Penalty Points, Part Three:
Constitutional Defenses

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This article is the third part of a three-part series examining the penalty provisions of the False Claims Act. This part will examine Constitutional defenses to the imposition of penalties under the Act. Parts One and Two addressed how courts determine the number of penalties to award and the dollar amount of the penalty within the statutory range.

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III. DUE PROCESS

A. Defense Rarely Raised and Never Successful Under the Act

B. Supreme Court Punitive Damages Cases Should Not Be Applied to the Act

INTRODUCTION

As explained in Part Two of this series, the imposition of penalties under the False Claims Act is mandatory for each claim found to be false. Nevertheless, a court's calculation of a total penalty amount in accordance with the Act's provisions is not necessarily the last step in the determination of a penalty award. In certain circumstances, the penalty may be subject to constitutional restraints. Defendants have challenged the Act's penalties under the Double Jeopardy and Due Process Clauses of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment.

Double jeopardy challenges to the Act's penalties apply only when civil claims under the Act are accompanied by parallel criminal proceedings. This defense enjoyed a brief period of recognition, but is now extremely unlikely to succeed. An understanding of the history of the double jeopardy defense remains relevant today, however, because the Supreme Court's test for whether a sanction constituted "punishment" for purposes of the Double Jeopardy Clause has since been imported into the excessive fines context.

The excessive fines defense has a much broader potential application, as it may be raised whether or not parallel criminal proceedings are involved. It is a relatively new defense on the False Claims Act scene, since it was only in 1993 that the Supreme Court first held that the Excessive Fines Clause applies to civil (as opposed to criminal) sanctions. Several courts have since applied the Clause to penalty awards under the Act, but defendants have seldom succeeded in showing that the Act's penalties are in fact "excessive."

Finally, due process challenges appear only in a few very old cases under the Act, but may begin to appear again if defendants attempt to import into the context of the Act recent Supreme Court decisions limiting punitive damages on due process grounds. Applied to the Act's penalties, however, the types of due process limits suggested in the Court's punitive damages cases would impermissibly substitute the judgment of a court for that of Congress as to what the appropriate penalty should be for submission of a false claim. Because the due process rationale of the Court's punitive damages cases, *i.e.*, that punitive damages must be limited in order to provide defendants with "fair notice" of the damages they may face, does not apply where penalties are defined by federal statute, the due process limits of the punitive damages cases should not be applied to penalties under the Act.

I. DOUBLE JEOPARDY

Where a civil False Claims Act case involves parallel criminal proceedings, the Double Jeopardy Clause[1] may be raised as a defense. The gist of the double jeopardy defense is that an award of penalties (or treble damages and penalties) under the Act constitutes "punishment," such that the imposition of both the Act's remedies *and* criminal sanctions would put the defendant twice "in jeopardy." In the most common procedural posture, the Clause is cited as a defense to the imposition of penalties under the Act following a criminal conviction,[2] guilty plea,[3] or acquittal[4] based on the same underlying conduct or transaction. Although less common, the Clause may also be cited as a defense to criminal charges when civil liability has previously been imposed under the Act.[5] In the absence of a related criminal proceeding, the double jeopardy defense has *no* application to claims under the Act.[6]

Although it has often been raised in an attempt to avoid the Act's penalties, the double jeopardy defense has been rejected in the overwhelming majority of cases and today has less chance than ever of succeeding. As detailed below, historically, courts, including the Supreme Court, had uniformly held that the double jeopardy defense was inapplicable to civil claims brought under the Act, because the Act's damages and penalties were civil remedies rather than criminal "punishment," and thus did not put the defendant in "jeopardy." Then, in 1989, the Court held for the first time in *United States v. Halper*[7] that the imposition of penalties under the Act could constitute a second "punishment" for double jeopardy purposes if the penalties actually imposed bore "no rational relationship to the goal of compensating the Government for its loss."[8] The Court cautioned, however, that *Halper* was a "rare case" and that in the "ordinary case" the Act's fixed-penalty-plus-double-damages formula would not produce a penalty that would run afoul of the Clause.[9]

Indeed, lower courts applying *Halper*'s reasoning to subsequent cases under the Act continued to find the defense inapplicable. Furthermore, a mere eight years after

1. The Double Jeopardy Clause reads: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. Const., Amdt. 5.

2. United States v. Peters, 110 F.3d 616 (8th Cir. 1997); United States v. Barnette, 10 F.3d 1553 (11th Cir. 1994); United States v. Boutte, 907 F. Supp. 239 (E.D. Tex. 1995), *aff'd*, 108 F.3d 332 (5th Cir. 1997); United States v. Pani, 717 F. Supp. 1013 (S.D.N.Y. 1989); Berdick v. United States, 612 F.2d 533 (Ct. Cl. 1979); United States v. Kates, 419 F. Supp. 846 (E.D. Pa. 1976); United States v. Greenberg, 237 F. Supp. 439 (S.D.N.Y. 1965).

3. United States v. Killough, 848 F.2d 1523 (11th Cir. 1988); United States v. Sazama, 88 F. Supp.2d 1270 (D. Utah 2000); United States v. Fliegler, 756 F. Supp. 688 (E.D.N.Y. 1990); United States v. Howell, 702 F. Supp. 1281 (S.D. Miss. 1988); United States v. Annicchiarico, 238 F. Supp. 339 (D.N.J. 1963); United States v. Grunstein & Sons Co., 127 F. Supp. 907 (D.N.J. 1955).

4. SGW, Inc. v. United States, 20 Cl. Ct. 174 (1990); United States v. MacEvoy, 10 F.R.D. 323 (D.N.J. 1950).

5. *See, e.g.,* United States v. Brekke, 97 F.3d 1043 (8th Cir. 1996).

6. *See, e.g.,* United States v. Williams, 2003 WL 21384640 at *3 (N.D. Ill., June 12, 2003) ("[B]ecause Defendants have not been charged with any criminal violation, they lack the requisite standing to contest the FCA's damage provisions on the basis of double jeopardy.").

7. 490 U.S. 435, 109 S.Ct. 1892 (1989).

8. 490 U.S. at 449, 109 S.Ct. at 1902.

9. *Id.*

Halper, in the case of *Hudson v. United States*,[10] the Supreme Court overruled *Halper*'s attempted distinction between nominally-civil remedies which were "punishment" and those that were not. Instead, the Court held that "[t]he Clause protects only against the imposition of multiple *criminal* punishments for the same offense"[11] and returned to its pre-*Halper* methodology for distinguishing between civil and criminal sanctions. Since the *Hudson* decision, double jeopardy is basically no longer a viable defense to claims under the Act.

A. *Hess* and Its Progeny: Double Jeopardy Defense Routinely Rejected in FCA Cases

The 1943 case of *United States ex rel. Marcus v. Hess*[12] was the basis for lower courts' initial long-term rejection of the double jeopardy defense. In *Hess*, the Supreme Court rejected a double jeopardy challenge to the imposition of civil liability under the Act where defendants had previously entered a plea of *nolo contendere* and been sentenced to pay a criminal fine based on the same conduct. The Court held that the double jeopardy defense was inapplicable because proceedings under the Act were not "actions intended to authorize criminal punishment to vindicate public justice" such as would subject a defendant to "jeopardy," but rather were "remedial and impose[d] a civil sanction."[13]

The Court approached the question of whether the remedies available under the Act were "civil" and "remedial" as one of "statutory construction"[14] rather than focusing on the particular damages or penalties at issue in the case. Regarding the (then double) damages provision of the Act, the Court found that it could not be said to afford the government "any recovery in excess of actual loss for the government."[15] The Court pointed out that since the case was a *qui tam* and the statute provided for a 50-percent relator share, the government's half of the double damages was only equal to the amount of actual damages proved.[16] The Court also observed that treble damages were available under the antitrust laws and cited the general practice in state statutes of allowing "double, treble, or even quadruple" damages in civil matters.[17] As for the (then $2000 per claim) penalty provision, the Court noted that there was no provision for imprisonment for failure to pay penalties under the Act such as might characterize a criminal forfeiture, and held that the mere use of the terms "forfeit and pay" was insufficient to transform the Act into a criminal statute.[18]

10. 522 U.S. 93, 118 S.Ct. 488 (1997).

11. 522 U.S at 99, 118 S.Ct. at 493 (citations omitted).

12. 317 U.S. 537, 63 S.Ct. 379 (1943).

13. *Id.* at 548–49, 63 S.Ct. at 386–87 (citing Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630 (1938)).

14. *Id.*

15. *Id.* at 550, 63 S.Ct. at 387.

16. *Id.*

17. *Id.* at 550–51, 63 S.Ct. at 387.

18. *Id.* at 551, 63 S.Ct. at 387–88.

In sum, the Court found that the main purpose of the Act was "restitution" and that "the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."[19] Because the Act did not authorize a criminal punishment but rather was civil and "remedial," the Court held that the Double Jeopardy Clause did not apply. For more than 45 years following the *Hess* decision, lower courts accordingly rejected the double jeopardy defense in proceedings under the Act.[20]

B. *Halper* and Its Progeny: Double Jeopardy Defense Viable in "Rare Case"

In 1989, while continuing to recognize as in *Hess* that "proceedings and penalties under the civil False Claims Act are indeed civil in nature" and that in the "ordinary case" application of the Act's penalty provision would do no more than make the Government whole, the Court in *United States v. Halper*[21] announced that in a "rare case," a civil penalty under the Act could be so disproportionate to the amount of actual damages as to constitute a "punishment."[22] In such a case, the *Halper* Court held, to impose both the Act's penalties and a criminal punishment would violate the Double Jeopardy Clause.

The *Halper* defendant submitted 65 separate false claims to Medicare, for a total overpayment of $585. He was first convicted under the criminal false claims statute and for mail fraud, sentenced to imprisonment, and fined. The Government then filed a civil suit against him under the Act, seeking double damages ($585 x 2) plus a civil penalty of $130,000 (65 false claims multiplied by the $2,000 penalty then in effect). The district court struck down the penalty on double jeopardy grounds, observing that it was more than 220 times greater than the amount of the fraud.[23]

In analyzing whether the proposed $130,000 penalty constituted a second "punishment" for double jeopardy purposes, the Supreme Court held that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."[24]

19. *Id.* at 551–52, 63 S.Ct. at 388; *see also id.* at 549, 63 S.Ct. at 387 ("We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it.") (citation omitted).

20. *See, e.g.*, *Berdick*, 612 F.2d at 538 (double jeopardy defense rejected because the Act's penalties were "civil, not criminal," citing *Hess*); *Kates*, 419 F. Supp. at 853–54 (double jeopardy defense rejected without discussion, citing *Hess*); *Greenberg*, 237 F. Supp. at 443–44 (where government sought no damages but only penalties, double jeopardy defense rejected as "without merit" with no discussion, citing *Hess*); *Annicchiarico*, 238 F. Supp. at 339–40 (double jeopardy defense not applicable despite fact that government sought no damages and defendants had already paid restitution and a fine pursuant to criminal plea because Act allowed recovery of penalties even in absence of any damage and proceedings were civil under *Hess*); *Grunstein & Sons Co.*, 127 F. Supp. at 912 (defense did not apply because, under *Hess*, Act is "not criminal"); *MacEvoy*, 10 F.R.D. at 326–27 (case was indistinguishable from *Hess* and therefore double jeopardy defense did not apply). *Cf.* United States v. Grannis, 172 F.2d 507, 511–12 (4th Cir. 1949) (because it was "clearly established that the defense of double jeopardy is not applicable in civil actions under [the Act]," trial court committed error in permitting jury to be told that defendants had been acquitted of related criminal charges).

21. 490 U.S. 435, 109 S.Ct. 1892 (1989).

22. *Id.* at 442, 449, 109 S.Ct. at 1898, 1902.

23. *See id.* at 439, 109 S.Ct. at 1897 (quoting district court decision).

24. *Id.* at 448; 109 S.Ct. at 1902.

The Court acknowledged precedent establishing that the Government was entitled to "rough remedial justice," and could demand compensation according to "somewhat imprecise formulas, such as . . . a fixed sum plus double damages."[25] The Court went on to hold, however, that when the actual application of such a formula produces a sanction that "bears no rational relation to the goal of compensating the Government for its loss," the sanction can no longer be said to be solely remedial, but instead constitutes "punishment."[26] Noting the "tremendous disparity" between the proposed penalty and actual damages,[27] as well as the fact that the government had incurred only about $16,000 in expenses related to the case, the Court held that the $130,000 penalty was "sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy."[28]

The Court emphasized the narrowness of its ruling, describing it as a "rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused."[29] In the same vein, the Court noted that "a suit under the Act alleging one or two false claims would satisfy the rational-relationship requirement. It is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise."[30]

Indeed, history shows that *Halper* has remained limited to its unusual facts. Lower courts applying *Halper* to subsequent cases under the Act have repeatedly and consistently found that other penalty awards were not so disproportionate as to constitute "punishment," and that the Double Jeopardy Clause was therefore not implicated.[31]

25. *Id*. at 446, 109 S.Ct. at 1900.

26. *Id*. at 449–50, 109 S.Ct. at 1902.

27. *Id*. at 452, 109 S.Ct. at 1903–04.

28. *Id*. at 452, 109 S.Ct. at 1904. The Court remanded the case to give the government an opportunity to present evidence of its "actual costs arising from *Halper*'s fraud," since the $16,000 figure was only an approximation. *Id*.

29. *Id*. at 449, 109 S.Ct. at 1902.

30. *Id*. at 451 n.12, 109 S.Ct. at 1903 n.12.

31. *See, e.g., Peters*, 110 F.3d at 616 (no double jeopardy violation where ratio of fixed penalties of $20,000 to $153,476 in single damages was less than 1 to 1 and number of claims for which defendant was held liable (four) was "relatively small"); *Barnette*, 10 F.3d at 1559–60 (where Government's direct loss was at least $15.7 million, even highest potential award of $50.5 million would not constitute a "second punishment" because the ratio of total recovery to total loss, including costs, would not exceed 3.2 to 1); *Boutte*, 907 F. Supp. at 239 (where government's direct loss was approximately $301,000 not including costs, treble damages plus penalties award of approximately $1 million was not punishment; total award was approximately 3.38 times the amount of the direct loss, and ratio would be even less if Government's costs were considered); *Fliegler*, 756 F. Supp. at 696–97 (Government's costs of approximately $110,000 for prosecuting both criminal and civil actions bore a rational relationship to $115,000 penalty (23 claims at $5,000 each) imposed by court on partial summary judgment); *SGW, Inc.*, 20 Cl. Ct. at 178 (where Government sought penalties and approximately $137,000 in treble damages, potential recovery was not so disproportionate as to require dismissal of action on double jeopardy grounds; damages due to contractor's alleged misconduct were "potentially immense" and treble damages sought by Government were "less than plaintiff has already been paid on the contract and well less than half the total contract amount"); *Pani*, 717 F. Supp. at 1017–19 (where 3 false claims totaled $1,280, $32,460 in damages and penalties sought by Government could not be said to bear "no rational relationship" to compensating the Government for its loss, considering the expenses of investigation and prosecution). *Cf. Killough*, 848 F.2d at 1534 (in case decided after district court's ruling but prior to the Supreme Court's decision in *Halper*, court found that even if it was to adopt *Halper* district court's reasoning, award of $104,000 in forfeitures along with $1,267,800 double damages would not violate the Double Jeopardy Clause because it would do no more than "afford the government indemnity for the injuries done it") (quoting *Hess*); *Sazama*, 88 F. Supp.2d at 1273–74 (even if *Halper* applied to case decided after Supreme Court's *Hudson* opinion was issued, there was no double jeopardy violation where ratio of recovery sought to amount of fraud was 4.7 to 1, "a far cry from the 222 to 1 ratio that motivated the *Halper* Court").

C. *Hudson* and Its Progeny: Double Jeopardy Basically Dead As A Defense to FCA Penalties

Although even under *Halper* the double jeopardy defense rarely (if ever) succeeded as a challenge to the Act's penalties, the mere availability of the defense at least provided defendants with some measure of hope. In *Hudson v. United States*,[32] even that was crushed, as the Court largely disavowed its previous *Halper* analysis. The *Hudson* Court expressly rejected *Halper*'s approach of trying to distinguish between civil penalties that constituted "punishment" those that did not, calling it "ill considered" and "unworkable."[33] Instead, the Court clarified that the Double Jeopardy Clause protects "only against the imposition of multiple *criminal* punishments."[34]

The *Hudson* Court reasoned that *Halper* had deviated from the Court's previous jurisprudence in two major respects. First, *Halper* had improperly bypassed the "threshold question" of whether the penalty at issue was a *criminal* punishment or not. Second, *Halper* had improperly focused on the penalty actually imposed, rather than limiting its analysis to an evaluation of the "statute on its face."[35] *Hudson* reaffirmed the Court's previously established approach, returning to a two-step analysis exemplified by *United States v. Ward*.[36]

Under the *Ward* approach, a court addressing whether a particular penalty implicates the Double Jeopardy Clause must determine first, as "a matter of statutory construction," whether the legislature intended the penalty in question to be civil or criminal in nature.[37] If it finds that the penalty was intended to be civil, the court must then take the second step of determining whether, despite the legislature's intent, the penalty is nonetheless so punitive as to transform it into a criminal penalty.[38] This determination must also be made "in relation to the statute on its face."[39] The *Hudson* Court admonished that "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[40]

In short, after *Hudson*, in order for a double jeopardy defense to succeed against penalties under the Act, the defendant would have to convince a court, by "the clearest proof" and by reference to "the statute on its face," that the Act's civil penalties

32. 522 U.S. 93, 118 S.Ct. 488 (1997).

33. *Id.* at 101–02, 118 S.Ct. at 494.

34. *Id.* at 99, 118 S.Ct. at 493.

35. *Id.* at 101, 118 S.Ct. at 494.

36. *Id.* at 96. 118 S.Ct. at 491 (citing United States v. Ward, 448 U.S. 242, 248–49, 100 S.Ct. 2636, 2641–42 (1980)).

37. *Id.* at 99, 118 S.Ct. at 493.

38. *Id.*

39. *Id.* at 99–100, 188 S.Ct. at 493. The Court enumerated seven factors that should be considered: (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69, 83 S.Ct. 554, 567–68 (1963)).

40. *Id.*

constitute a *criminal* punishment. This seems highly unlikely, since *Hudson* essentially mandates a return to the pre-*Halper* analysis under the which the Court, in *Hess* and other cases, had repeatedly found the Act's penalties to be civil in nature.[41] Even the *Halper* Court acknowledged the long line of precedent establishing that "proceedings and penalties under the civil False Claims Act are indeed civil in nature."[42]

Defendants have perhaps foreseen the difficulty of convincing a court that the Act's penalties constitute criminal punishment, as there is a dearth of published opinions post-*Hudson* in which a double jeopardy defense was raised to claims under the Act. At least one post-*Hudson* opinion, however, rejected the defense, holding that penalties (and treble damages) under the Act are "civil" for purposes of double jeopardy analysis.[43] In addition, at least two other courts have held that similar penalty provisions under other statutes are civil remedies.[44] Thus, after a brief and insubstantial resurrection in the days of *Halper*, the double jeopardy defense has returned to its long-term residence in the False Claims Act defense graveyard. As will be seen below, however, *Halper's* test for whether a sanction constitutes "punishment" remains very much alive, although in a new context—the Court's Excessive Fines Clause jurisprudence.

II. EXCESSIVE FINES

Although *Hudson* marked the end of the double jeopardy defense as a viable challenge to the Act's penalty provisions (and many other civil sanctions), the *Hudson* Court did point out several possible alternative defenses to such sanctions. The Court noted in *dicta* that "some of the ills at which *Halper* was addressed are addressed by other constitutional provisions," including the Eighth Amendment's prohibition against excessive fines.[45] As *Hudson* foreshadowed, the Excessive Fines Clause[46] has increasingly been raised as a challenge to the Act's penalties.

41. Moreover, if court were to hold that the Act's penalties constitute "criminal" punishment for purposes of double jeopardy analysis, then defendants in proceedings under the Act would also be entitled to the full panoply of procedural protections available in criminal cases. *See, e.g.*, SEC v. Palmisano, 135 F.3d 860, 864 (2d Cir. 1998) ("The test to be used in determining whether a sanction is . . . subject to the Double Jeopardy Clause's bar on multiple punishments, is the same inquiry that is used in determining whether other criminal proceeding protections apply."). Such a result would be highly anomalous after treating the Act as a civil statute for more than 140 years, and would also have widespread implications for other civil statutes with similar remedial schemes.

42. 490 U.S. at 441–42, 109 S.Ct. at 1898 (citing *Hess*, Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630 (1938) and Rex Trailer Co. v. United States, 350 U.S. 148, 76 S.Ct. 219 (1956)); *see also id.* at 438, 109 S.Ct. at 1896 (noting that district court had explicitly recognized that the Act's provision for damages plus penalties "was not in itself criminal punishment").

Although the dollar amount of the penalty available under the Act has been raised from $2,000 to a range of $5,500 to $11,000 since the *Hess, Helvering v. Mitchell, Rex Trailer,* and *Halper* decisions establishing its civil nature, it is important to remember that the penalty was set at $2,000 when the Act was originally enacted in 1863. Thus, in real dollar terms, today's penalties are probably far *less* than they were historically. Accordingly, if the $2,000 penalty was "civil" back when these cases were decided, it should still be civil today, despite the nominal increase of its amount to a range of $5,500 to $11,000.

43. United States v. Lamanna, 114 F. Supp.2d 193, 198 (W.D.N.Y. 2000).

44. United States v. Lippert, 148 F.3d 974, 976–77 (8th Cir. 1998) (Anti-Kickback Act penalty of twice the amount of each kickback plus "not more than $10,000" for each violation is not a criminal punishment); *Palmisano*, 135 F.3d at 866 (2d Cir. 1998) (SEC penalties ranging from $5,000 to $500,000 per violation were civil).

45. 522 U.S. at 102, 118 S.Ct. at 495.

46. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amdt. 8.

A. Supreme Court Rulings on the Excessive Fines Clause

The excessive fines defense is somewhat new in cases under the Act, as for many years it was thought that the Eighth Amendment applied only to criminal cases. In 1993, however, in the case of *Austin v. United States*,[47] the Supreme Court held that the Excessive Fines Clause could apply in a civil context, if the civil sanction at issue constituted "punishment." Subsequently, in *United States v. Bajakajian*,[48] the Court held that, where it applies, the Clause prohibits imposition of a fine that is "grossly disproportional to the gravity of a defendant's offense."[49]

1. *Austin:* Excessive Fines Clause Applies to Civil Sanctions

In *Austin*, the Supreme Court held for the first time that the Excessive Fines Clause could apply to a civil sanction. The case was not a False Claims Act case, but rather involved a civil *in rem* statutory forfeiture of a mobile home and auto body shop which had been associated with illegal drug activity. After examining the text and history of the Excessive Fines Clause, the *Austin* Court held that it "limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'"[50] The Court rejected the argument that the Clause applied only in criminal cases, on the grounds that "the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment."[51]

To determine whether a particular sanction constitutes a "punishment" for purposes of the Excessive Fines Clause, the Court adopted the same test that had been used for double jeopardy purposes in *Halper*, *i.e.*, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment . . . ."[52] Unlike the *Halper* Court, however, the *Austin* Court did not base its analysis on the individual sanction at issue. Rather, the Court examined 1) whether at the time the Eighth Amendment was enacted the remedy of forfeiture was understood, at least in part, as punishment,[53] and 2) whether forfeitures under the particular forfeiture statute at issue could properly be considered punishment today.[54]

The Court found that statutory *in rem* forfeitures had historically been viewed as punishment and that there was nothing about the present forfeiture statute that would contradict that historical understanding.[55] Since the statutory forfeiture pro-

47. 509 U.S. 602, 113 S.Ct. 2801 (1993).

48. 524 U.S. 321, 334, 118 S.Ct. 2028, 2036 (1998).

49. For an excellent discussion of the Supreme Court's excessive fines cases and their implications for the False Claims Act, see Suzanne E. Durrell, The Excessive Fines Clause of the Eighth Amendment and the Civil False Claims Act: To *United States v. Bajakajian* and Beyond, False Claims Act and *Qui Tam* Quarterly Review 29 (July 2002).

50. 509 U.S. at 610, 113 S.Ct. at 2805 (quoting *Browning-Ferris*, 492 U.S. at 265, 109 S. Ct. at 2915).

51. *Id.* at 610, 113 S.Ct. at 2806.

52. *Id.* (quoting *Halper*, 490 U.S. at 448, 109 S. Ct. at 1902).

53. *Id.* at 611–19, 113 S.Ct. at 2806–10.

54. *Id.* at 619–22, 113 S.Ct. at 2810–12.

55. *Id.* at 619, 113 S.Ct. at 2810.

vision therefore could not be said to be solely remedial under the *Halper* test, the Court held that it was a "punishment" subject to the limitations of the Excessive Fines Clause.[56] The *Austin* Court did not set forth a standard for determining whether the forfeiture provided for in the statute was excessive, instead remanding the case for consideration of that issue.[57]

2. *Bajakajian:* Standard for Excessiveness is "Gross Disproportionality"

In 1998, the Court picked up where it left off in *Austin*, articulating for the first time in *United States v. Bajakajian* the standard for determining whether a sanction is "excessive" under the Excessive Fines Clause. *Bajakajian* echoed *Austin* in holding that a penalty is only subject to the Excessive Fines Clause if it constitutes "punishment" for an offense. It then added the standard: a penalty is "excessive" if the amount of the penalty is "grossly disproportional to the gravity of the defendant's offense."[58] *Bajakajian*, like *Austin*, was not a False Claims Act case. Instead, it involved the forfeiture, pursuant to a criminal forfeiture statute, of $357,144 in cash that the defendant had attempted to take out of the country without reporting it as required by law. The district court held that forfeiture of the whole amount was "excessive," but that a $15,000 forfeiture would pass constitutional muster. The Ninth Circuit affirmed.

a. Is the Sanction "Punishment"?

As in *Austin*, the *Bajakajian* Court applied the *Halper* "solely remedial" test to determine whether the criminal forfeiture statute's sanctions constituted "punishment."[59] The Court's continued use of the *Halper* test was perplexing in that, just the year before in *Hudson*, the Court had abandoned the test in the double jeopardy context, deeming it "unworkable" and "ill-advised." The *Hudson* Court had also strongly suggested that the *Halper* test was overbroad, pointing out that, since the Court had previously recognized that "all civil penalties have some deterrent effect," *no* civil penalty could truly be said to be "solely" remedial; accordingly, no civil penalty could ever satisfy the *Halper* test and escape constitutional scrutiny.[60]

Nevertheless, the *Bajakajian* Court went through the exercise of applying the *Halper* test to the criminal forfeiture statute before it. As in *Austin*, the Court focused on the statute on its face, considering the statutory language, the purpose of the for-

56. *Id.* at 622, 113 S.Ct. at 2812.

57. *Id.* at 622–23, 113 S.Ct. at 2812.

58. 524 U.S. at 334 & 337, 118 S. Ct. at 2036 & 2038.

59. *Id.* at 329 n.4; 118 S.Ct. at 2034 n.4 (noting that even if the forfeiture at issue was remedial in part, it would still be "punitive in part," and this is "sufficient to bring the forfeiture within the purview of the Excessive Fines Clause") (citing *Austin*, 509 U.S. at 621–22, 113 S.Ct. at 2811–12).

60. *Hudson*, 522 U.S. at 102, 113 S.Ct. at 494–95.

feiture, the circumstances under which the forfeiture could be imposed, and whether the type of forfeiture provided had historically been considered a punishment.[61] Not surprisingly, the Court had no trouble concluding that the statutory criminal forfeiture constituted a "punishment."

At the same time, however, the *Bajakajian* Court suggested that many civil penalties may fall outside the scope of excessive fines review. Discussing certain early customs statutes imposing civil *in rem* forfeitures and monetary forfeitures proportioned to the value of the goods involved, the Court commented that such statutes "serve the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs duties" and historically were not considered punishment.[62] The *Bajakajian* dissent interpreted this discussion as suggesting that many civil fines may be outside the reach of the Excessive Fines Clause, even if they impose penalties which far exceed the harm suffered.[63]

b. Is the Sanction "Grossly Disproportional"?

After determining that the criminal forfeiture was "punishment" and therefore a "fine" subject to the Excessive Fines Clause, the Court next went on to determine what the test should be for determining whether a fine is "excessive." It began by citing its previous excessive fines jurisprudence, stating that "the touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[64] The Court then held that a fine is excessive if the amount is "grossly disproportional to the gravity of the defendant's offense," giving two reasons why it was adopting the higher standard of "gross disproportionality" instead of merely requiring "strict proportionality."[65] First, "judgments about the appropriateness of a fine belong in the first place to the legislature" and should be granted "substantial deference."[66] Second, "any judicial determination regarding the gravity of a particular offense will be inherently imprecise."[67]

The Court then applied the "gross disproportionality" standard to the facts of the case. The Court noted that the $357,144 that the government sought to forfeit had not been illegally obtained, and thus the defendant was not among the classes of persons,

61. *Bajakajian*, 524 U.S. at 328–32, 118 S.Ct. at 2033–35. Specifically, the Court noted that the forfeiture was imposed at the end of a criminal proceeding and required conviction of an underlying felony in order to be imposed. Further, even if the forfeiture had some remedial purposes, it was still punitive in part. Finally, the Court rejected the Government's argument that the forfeiture was analogous to traditional *in rem* forfeitures that were not considered punishment.

62. *Bajakajian*, 524 U.S. at 342–43, 118 S.Ct. at 2040–41.

63. *Id.* at 344–45, 118 S.Ct. at 2041 (Kennedy, J., dissenting) ("[T]he majority treats many fines as 'remedial' penalties even though they far exceed the harm suffered."); *id.* at 356, 118 S.Ct. at 2047 (Kennedy, J., dissenting) ("So-called remedial penalties, most *in rem* forfeitures, and perhaps civil fines may not be subject to scrutiny at all. I would not create these exemptions from the Excessive Fines Clause.").

64. *Id.* at 334, 118 S.Ct. at 2036 (citing *Austin*, 509 U.S. at 622–23, 113 S.Ct. at 2812 and Alexander v. United States, 509 U.S. 544, 559, 113 S.Ct. 2766, 2776, 125 L.Ed.2d 441 (1993)).

65. *Id.* at 336, 118 S.Ct. at 2037.

66. *Id.*

67. *Id.*

such as money launderers or drug traffickers, against whom the statute was intended to protect.[68] It then found that the maximum criminal sentence which could have been imposed on the defendant under the Sentencing Guidelines was a $5,000 fine and six months imprisonment.[69] The Court held that this criminal penalty "confirm[ed] a minimum level of culpability."[70] Finally, the Court noted that respondent's conduct caused minimal harm, including "no fraud on the United States, . . . and no loss to the public fisc."[71] Based on these facts, the Court found the forfeiture to be "grossly disproportional," observing that it was larger by "many orders of magnitude" than the $5,000 criminal fine imposed by the sentencing court and that it bore "no articulable correlation" to any Government injury.[72]

B. Lower Courts' Application of the Clause to Penalties Under the Act

Only a small number of courts have considered excessive fines challenges to penalties under the Act. To the extent they have addressed the issue, these courts have held that the Act's penalties do constitute "punishment" subject to excessive fines review. Defendants have rarely succeeded, however, in convincing the courts that the penalties actually imposed under the Act in a particular case were "excessive."

1. Are the Act's Penalties "Punishment"?

Interestingly, many of the courts addressing excessive fines defenses in the context of the Act have simply skipped over the initial inquiry of whether the Act's penalties constitute "punishment" (perhaps anticipating, as did the *Hudson* Court, that no penalty is likely to escape the reach of the *Halper* test).[73] The Ninth Circuit in *United States v. Mackby*,[74] is apparently the only court which has provided a complete analysis of the issue.[75]

68. *Id.* at 337–38, 118 S.Ct. at 2038.

69. *Id.*

70. *Id.* at 339, 118 S.Ct. at 2038.

71. *Id.* at 339, 118 S.Ct. at 2039.

72. *Id.* at 339–340, 118 S.Ct. at 2039.

73. *See, e.g.,* United States v. Rachel, 2004 WL 2422113 (D. Md. Sept. 29, 2004); Lamb Engineering & Construction Co. v. United States, 58 Fed. Cl. 106 (2003); United States v. Cabrera-Diaz, 106 F. Supp.2d 234 (D.P.R. 2000); United States v. Byrd, 100 F. Supp.2d 342 (E.D.N.C.2000); United States v. Advance Tool Co., 902 F. Supp. 1011 (W.D. Mo. 1995), aff'd, 86 F.3d 1159 (8th Cir. 1996).

74. 261 F.3d 821 (9th Cir. 2001) (*Mackby I*).

75. The court in *United States v. Williams*, 2003 WL 21384640 at *4 (N.D. Ill. June 12, 2003), concluded that the Act's penalties (as well as its treble damages) constitute "punishment." The court provided little discussion of this conclusion, merely citing *Mackby I* and mentioning the Supreme Court's statement in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784–86, 120 S.Ct. 1858, 1869–70 (2000) that the treble damages and increased penalties of the 1986 amendments are at least in part, punitive in nature.

The court in *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71 (E.D. Mich. 1993), also determined that the Act's penalties constitute "punishment"; however, it based this conclusion on the particular fine at issue, rather than examining the statute on its face. *See id.* at 74 (comparison of the "low level of actual damages" (under $2,000) to the applicable minimum penalty of $290,000 ($5,000 x 58 false claims) indicated that penalty constituted "punishment"). After *Austin*, *Hudson*, and *Bajakajian*, the accepted approach is to examine the statute on its face. *See, e.g., United States v. Lippert*, 148 F.3d at 977 n.2 ("[W]hether the Excessive Fines Clause applies to a type of civil penalty should be based on a facial evaluation of the statute. If the Clause applies, a court must then determine whether the particular fine at issue is constitutionally

The *Mackby* court concluded that the Act's penalty provision (as well as its treble damages provision)[76] was "punishment" and thus subject to the limitations of the Excessive Fines Clause. The court considered the statute on its face and looked at the same types of factors that were examined in *Bajakajian*.[77] Specifically, with respect to penalties, the court noted that the Act itself does not state whether its penalty provision is intended to be remedial or punitive. However, the court reasoned that the fact that no damages need be shown in order to recover penalties under the Act suggests that the penalties have a punitive purpose. The court further concluded that the fact that treble damages are provided in addition to penalties demonstrates that the penalties are not intended to provide a form of damages. The court also noted that the legislative history of the 1986 amendments to the Act indicated a deterrent purpose, and that the Supreme Court had previously concluded that the Act was adopted to punish and prevent frauds. Based on these factors, the court held that the Act's penalties constituted "a payment to the government, at least in part, as punishment."[78]

Notwithstanding the *Mackby* court's ruling in the Ninth Circuit, and although it may be an uphill battle at least while the *Halper* test as applied by *Austin* and *Bajakajian* is the law, an argument can still be made that the Act's penalty provisions are remedial and "non-punitive," because they serve to reimburse the Government for losses associated with false claims.[79] As noted above, the *Bajakajian* decision hints that, even under the *Halper* test, there may be entire categories of essentially compensatory civil fines that do not constitute "punishment," including monetary sanctions which far exceed "actual damages." The Court has long recognized that the Act is intended to reimburse the government not just for the losses quantified by the particular claims at

excessive."); *see also Austin*, 509 U.S. at 622 n. 14, 113 S.Ct. at 2039 n. 14 (Court focused on statute "as a whole" in determining whether it was punitive).

Finally, it is not entirely clear whether or not the court in *United States ex rel Trice v. Westinghouse Hanford Co.*, 2000 WL 34024248 at *24 (E.D. Wash. March 1, 2000), determined that the Act's penalties constitute punishment. In addressing a defense argument that the imposition of penalties in the absence of actual damages would violate the Excessive Fines Clause, the court seemingly blended the two prongs of the *Bajakajian* test: after a discussion that considered the Act's penalty provision on its face but not any specific penalty award, the court concluded that "Congress determined that this was the proper penalty, and does not seem grossly disproportional to a defendant's violation." *Id.*

76. A complete discussion of whether treble damages constitute "punishment" for excessive fines purposes is outside the scope of this article. However, it is worth noting that some of the cases cited above in the double jeopardy context suggest that treble damages are not "punishment." For example, the Eighth Circuit held that the Act's treble damages provision was "in the nature of rough remedial justice" as described in *Halper* and not punitive, and that defendants therefore had *no* double jeopardy defense to the treble damage component of an award; instead, the double jeopardy analysis was limited to examining "how the total fixed penalties relate arithmetically to the total damages caused." *Peters*, 110 F.3d at 617; *see also Brekke*, 97 F.3d at 1048 (Act's treble damages were not punishment because they were no different than the "ordinary case" of "fixed-penalty-plus-double-damages" cited in *Halper*, thus, previous civil settlement under the Act was "compensatory rather than civil" and no bar to a subsequent indictment); *cf.* United States v. Howell, 702 F. Supp. 1281, 1284 (S.D. Miss. 1988) (in case decided after district court ruling but before Supreme Court decision in *Halper*, court held without discussion that *Halper* district court's rationale was "not even arguably applicable" to Government's claims for damages under the Act). Whether treble damages are punishment for purposes of the Excessive Fines Clause continues to be a hotly contested issue.

77. *Mackby I*, 261 F.3d at 830. As discussed *supra* at note 61 and accompanying text, these factors include "the language of the statute creating the sanction, the sanction's purpose(s), the circumstances in which the sanction can be imposed, and the historical understanding of the sanction." *Id.* (citation omitted).

78. 261 F.3d at 830.

79. For the complete text of one such argument, see the Government's Brief in *Mackby I*, available on WESTLAW at 1999 WL 33631494 at *40–45 (9th Cir.).

issue, but also other costs, such as the costs of investigation and prosecution, as well as costs that are difficult or impossible to quantify, such as the "constant Treasury vigil" false claims necessitate[80] and the damage to the public's confidence in the integrity of government programs.[81] The argument can thus be made that, even though the Act provides for treble damages and penalties instead of merely single damages, its remedies, like those of the remedial customs duties referred to in *Bajakajian*, are merely intended to make the government whole by reimbursing it for all of the costs accruing from the presentation of false claims.[82] At least two courts applying *Bajakajian* have suggested that civil penalties similar to those under the Act, "insofar as they reimburse the Government, if roughly, may not be subject to the Excessive Fines Clause."[83]

In addition, there is always the possibility that the Court may eventually find the *Halper* test to be just as "ill-advised" and "unworkable" in the excessive fines context as it was in the double jeopardy context. The Court might reject the punitive vs. non-punitive distinction and return to applying excessive fines analysis only to criminal cases, keep the punitive vs. non-punitive distinction but redefine it,[84] or devise some other test for determining when the Clause is applicable.[85]

80. United States v. Toepelman, 263 F.2d 697, 699 (4th Cir. 1959) ("[S]urely, no proof is required to convince one that to the Government a false claim, successful or not, is always costly. Just as surely, against this loss the Government may protect itself, though the damage be not explicitly or nicely ascertainable. The Act seeks to reimburse the Government for just such losses. For a single false claim $2000 would not seem exorbitant. Furthermore, even when multiplied by a plurality of impostures, it still would not appear unreasonable when balanced against the expense of the constant Treasury vigil they necessitate.").

81. United States v. Mackby, 339 F.3d 1013, 1019 (9th Cir. 2003) (*Mackby II*) ("The government has a strong interest in preventing fraud, and the harm of such false claims extends beyond the money paid out of the treasury. . . . Fraudulent claims make the administration of Medicare more difficult, and widespread fraud would undermine public confidence in the system.") (citing U.S. ex rel. Rosales v. San Francisco Housing Auth., 173 F.Supp.2d 987, 1019–20 (N.D.Cal.2001) (discussing Congress's purpose in the FCA to maintain public confidence in the government by protecting against fraud) and S.Rep. No. 99-345, at 2–3, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267–68 (noting the pervasiveness of fraud in government in programs, including entitlement programs, and the difficulty in deterring fraud)).

82. *But see* Cook County v. United States *ex rel.* Chandler, 539 U.S. 119, 120, 123 S.Ct. 1239, 1241 (2003) (commenting in *dicta* that the Act's treble damages have both compensatory and punitive functions); (Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784–86, 120 S.Ct. 1858, 1869–70 (2000) (commenting in *dicta* that after the 1986 amendments the Act's treble damages and penalty provisions, at least in combination, are "essentially punitive in nature").

83. United States v. Kruse, 101 F. Supp.2d 410, 414 (E.D. Va. 2000) (Anti-Kickback Act); *see also Lippert*, 148 F.3d at 978 (penalties available under Anti-Kickback Act "may not be subject to the Excessive Fines Clause at all, because . . . they serve the remedial purpose of reimbursing the government for losses accruing from kickbacks").

84. For example, instead of requiring that a sanction be "solely" remedial in order to avoid the "punishment" label, the test could require that the sanction be "primarily" remedial or "substantially" remedial.

85. *See, e.g., Kruse*, 101 F. Supp. 2d at 413 (goal of Excessive Fines Clause is to "prevent[] the Government from abusing its power to punish" and test for application of Clause should consider "whether the Government is acting in its prosecutorial role or in the role of an injured party")

2. Are the Act's Penalties "Grossly Disproportional"?

Although two pre-*Bajakajian* district court cases held that penalties under the Act violated the Excessive Fines Clause,[86] most cases decided after *Bajakajian* have upheld the Act's penalties.[87] As discussed below, courts have considered a wide variety of factors bearing on the excessiveness inquiry, some of which are generally applicable to all excessive fines challenges to the Act, and some of which are case-specific.

a. Generally Applicable Considerations

i. Clearly Articulated Congressional Purpose for Penalties. As the *Bajakajian* Court instructed, every court considering an excessive fines challenge must "grant *substantial* deference to Congress in legislating punishment."[88] Such deference is particularly appropriate in cases challenging the Act, because of Congress' "well-articulated basis for its damages scheme under the FCA."[89] As the Seventh Circuit put it, "'[it] could not be more clear that Congress, in adopting [the treble damages and increased penalties of the 1986 amendments], addressed the situation with careful precision as to what sort of damage scheme was necessary to achieve the goals of the statute.'"[90] Indeed, the Act's legislative history indicates, for example, that the Act's penalties were enacted in response to Congress' findings that fraud against the Government was: 1) significant in monetary terms, 2) growing due to inadequate deterrence under the previous $2,000 penalty scheme, and 3) spread across all government programs, big and small.[91] In addition, as another court noted, Congress' selection of a per occurrence penalty in addition to treble damages "reflect[s] the frequency and extent of defendant's false claims submissions."[92] In short, the Supreme Court's admonition that courts must

86. *See Advance Tool*, 902 F. Supp. at 1018–19 (where Government failed to prove actual damages at trial, minimum penalty of $3.43 million ($5,000 time 686 false invoices) would be unconstitutionally excessive); *Gilbert Realty*, 840 F. Supp. at 74–75 (where actual damages were $1,630, minimum penalty of $290,000 ($5,000 times 58 false claims) would be constitutionally excessive).

87. **Penalties violated Excessive Fines Clause:** Hays v. Hoffman, 325 F.3d 982 at 993–94 (8th Cir. 2003) (potential fine of more than $1,000,000 "bears no rational relationship to the false claim misconduct—seeking reimbursement for spending $6,000 to purchase apples"); *Cabrera-Diaz*, 106 F. Supp.2d at 242 (where defendant submitted 455 false claims totaling approximately $450,000, potential penalty range of $2,275,000 to $4,550,000 was deemed excessive).

Penalties did not violate Excessive Fines Clause: *Mackby II*, 339 F.3d at 1016–19 (where single damages were $58,151, penalty of $550,000 ($5,000 x 111 claims) was not excessive); *Rachel*, 2004 WL 2422113 at *3 (where defendant's fraudulent schemed netted $408,478, penalty of $220,000 ($10,000 x 22 false claims) was not excessive); *Lamb Engineering*, 58 Fed. Cl. at 111–12 (rejecting excessive fines defense and granting summary judgment for $20,000 penalty ($5,000 x four false claims) while denying summary judgment on claim for treble damages of $258,900); *Williams*, 2004 WL 21384640 at *4–*6 (where actual damages were at least $14,387 (not including costs), and "punitive portion of the fine" (*i.e.*, $28,774 double damages plus $27,500 penalty) was $56,274, court held that the resulting "total penalty" of $70,661 was not excessive); *Byrd*, 100 F. Supp.2d at 344–45 (where treble damages were $255,036, penalty of $1,320,000 ($5,000 x 264 false claims) was not excessive).

88. *Williams*, 2004 WL 21384640 at *6 (emphasis original).

89. *Id.*

90. *Id.* (quoting United States ex rel. Chandler v. Cook County, 277 F.3d 969, 978 (7th Cir. 2002), *aff'd*, 538 U.S. 119, 123 S.Ct. 1239 (2003)).

91. *Id.* (citing S. Rep. No. 99-345).

92. *Byrd*, 100 F.Supp. 2d at 345; *see also Westinghouse*, 2000 WL 34024248 at *24 ("Congress determined that [a penalty between $5000-$10,000] was the proper penalty. . . .").

show "substantial deference" to legislative judgments regarding sanctions is particularly apt in cases under the Act because of the extensive legislative record detailing Congress' reasons for adopting the Act's particular penalty scheme.

ii. Penalties Reach Intended Targets. A second factor that will always weigh in favor of upholding the Act's penalties is that, unlike the penalties at issue in *Bajakajian*, penalties under the Act are imposed only against those whom the Act was intended to target. A significant factor influencing the *Bajakajian* Court's finding of "gross disproportionality" was that the defendant was not among the class of people the currency statute at issue was meant to cover, *i.e.*, money launderers, smugglers and drug dealers. The False Claims Act, by contrast, "targets those who knowingly make a false claim for payment to the government."[93] Thus, any person who is found liable under the Act will fall among the class of persons targeted by the Act's penalties.

iii. Significant Harm Caused By Defendant's Acts. The fact that violations of the Act by definition involve fraud on the government and harm to the public fisc is another generally-applicable factor suggesting that the Act's penalties are not excessive. In finding that the *Bajakajian* defendant had caused "minimal harm," the Court specifically noted that his conduct involved "no fraud on the United States, . . . and no loss to the public fisc."[94] Cases under the Act, however, always involve fraud on the United States and usually also involve loss to the public fisc, as well as harm to the integrity of government programs.[95] Thus, false claims cases always involve a type of harm that the Supreme Court specifically contrasted to the "minimal" harm at issue in *Bajakajian*. In recognition of the serious nature of the harm caused by *all* false claims against the Government, at least two district courts have held that even where the Government has not proved any actual damages, an award of penalties under the Act can still comport with the Excessive Fines Clause.[96]

b. Case-specific Considerations

i. Comparison to Maximum Penalty Available Under Act. One important case-specific consideration in determining whether a particular penalty under the Act suffers from "gross disproportionality" is a comparison of the amount of the requested penalty to the maximum penalty available under the Act. For example, in concluding that penalties under the Act were not excessive, both the district court and the Ninth

93. *Mackby II*, 339 F.3d at 1017 ("Mackby, who submitted claims using a false PIN number, therefore falls among the class of person targeted by the Act."); *see also Rachel*, 2004 WL 2422113 at *3 ("Unlike Bajakajian, Priscilla Rachel [who had already been found liable for violating the FCA and who had acted at least with "reckless disregard"] is the type of person whom the relevant statute intended to target.").

94. 524 U.S. at 339, 118 S.Ct. at 2039.

95. *See Mackby II*, 339 F.3d at 1018 (in upholding fine against excessiveness challenge, court relied in part on fact that "Mackby's false claims also harmed the government, in the form of both monetary damages and harm to the administration and integrity of Medicare").

96. *See Westinghouse*, 2000 WL 34024248 at * 23–24 (rejecting defendant's claim that Act's penalties would be excessive if plaintiff could not prove any damage to the United States); *Advance Tool*, 902 F. Supp. at 1018–19 (even where government had failed to prove actual damages, penalty of $365,000 would not be unconstitutionally excessive).

Circuit in the *Mackby* case relied heavily on the fact that the penalties actually sought by the Government in this case were far below the maximum available: although the Act would have authorized 8499 penalties of up to $10,000, or a total penalty of nearly $85 million, the Government sought only 111 penalties of $5,000, for a total penalty of $550,000.[97] The Ninth Circuit held that "the substantial difference between the actual judgment . . . and the maximum available penalties weighs against a finding of gross disproportionality."[98] As *Mackby* teaches, a savvy plaintiff facing a situation where penalties might potentially be deemed "excessive" (e.g., where there are a large number of false claims of a low dollar value) may want to consider seeking less than the maximum available penalties from the outset.

ii. Comparison to Criminal Penalties for Same Conduct. A comparison of the requested penalty under the Act to available criminal penalties for the same conduct has also been used by the courts to analyze whether the Act's penalties are "grossly disproportional" in a particular case. The *Bajakajian* Court, finding that the maximum available punishment for defendant's conduct under the Sentencing Guidelines would have been a $5,000 criminal fine and a 6 month term of imprisonment, held that these potential criminal penalties "confirm[ed] a minimum level of culpability."[99] Furthermore, the Court found that the fact that the requested forfeiture was larger by "many orders of magnitude" than the $5,000 fine imposed by the sentencing court weighed in favor of a finding of disproportionality.[100]

Applying this reasoning in *United States v. Mackby*, the Ninth Circuit held that even where the available range of criminal fines was "an order of magnitude" less than the civil judgment under the Act, the fact that the defendant could also have been sentenced to a term of imprisonment of 37 to 46 months and restitution of the full amount of the government's loss weighed against a finding of "gross disproportionality."[101] The court noted that "when courts have compared civil judgments with criminal penalties for the same conduct, they have considered the *full* criminal penalty."[102] In constrast to *Bajakajian*, the court held that the substantially greater penalties that the *Mackby* defendant could have faced did not "confirm a minimal level of culpability."[103]

iii. Presence of Related Criminal Activity. Another one of the factors cited by the *Bajakajian* Court was that the defendant's currency reporting violation was not connected to any illegal scheme such as money laundering or drug trafficking. The fact that the defendant was not engaged in any related criminal activity weighed in favor of the Court's finding that the forfeiture at issue was "grossly disproportional." The

97. *See Mackby II*, 339 F.3d at 1018.

98. *Id.*

99. *Bajakajian*, 524 U.S. at 339, 118 S.Ct. at 2038.

100. *Id.* at 339–40, 118 S.Ct. at 2039.

101. *Mackby II*, 339 F.3d at 1018.

102. *Id.* (emphasis added) (citations omitted).

103. *Id.*

presence or absence of related criminal activity has also been listed as a factor for consideration in at least one excessiveness challenge to the Act's penalties.[104]

iv. Gravity of the Offense. Courts have also considered a variety of factual circumstances as otherwise bearing on the "gravity of the defendant's offense." Examples include: the amount required to achieve deterrence;[105] whether the defendant's conduct could be considered "an isolated lapse in judgment";[106] the fact that defendant's conduct, although technically a "false claim," was not the type of activity to which one would normally expect such liability to attach;[107] and the government's conduct.[108]

vi. Mathematical Ratio Not Determinative. As a final case-specific consideration, it is important to note that, although "proportionality" is the central requirement of the Excessive Fines Clause, it would be improper for a court to limit its analysis to calculating the mathematical ratio of single or "actual" damages to the amount of the penalty and then arbitrarily decide based on the resulting number whether the penalty is "grossly disproportional." Instead, as discussed above, multiple factors must be considered in determining the proportionality of the dollar amount of the penalties under the Act to "the gravity of the defendant's offense." Focusing exclusively on numerical ratios would improperly elevate to dispositive status what should be just one factor bearing on the excessiveness inquiry. Properly, most courts have not even mentioned such a ratio as part of their analysis.[109]

104. *See* United States v. Mackby, 221 F. Supp.2d 1106, 1109–10 (N.D. Cal. 2002), *aff'd*, 339 F.3d 1013 (9th Cir. 2003) (noting there was no indication that Mackby was involved in other illegal activity).

105. *See id.* at 1113–14 ("Mackby's argument [that a minimal fine would be sufficient for purposes of deterrence] rings hollow given his steadfast denial of any wrongdoing, notwithstanding this Court's and the Ninth Circuit's holdings to the contrary."); *Byrd*, 100 F. Supp.2d at 345 (Act's penalties are meant to deter submission of false claims and "their application here serves to protect the Food Stamp Program").

106. *Williams*, 2003 WL 21384640 at *6 (fact that "[d]efendants knowingly submitted fraudulent information on no less than five occasions over the same number of years" cited in support of conclusion that penalty was not grossly disproportional).

107. *Gilbert Realty*, 840 F. Supp. at 75 (fact that "one does not normally expect a landlord to consider the terms of the rental agreement for an inexpensive rental apartment each time a rent check is cashed" rendered penalties based on cashing of rent checks unconstitutionally excessive; additional penalties based on actual false certifications to the housing authority were not excessive).

108. *Advance Tool*, 902 F. Supp. at 1018 (government's inability to prove damages, its "poor investigative procedures," and its "confusing and regulatory and contractual purchasing arrangements which virtually encourage the type of conduct at issue here" were basis for court's finding that proposed penalty was unconstitutionally excessive).

109. Two exceptions approach opposite ends of the excessiveness spectrum: in *Advance Tool*, 840 F. Supp. at 74, a ratio of approximately 1:178 between single damages of $1,630 and a penalty of $290,000 was held to be excessive, whereas in *Williams*, 2203 WL 21384640 at *6, a ratio of "less than four" between the double damages plus penalty portion of the award and its single damages component was considered not to be excessive. *Cf. Lamb Engineering*, 58 Fed. Cl. at 112 (penalties not excessive where there were "only four violations during the course of a contract potentially worth approximately $3.4 million").

3. Are "Excessive" Penalties Eliminated Entirely or Merely Reduced?

A finding that a particular penalty is "excessive" does not mean that *no* penalty may be awarded. Although the district court in *United States v. Cabrera-Diaz* allowed no penalty at all after finding that even the minimum penalty required under the Act would have been excessive,[110] most courts have simply reduced the penalty to a constitutionally acceptable level, usually by finding some alternative way of calculating the number of "claims" for which a penalty must be assessed.

For example, in *United States v. Advance Tool*,[111] the defendant had submitted 686 claims for tools that did not meet government specifications. The court found that the resulting minimum $3.43 million fine would have been excessive. Accordingly, it decided to base the number of penalties on the 73 different types of tools involved, resulting in a penalty of $365,000 which the court found constitutionally acceptable. Similarly, in *Hays v. Hoffman*,[112] the court declined to adopt an expert's testimony suggesting that a $6,000 unallowable expense had been spread through numerous cost reports at eight facilities, resulting in over 200 false claims. Finding that this approach was "laced with Excessive Fines Clause implications" the court instead awarded eight penalties, one for each of the facilities involved. The court in *United States ex rel. Smith v. Gilbert Realty*[113] took a hybrid approach: finding that a penalty of $290,000 based on 55 false claims would have been excessive, the court found that 48 of the claims were not sufficiently serious to warrant a penalty and disallowed those penalties entirely; it then awarded penalties on the remaining 7 claims, resulting in a final penalty award of $35,000 which the court held was constitutionally acceptable.

Thus, a plaintiff who has not already circumvented the excessive fines issue by self-reducing the requested number of penalties should at least be prepared to suggest to the court some alternative methodology for calculating a constitutionally acceptable penalty in the event of an excessive fines challenge. Otherwise, plaintiff runs the risk that the court will undertake its own reduction without the plaintiff's input (as in the above examples), or disallow the penalty entirely (as in *Cabrera-Diaz*).

To sum up the excessive fines analysis, while the Clause provides defendants with a viable challenge to the imposition of penalties under the Act, in those cases where the defense has been applied, the Act's penalties usually have not been found excessive. Even where penalties are deemed excessive, they are usually reduced, not eliminated entirely. Thus, the excessive defines defense appears unlikely to affect most penalty awards. Nevertheless, the mere availability defense has changed the landscape of penalties litigation and raises new strategic considerations for plaintiffs pursuing penalties

110. *See* 106 F. Supp.2d at 242.

111. 902 F. Supp. 1011, 1018–19 (W.D. Mo. 1995)

112. 325 F.3d 982, 993–94 (8th Cir. 2003).

113. 840 F. Supp. 71, 74–75 (E.D. Mich. 1993).

under the Act. At a minimum, constitutional scrutiny will likely now be applied in cases where courts previously would have ended their inquiry with a statement that they had no discretion to alter the penalty award mandated by the Act.[114]

III. DUE PROCESS

A. Defense Rarely Raised and Never Successful Under the Act

Finally, defendants have also challenged the Act's penalties under the Due Process Clause of the Fifth Amendment.[115] The core of the substantive due process defense is that penalties under the Act are unconstitutional unless there is a "fair ratio" between the penalty amount and actual damages.[116] This defense was raised in the 1959 case of *Toepelman v. United States*,[117] in which defendants argued that it would violate due process to award penalties under the Act in a case in which the government failed to prove actual damages. Defendants asserted that "[i]f the forfeiture is not in some measure referable to the damages suffered, . . . then there is no lawful basis for the taking which the forfeiture makes of the defendant."[118] The Fourth Circuit rejected this contention on the ground that

> damages are always suffered by the United States when a false claim is presented and . . . the Government may protect itself against this eventuality even though the damages are not nicely ascertainable, so that even when the penalty is multiplied by a plurality of impositions, the total amount of the forfeiture cannot be justly regarded as a taking without just cause or due process.[119]

114. Two such cases which come to mind are *United States v. Lorenzo*, 768 F. Supp. 1127, 1133 (E.D. Pa. 1991) (where single damages were $130,719 and defendant had filed 3683 false claims, court awarded statutory minimum penalty of $18,415,000 ($5,000 times 3683), holding that the Act "limits a court's discretion to a range between $5,000 and $10,000 per false claim") and *United States v. Fahner*, 591 F. Supp. 794, 801–02 (N.D. Ill. 1984) (where single damages were $9,775 and defendant had submitted 551 false claims, court awarded penalty of $1,102,000 ($2000 times 551), commenting that "while the total damage award in this action may appear to be excessive, it reaches such proportions for the sole reason that [defendant] has been found to have submitted 551 separate false claims").

115. The Due Process Clause reads: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const., Amdt. 5.

116. Defendants have also occasionally invoked procedural due process, arguing that the Act's penalties are so punitive in nature as to constitute a criminal punishment, and that it is therefore unconstitutional not to afford a defendant under the Act the procedural safeguards of a criminal proceeding. *See, e.g.*, Toepelman v. United States, 263 F.2d 697 (1959). It does not appear that any court has ever accepted this argument with respect to the Act's penalties. Moreover, as noted above, such a holding appears highly unlikely given the demanding standard set forth in the *Hudson* case for concluding that a nominally civil penalty is nevertheless a criminal punishment.

After the 1986 amendments increased the Act's damages and penalties, numerous defendants also raised a due process defense to the "retroactive" application of the new provisions to false claims made prior to 1986. Now that 20 years have passed since the amendments, this defense has little (if any) continuing significance.

117. 263 F.2d 697, 698–700 (4th Cir. 1959).

118. *Id.* at 698.

119. United States v. Cato Brothers, Inc., 273 F.2d 153 (4th Cir. 1959) (summarizing the holding of *Toepelman*).

In 1969, defendants raised the due process defense again in *United States v. Greenberg*.[120] In *Greenberg*, the government sought penalties under the Act but did not assert any damages. Defendants claimed that application of the Act's penalties to them in such circumstance would "violate[] due process because there is no rational relationship between the actual or possible damages to the government and the statutory penalty of $2,000 for each false claim and double the amount of actual damages."[121] The district court summarily rejected this argument, citing *Toepelman*.[122]

B. Supreme Court Punitive Damages Cases Should not Be Applied to the Act

Interestingly, after its rejection by this pair of decades-old cases, it appears that the due process defense has not been discussed again in a published opinion involving the Act.[123] Recently, however, the Due Process Clause has been the subject of several Supreme Court decisions which may spark a renewed interest in the defense as it relates to the Act's penalties.

In a series of decisions, the Court has held that the Due Process Clause of the Fourteenth Amendment prohibits the states from imposing "grossly excessive" punitive damages on tortfeasors.[124] Most recently, in the case of *State Farm Mutual Insurance Co. v. Campbell*,[125] the Court, while avoiding a bright-line rule, suggested that substantive due process considerations may require a "single digit" ratio between punitive damages and actual damages, or even a lower ratio where actual damages run to large dollar amounts.[126]

It is unclear whether substantive such due process limitations on punitive damages in tort cases may appropriately be applied to the imposition of civil penalties pursuant to a federal statutory scheme enacted by Congress. Indeed, the central due process principle underlying the Court's punitive damages cases, *i.e.*, that a tortfeasor is entitled to adequate notice of the magnitude of the punitive sanction a State

120. 237 F. Supp. 439, 443–44 (S.D.N.Y. 1965).

121. *Id.* at 443–44.

122. *Id.*

123. In *Peterson v. Weinberger*, the Fifth Circuit upheld the district court's conclusion that a forfeiture under the Act "should reflect a fair ratio to damages to insure that the Government completely recoups its losses." 508 F.2d 45, 55 (5th Cir. 1975). The court, however, although it cited *Toepelman*, did not invoke the Due Process Clause. Rather the Fifth Circuit appears to consider a reduction of penalties to be a matter within the court's discretion. *See* United States v. Garibaldi, 46 F. Supp.2d 546, 564–65 (E.D. La. 1999) (in the Fifth Circuit, unlike in other circuits, court has discretion to reduce the number of penalties required by the Act).

Cf. In re Matter of Garay, 444 A.2d 1107, 1113 (N.J. 1982) (in case challenging award of penalties under state medicaid fraud statute, court commented that "[a]utomatic application of the maximum penalty when a person committed a large number of frauds involving small dollar amounts could be unreasonable and therefore a violation of due process," but did not reach the issue).

124. *See, e.g.*, BMW of North America, Inc. v. Gore, 517 U.S. 559, 562, 116 S.Ct. 1589, 1592 (1996) (Due Process Clause of the Fourteenth Amendment prohibits states from imposing a "grossly excessive" punishment award on a tortfeasor).

125. 538 U.S. 408, 123 S.Ct. 1513 (2003);

126. *Id.* at 425, 123 S.Ct. at 1524 ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."); *id.* ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

might impose,[127] does not apply in the context of the Act. Unlike punitive damages, of course, the Act's penalties are set forth by statute and thus prospectively provide all defendants (and potential defendants) clear notice of the sanctions they may face should they elect to submit false claims to the federal government. Moreover, *unlike* punitive damages, the Act's penalties are not unlimited. Rather, they are circumscribed by the statutory penalty range and the number of false claims submitted by the defendant. Thus, the due process rationale behind the Supreme Court's punitive damages cases does not apply to the Act' penalties.[128]

Even if the Court's punitive damages due process cases would not literally transfer to the context of the Act, however, there is the possibility that some of the reasoning of those cases may work its way into cases challenging the Act's penalties, via the excessive fines defense. As the Supreme Court noted in *Cooper Industries, Inc. v. Leatherman Tool*,[129] constitutional violations in both the due process and the excessive fines contexts are predicated on a judicial determination of "gross disproportionality." As a result, concepts initially introduced in these due process punitive damages cases could later creep into the Court's excessive fines jurisprudence, in much the same way the *Halper* test originated in the double jeopardy context but later became the standard for determining whether a civil sanction constitutes "punishment" under the Excessive Fines Clause.

Imposed in the context of a state law tort action, the limits suggested by the Supreme Court in *State Farm* may seem desirable, as they arguably add a degree of predictability and standardization to the one-of-a-kind factual situations presented in each different tort case. Imposed in the context of cases arising under the Act, however, such limitations would appear to impermissibly override Congress' considered judgment that the Act's penalties properly reflect the seriousness of submitting false claims to the government.

For example, the parameters suggested in *State Farm* would effectively grant false claims of less than $550 a free pass from penalties (because, in the case of such claims, the ratio of the Act's minimum penalty of $5,500 to the damage amount of $550 or

127. *See, e.g., BMW v. Gore*, 517 U.S. at 574, 116 S.Ct. at 1598 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

128. In the context of reviewing civil sanctions set forth in a federal statute for double jeopardy purposes, the Supreme Court in *Hudson* commented in *dicta* that the Due Process Clause "protect[s] individuals from sanctions which are downright irrational." 522 U.S. at 102–03, 118 S.Ct. at 495. Although this comment suggests that the Act's civil sanctions would be subject to due process review, the Court's statement that only sanctions which are "downright irrational" are prohibited by the Due Process Clause also suggests that such review would be very deferential. Moreover, in support of this proposition, the *Hudson* Court cited *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461 (1955), in which the Court addressed a Fourteenth Amendment due process challenge to a state statute regulating visual care. The *Williamson* Court applied a very lenient standard of review, examining only whether the regulation bore "no rational relation" to its objective. *Id.* at 491, 75 S.Ct. at 466. The *Williamson* Court overturned the district court's findings that the regulation violated due process, asserting that the "day is gone" when the Court would strike down state laws as improvident or unwise. *Id.* at 488, 75 S.Ct. at 464–65. The Court also emphasized that for protection against alleged abuses by legislatures, "the people must resort to the polls, not to the courts." *Id.* (quoting *Munn v. State of Illinois*, 94 U.S. 113). *Hudson*'s citation of *Williamson* suggests, therefore, that statutory civil sanctions would be reviewed under a very deferential standard, with extreme deference given to Congress' judgment as to the remedies appropriate to meet its objectives.

129. 532 U.S. 424, 434–35, 121 S.Ct. 1678, 1684–85 (2001).

less would be greater than ten and thus would not be a "single digit" ratio). Such a result could severely undermine the effectiveness of the Act. Federal healthcare programs such as Medicaid and Medicare process a huge number of claims, a large percentage of which would likely fall below the $550 threshold; nevertheless, participants submitting false claims below this amount would basically be immunized from the Act's penalties. Moreover, compared to a small number of very large claims, a large number of smaller claims is already harder to detect and more difficult to find the resources to recover. Thus, the imposition of penalties even in cases of low-dollar false claims serves an important purpose in reimbursing the government for the high cost of policing such claims and the high costs that such prolific but small false claims impose in terms of the integrity of, and public confidence in, affected government programs. Indeed, as discussed in Part One of this series, penalties may be imposed under the Act even where the plaintiff cannot prove any damages associated with a particular false claim. The wholesale adoption of *State Farm* and similar cases into the context of the Act would thwart the Act's purposes by preventing the imposition of penalties for small dollar (or no dollar) value false claims.

At the other end of the spectrum, extremely large false claims would also escape Congress' intended penalties and possibly even treble damages (based on *State Farm*'s suggestion that where compensatory damages are "substantial" even punitive damages that are simply equal to the compensatory damages might "exceed the outer limits of due process"). Here again, this would inappropriately reduce or eliminate the Act's penalties in the case of those violators who have access to the largest amounts of taxpayer funds and who most flagrantly cheat the government. The better rule is that set forth by the Eleventh Circuit in *United States v. Barnette*,[130] *i.e.*, that even where a potential recovery exceeds the Government's total loss by a very large dollar amount, it still does not run afoul of the Constitution unless it is "disproportional" to the total loss. As the Court put it, "[t]he Constitution does not have two sets of provisions, one that operates at retail and another at wholesale. It offers no quantity discounts."[131]

In short, to apply the Court's due process limitations from the punitive damages context to the Act would impermissibly substitute the judgment of a court for that of Congress. Such judicial activism cannot be justified in the name of "fair notice" to defendants, because the Act's penalty provision already provides defendants with notice of the potential penalties they may face.[132]

* * *

130. 10 F.3d at 1560 (where direct loss was at least $15.7 million and Government sought recovery of between $15.1 million and $50.5 million under various theories, including civil claims under the Act, court held that fact that total recovery sought exceeded total loss by a large amount was irrelevant, stating that "[w]e do not dispute that the amounts claimed . . . are large, but they are not disproportionate, and proportionality is the key").

131. *Id.*

132. *Cf.* Golson v. Green Tree Financial Services Corp., 26 Fed. Appx. 209, 216 (4th Cir. 2002) (unpublished) (declining to apply *BMW v. Gore* due process argument in Title VII case because statute provided defendant with notice of the range of damages that could be imposed, and fact that penalty fell within the range set by Congress was a "strong indicator" that the award was not unconstitutional).

When it comes to constitutional challenges to the imposition of penalties under the Act, the double jeopardy defense is the past, the excessive fines defense is the present, and the due process defense may or may not be the future. To date, most penalty awards under the Act have survived constitutional challenge under the Double Jeopardy and Excessive Fines Clauses, and for the most part only the extreme outliers have been struck down. If recent Supreme Court due process cases in the punitive damages context were to be applied to the Act, however, the limits on damages suggested in these cases could threaten to override Congressional intent by eviscerating the Act's penalty provisions. Because the fair notice principles of due process underlying these punitive damages cases do not apply where a federal statute provides a defendant with notice of the penalties it may face, the types of limits the Supreme Court has imposed on punitive damages should not be applied to limit the Act's penalties.