cl. 1975) (competitive price determined by taking contractor's actual cost and adding a profit margin). *See also United States ex rel. Marcus v. Hess*, 41 F. Supp. 197, 216 (W.D. Pa. 1941), *rev's* 127 F.2d 233 (3d Cir. 1942), *reinstated and aff'd*, 317 U.S. 537 (1943) (in bid-rigging case, evidence admitted regarding the difference in price between fraudulent bids and fair competitive bids; contractor's actual costs deemed irrelevant).

## **7. Defective Pricing**

Many government contracts are sole-source contracts that require the government to determine the price of the contract based on the contractor's own cost and pricing information. The Truth in Negotiations Act ("TINA"), 10 U.S.C. 2306a, governs such contracts. Some of TINA's features have been applied to False Claims Act cases, including, most notably, TINA's "rebuttable presumption that the Government is damaged dollar for dollar by the non-

disclosed amount once non-disclosure is shown." See *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1333 (4<sup>th</sup> Cir. 1989) (undisclosed volume discount assumed to have full impact). The burden is then on the contractor to show "nonreliance on behalf of the Government in order to rebut the natural and probable consequences of the existence of the nondisclosed or inaccurate data." *Sylvania Elec. Products, Inc. v. United States*, 479 F.2d 1342, 1349 (Ct. Cl. 1973).

Multiple Award Schedule contracts awarded by the General Services Administration (for purchases by government agencies of commercially available products) similarly require the submission of pricing information by contractors, for the purpose of insuring that the Government is being given the best available price by the contractor. The measure of damages in such cases is generally the difference between the amount paid by the Government and the amount it would have paid had it been charged the supplier's lowest commercial price. See generally *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1266 (1<sup>st</sup> Cir. 1992).

## **8. Kickbacks**

In *United States v. Killough*, 848 F.2d 1523 (11<sup>th</sup> Cir. 1988), the defendant paid kickbacks to state officials in charge of administering federal funds. The kickbacks paid totaled \$577,000, and the jury awarded \$633,000 in the case. "The government introduced the inflated invoices into evidence, as well as testimony from other contractors who were willing to do the work for less money and expert testimony on the fair market value . . ." *Id.* at 1531. The court determined that "[a]llthough [the amount of the kickback] was neither a floor nor a conclusive presumption of the measure of damages, it was relevant as circumstantial evidence." *Id.* at 1532. "Taken together, this was more than sufficient evidence from which the jury could have determined damages attributable to the defendants." *Id.* at 1531. The court rejected the argument that the Government had suffered no damages simply because honest contractors had submitted higher bids than the collusive contractors. *Id.* at 1532; see also *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 1017, 1047-1049 (S.D. Tex. 1998) (in case

involving payment of kickbacks by one medical provider to another where financial impact on government unclear, conduct may still be actionable; "pecuniary damage to the public fisc is no longer required for an actionable claim under the FCA").

## **9. Extrapolation Cases**

In some FCA cases (often involving the Medicare program), the amount of damages is difficult or impossible to ascertain and prove simply as a consequence of the number of false claims submitted by the defendants in connection with a particular scheme. Courts have permitted proof of damages in such cases through the use of statistical sampling. See e.g. *United States v. Cabrera Diaz*, 106 F. Supp.2d 234 (D.P.R. 2000); see also *United States v. Krizek*, 192 F.3d 1024 (D.C. Cir. 1999); *Brooks v. Department of Agriculture*, 841 F. Supp. 833 (N.D. Ill. 1994).

In the related area of Medicare overpayment cases, courts have similarly permitted proof of damages through statistical extrapolation. See *Ratanasen v. State of California*, 11 F.3d 1467 (9th Cir. 1993) (rejecting due process challenges to the use of statistical extrapolation); *Yorktown Medical Laboratory, Inc. v. Perales*, 948 F.2d 84, 89-90 (2d Cir. 1991) (same); *Chaves County Home Health Service v. Sullivan*, 931 F.2d 914 (D.C.Cir. 1991), cert. denied, 502 U.S. 1091, 112 S.Ct. 1160, 117 L.Ed.2d 408 (1992) (upheld HHS' disallowance of claims based on extrapolations from audits from a random selection of Medicare claims); *Illinois Physicians Union v. Miller*, 675 F.2d 151, 155 (7th Cir. 1982) ("the use of statistical samples had been recognized as a valid basis for findings of fact in the context of Medicaid reimbursement").

## **10. Consequential Damages**

Courts have generally held that consequential damages are not, per se, recoverable under the False Claims Act. See *United States v. Aerodex*, 469 F.2d 1003 (5<sup>th</sup> cir. 1972); *BMV-Combat Systems v. United States*, 44 Fed. Cl. 141, 147 (1998). There is, however, some debate over the definition of consequential damages, and there are exceptions to the general rule in cases where it is not possible for the



Government to prove the exact amount of its damages.

In *United States v. Ekelman & Associates, Inc.*, 532 F.2d 545, 550 (6<sup>th</sup> Cir. 1976), the Sixth Circuit held that allowable damages recoverable under the Act include those that "naturally and proximately flow from the 'act' of filing a fraudulent claim under the Act."

As the district court put it in *United States ex rel. Roby v. Boeing Co.*, 79 F. Supp. 2d 877, 894 (S.D. Ohio 1999), the issue "boils down to one of causation, specifically, proximate causation." While acknowledging that consequential damages are not recoverable under the Act, the court held that "if the Government and relator present sufficient evidence that the damages sought are of a direct, proximate, and foreseeable nature, then those damages may be available to the Government and Relator under a FCA theory of recovery." *Id.* at 895. The court also noted the availability of damages for "incidental or maintenance" costs resulting from a fraud, as distinguished from "consequential damages." *Id.* All these issues were held to be questions of fact. *Id.*

On appeal, the Sixth Circuit upheld the district court decision, observing that the amount "wrongfully paid" was the amount paid in response to Boeing's entire claim for payment, not just the amount paid for the defective gear. *United States ex rel Roby v. Boeing*, 302 F.3d 637, 646-647 (6<sup>th</sup> Cir. 2002). The contract amount, however, was not the measure of damages.<sup>5</sup> The court held the Government's damages equaled "the difference between the market value of [the helicopter] as received (zero) and as promised." *Id.* at 648. While the Government was not entitled to damages based on the value of a new helicopter, it was entitled to the value of a remanufactured helicopter that met contract specifications. *Id.* See also *United States v. Woodbury*, 359 F.2d 370, 379 9th Cir. 1966) (government's damages included "money spent by its

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5 The court distinguished *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 305 (6<sup>th</sup> Cir. 1998), which awarded the contract amount as damages, based on the fact that the Government "apparently did not claim that its full or actual damages were more than the contract price in *Compton* . . . ."

employees in straightening out the mess [caused by the false claims] and in protecting its interest thereafter"); *United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545, 550-51 (6th Cir. 1976) (Government permitted to recover not only the guarantee amount but also the reasonable expenses incurred in preserving the properties that served as collateral for the loans).

In those cases where it is not possible for the Government to quantify its damages, consequential damages are explicitly permissible. In such cases, the "replacement costs" or the "cost of remedying defects" may be used if those costs are "not clearly disproportionate to the probable loss in value caused by the defects in question." *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1372-1373 (Fed. Cir. 1998). "The cost of remedying defects is not regarded as disproportionate if the defects significantly affect the integrity of a structure being built. In that setting, the injured party is entitled to recover the cost of remedying the defects despite the fact that the cost may be very high." *Id.* at 1372. See also *Daff v. United States*, 78 F.3d 1566 (Fed. Cir. 1996) (costs incurred in testing and repairing included in single damage calculation); *BMV-Combat Systems v. United States*, 44 Fed. Cl. 141 (1998) (costs of replacement parts, inspection and replacement and some interest included in single damages).

## **B. LIMITS ON PENALTIES AND DAMAGES**

The statutory language on damages and penalties under the FCA is mandatory. It states that any person who violates the False Claims Act "is liable" for the damages and penalties specified therein. 31 U.S.C. § 3729(a). Violations of the FCA occurring after September 29, 1999 are subject to increased penalties of between \$5,500 and \$11,000. See 28 U.S.C.A. § 2461 note (2002); 28 C.F.R. § 85.3(9) (2000).

In general, the number of penalties under the Act is limited to the number of demands for payment by the Government. See *United States v. Bornstein*, 423 U.S. 303, 309 n. 4 (1976); *United State v. Woodbury*, 359 F.2d 370 (9<sup>th</sup> Cir. 1966). But see *United States v. Zan Machine*, 803 F. Supp. 620, 624 (E.D.N.Y. 1992) (penalties assessed based on the number of false records).

In cases where defendants are conducting business indirectly with the Government, the number of penalties may be determined by the number of fraudulent acts by the defendant, which may or may not necessarily coincide with the number of resultant payment demands on the Government by the company conducting business directly with the Government. See *Bornstein*, 423 U.S. at 313 (penalties assessed against subcontractor based on number of deliveries by subcontractor; not based on number of claims made against the Government by the prime contractor).

### **1. Constitutional Limits on Penalties**

In cases involving large numbers of claims, constitutional limits have sometimes been placed on the number of available penalties.

#### **a. Double Jeopardy Clause**

Historically, the only constitutional limit on penalties was derived from the Double Jeopardy Clause. In *United States v. Halper*, 490 U.S. 435 (1989), the Supreme Court reasoned that, in cases where the defendant had a prior criminal conviction, a large penalty award under the FCA could effectively amount to punishment and thus violate the Double Jeopardy Clause.

In *Hudson v. United States*, 522 U.S. 93 (1997), however, the Supreme Court reconsidered *Halper* and rejected its "punitive versus non-punitive" framework for evaluating penalties. The issue was whether they were criminal or civil. The Court concluded that civil penalties could only be considered criminal in effect if Congress intended them to be so, or the "clearest proof" demonstrated they were "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Id.* (internal citation omitted). Civil False Claims Act penalties would plainly never meet the foregoing standard and thus cannot present a basis for a Double Jeopardy violation. Notably, however, the Court also noted that "the Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational," and "the Eighth Amendment protects against excessive civil fines, including forfeitures." *Id.* at 103. This observation presaged the Court's subsequent

analysis of these same issues.

**b. Excessive Fines Clause**

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *U.S. Const., Amdt. 8.*

In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Supreme Court applied the Excessive Fines clause for the first time, in a case involving a forfeiture for failure to report currency. The Court examined two issues in determining whether the sanction violated the Excessive Fines Clause: First, the Court examined whether the forfeiture was punitive, then, upon concluding that it was, evaluated whether the forfeiture was excessive. On the latter issue, the Court held "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the offense it is designed to punish." *Id.* at 322.

Four factors were relevant to the Court in evaluating the gravity of the defendant's offense: (1) the severity of the violation; (2) whether the crime was related to any other illegal activities, (3) the maximum criminal penalty the defendant might have faced, and (4) the harm caused by the violation. *Bajakajian*, 524 U.S. at 337-40.

Subsequent to *Bajakajian*, the Ninth Circuit held in *United States v. Mackby*, 339 F.3d 1013 (9<sup>th</sup> Cir. 2003) that an award of \$174,454.92 in treble damages and \$550,000 in penalties was not excessive under the Eighth Amendment. While the court did not consider the *Bajakajian* factors a "rigid set of factors," it did reference them in its decision. *Id.* at 1017.

The Court of Appeal first pointed to the fact that, unlike the defendant in *Bajakajian*, Mackby was "among the class of people targeted by the Act." Also, while Mackby was assessed \$550,000 in penalties, he had committed a total of 8499 violations of the Act. *Id.* at 1018.

In comparing the penalties and damages awarded against Mackby to the potential criminal sanction for

the conduct, the court observed that the criminal sanction could conceivably have been worse - several years of jail time and restitution for the full amount of the fraud. *Id.* Also relevant was the fact that the defendant's conduct - falsely representing himself as a licensed medical provider - harmed the Government, both in the form of monetary damages and harm to the administration and integrity of Medicare. *Id.* at 1018-1019.

Lastly, the Court noted that "some part of the judgment against Mackby [was] remedial." *Id.* Relying on *United States v. Bornstein*, 423 U.S. 303, 314 (1976), the Ninth Circuit observed that the pre-amendment version of the Act - which called for double damages and \$2,000 in penalties per false claim - had been deemed "largely remedial" by the Supreme Court. *Id.* at 1019. Accordingly, it held that "at least some portion of the award that was over and above the amount of money actually paid out by the government was similarly remedial." *Id.* In the end, the Court of Appeals thus upheld the award of penalties equal to 9.5 times the amount of single damages. See also *United States v. Byrd*, 100 F. Supp. 2d 342 (E.D. N.C. 2000) (in case with \$85,012 in damages, court awarded \$1.3 million in penalties -- more than 15 times single damages); *U.S. v. Advance Tool Co.*, 902 F. Supp. 1011, 1018 (W.D. Mo 1995) (court awarded \$365,000 in penalties in case with zero damages and \$3,430,000 in possible penalties available); *Hays v. Hoffman*, 325 F.3d 982, 993-994 (8<sup>th</sup> Cir. 2003) (\$1.68 million in penalties reduced to \$80,000 in case involving \$6,000 overcharge; while Excessive Fines Clause not the basis relied upon for the reduction, court noted district court's decision was "laced with Excessive Fines Clause implications").<sup>6</sup>

### C. TREBLE DAMAGES

No case has ever held that treble damages under

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<sup>6</sup> As of this date, no court has applied the Due Process clause to limit the award of penalties under the False Claims Act. *But see State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 410 (2003) ("in practice, few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process").

the FCA violate the U.S. Constitution. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000), the Supreme Court described treble damages under the False Claims Act as "essentially punitive in nature." In *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003), however, the Court clarified its statement in *Stevens*, observing that "treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives." The Court thus held that the FCA's treble damages provision "certainly does not equate with classic punitive damages." *Id.* at 132. See also *United States v. Mackby*, 261 F.3d 821 (9<sup>th</sup> Cir. 2001) (treble damages in combination with large penalty awards may potentially be limited by the Eighth Amendment's prohibition against excessive fines and penalties).

#### **1. Calculating Treble Damages - Credits**

After a payment has been made on a false claim, defendants will sometimes reimburse the falsely claimed amount or the government will otherwise mitigate its damages. In such cases, treble damages are still calculated in the same fashion (i.e., based on the damage resulting from the initial false claim) and the amount recovered by the Government is simply credited against the trebled amount. See *United States v. Ekelman Associates, Inc.*, 532 F.2d 545, 550 (6<sup>th</sup> Cir. 1976).

#### **D. VOLUNTARY DISCLOSURE**

A defendant's exposure for damages under the Act may be limited to double damages plus costs under the following circumstances:

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with

any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

31 U.S.C. § 3729(a).

**E. INDEMNIFICATION**

Cross-complaints by defendants seeking indemnification or contribution by relators are generally disfavored. In *Mortgages, Inc. v. United States District Court*, 934 F.2d 209, 212 (9<sup>th</sup> Cir. 1991), the Ninth Circuit reversed a district court decision permitting the defendants to pursue such claims against the relator. The Court of Appeal reasoned that permitting such claims would contravene the Act's fundamental purpose of motivating even culpable relators to blow the whistle. *Id.* at 213.