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HEALTH LAW ANALYSIS
JULY 2006

False Claims Act Damages: "One Size Doesn't Fit All"

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I. INTRODUCTION

The Federal False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, is the primary civil litigation tool used by the U.S. Government (Government) and qui tam relators (also known as whistleblowers) against individuals and entities to seek the recovery of funds alleged to have been wrongfully obtained from the Federal Treasury.[1] In general, the FCA imposes civil liability for both actual damages and civil penalties against anyone who knowingly submits false or fraudulent claims for payment to the Government for services or products not provided or for substandard services or products. Over the last decade, the primary focus of FCA cases has been in the healthcare industry. Given the billions of dollars expended by the Government on healthcare, whether under the expanding Medicare program including the new Part D program, the Medicaid program, or health benefits for federal employees, any healthcare institution, pharmaceutical company, or provider of healthcare products or services remains vulnerable to potential or actual FCA liability.

In years past, there existed a relatively straightforward measure of damages applicable to FCA claims. Today, however, an increasing number of decisions involving ever more complex cases have recognized more expansive measures of damages under the FCA. Accordingly, all potential measures of damages in FCA cases must be understood by the Government, defense counsel, and relators' counsel attempting to recover and defendants seeking to avoid or minimize their damages exposure.

II. THE TRADITIONAL FCA MEASURE OF DAMAGES

The modern FCA states simply that a defendant is liable for "3 times the amount of damages which the Government sustains because of the act of that person. . . ." 31 U.S.C. § 3729(a) (2006). The sixty-four thousand dollar ($64,000) question (or in FCA cases what might be a billion dollar question) is: what are the "damages" that fall within this statutory provision?

For decades, courts consistently have articulated a simple and straightforward measure of damages under the FCA—the difference between what "was paid" and "what should have been paid." As stated by the U.S. Court of Appeals for the Ninth Circuit:

> Ordinarily the measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful. Such a rule is readily applied, for example, where a false claim, showing unreal costs, is made in connection with a cost-plus type of contract.

United States v. Woodbury, 359 F.2d 370, 379 (9th Cir. 1966). As also held by the U.S. Court of Appeals for the Eleventh Circuit:

> Case law indicates the measure of damages is generally determined to be the difference between what the government actually paid on the fraudulent claim and what it would have paid had there been fair, open and competitive bidding.

United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988) (citations omitted).

This measure of damages has its genesis in two typical types of FCA cases, namely: (1) a defendant's fraudulent overpricing of goods or services; or (2) goods or services not provided yet billed to the Government. As aptly stated by the U.S. Court of Appeals for the Fifth Circuit:

> The cases that have considered the application of this statute's double damage provision have generally been of two kinds. One line of cases involves an overpricing for what was sold and delivered to the government.

> Here the damage sustained by the United States is the difference between the reasonable cost of the goods sold and the price the government actually paid for the goods, and recovery is double that amount. . . .
>
> In the other line of cases, the government has been billed and has paid for a greater quantity of goods or services than it has received. The basis for the double damage recovery is then the amount it paid for the goods that were short in delivery.

United States v. Aerodex, Inc., 469 F.2d 1003, 1010-11 (5th Cir. 1972) (citations omitted).[2]

Existing Supreme Court precedent supports this traditional measure of damages. In *United States v. Bornstein*, 423 U.S. 303 (1976), the Court found that an appropriate measure of damages in an FCA case is "the difference between the market value of the [product or service] it received and retained and the market value that the [product or service] would have had if [it] had been of the specified quality." *Id.* at 317 n.13. The Supreme Court in *Bornstein* adopted this measure because it "maximizes the deterrent impact of the [previous] double-damages provision and fixes the relative rights and liabilities of the respective parties with maximum precision. . . ." *Id.*

In application, however, there may be many practical difficulties in establishing the "market value" of the product or service supplied or "what should have been paid" by the Government. The issue becomes, therefore, whether there are possible alternative measures of damages that are available under the FCA or whether a defendant may avoid liability due to a plaintiff's failure to establish harm from the putative defendant's alleged wrongful conduct.

Those seeking rigid application of the traditional measure of damages in FCA cases often overlook the fact that nothing in the text of the FCA or its legislative history reflects that Congress intended the FCA to provide for a single measure of damages. As noted by the court in *Killough*:

> 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 courts should remain free to fashion measures of damages on a case by case basis. . . . [C]ourts 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.

Killough, 848 F.2d at 1532 (citation omitted).

As a result, although the traditional measure of FCA language is often recited as the initial inquiry that must be undertaken for an analysis of damages issues, courts have recognized, as a general principle, that there is no single measure of damages that governs claims under the FCA. *See, e.g., id.* at 1532 ("Under the [FCA], there is no set formula for determining the government's actual damages"). *See also BMY—Combat Systems Division of Harsco Corp. v. United States*, 44 Fed. Cl. 141, 147 (Fed. Cl. 1998) ("Because each case under the FCA involves unique types of damage to the government, a formula for calculating damages must be created for each case that will provide the government with its damages directly caused by the filing of a false claim."). Accordingly, the potential measures of damages in a FCA case will be heavily dependent on the particular facts underlying the conduct at issue. As succinctly stated by the court in *United States v. Cabrera-Diaz*, 106 F. Supp. 2d 234 (D.P.R. 2000):

> There is no set formula for measuring damages under the False Claims Act. Damages have been measured in a variety of ways and the measure applied by the courts in specific cases has been greatly influenced by the nature of the fraud and the type of Government transaction affected by it.

Id. at 239.

The FCA, therefore, specifically contemplates or, at a minimum, certainly does not preclude the application of alternative measures of damages. Further, in pursuing or defending against alternative measures of damages, parties must be aware that difficulties in proof will not necessarily preclude a plaintiff from seeking damages, particularly where a plaintiff can establish that the difficulty in establishing the extent of damages was a result of conduct by the defendant. As stated by the U.S. Supreme Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946):

> In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act on probable and inferential as well as (upon) direct and positive proof." Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recov-

> ery. The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

Id. at 264-65 (citations omitted).[3] *See also Killough*, 848 F.2d at 1531 (following *Bigelow* in FCA case). The issue, therefore, is what additional measures of damages may be available in an FCA case under existing jurisprudence.[4]

III. ALTERNATIVE MEASURES OF DAMAGES UNDER THE FCA

While courts have addressed a variety of damages issues under the FCA, there are three major potential measures of damages that can and must be considered in connection with almost any modern complex FCA case. Each of these will be discussed in turn.

A. Damages Based on the Contract Price or the Full Value of the Contract

Rather than accept the mere difference in value as the measure of damages, those prosecuting FCA cases may seek what can appropriately be referred to as the "nuclear option"—the entire contract price—by claiming that the Government received "no value" from the contract. This measure of damages may arise in the FCA context in those cases where the defendant is alleged to have provided "worthless services" to the Government. *See United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001) ("[K]nowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under § 3729, regardless of any false certification conduct. . . .[I]f . . . a party to a government contract knowingly or with deliberate ignorance charged the government for worthless services, then there would be fraud on the government that may be pursued under the FCA.") (citations omitted); *Mikes v. Straus*, 274 F.3d 687, 703 (2d Cir. 2001) ("We agree that a worthless services claim is a distinct claim under the [False Claims] Act. It is effectively derivative of an allegation that a claim is factually false because it seeks reimbursement for a service not provided. In a worthless services claim, the performance of the service is so deficient that for all practical purposes it is the equivalent of no performance at all.") (citations omitted). *See also Hunt*, 336 F. Supp. 2d at 439-40 ("In some cases, such as the drug shorting allegations, Medco allegedly billed for products that it simply did not provide. If the allegations are true, these bills could form the basis of a false claim . . . . It seems clear to this Court that any drugs charged for and not delivered are potential violations of § [3729](a)(1).").

This measure of damages, albeit challenging, has growing support in case law. For example, in *Aerodex*, the defendant failed to provide aircraft engine bearings as specified in a contract. 465 F.2d at 1005. Instead of providing the contractually mandated product, the defendant provided different bearings that had been "reworked" by the defendant. *Id.* at 1006. The defendant was found to have violated the FCA by deliberately mislabeling the product provided and failing to comply with the contract specifications. *Id.* at 1007-08. While refusing to allow the Government to recover its costs in removing and replacing the bearings, the *Aerodex* court nevertheless awarded the government the full amount of the contract price holding that:

> We think that a proper application of the double damage provision limits the government's claim to the amount that was paid out by reason of the false claim. We treat the matter as if the claims for $27,000 for P/N 171815 bearings were false because those bearings were never delivered. The government paid $27,000 for bearings it did not receive.

Id. at 1011. Failure to provide a product, therefore, otherwise consistent in all respects with contract specifications could implicate the full contract price measure of damages.

Similarly, failure to comply with mandated contractual requirements viewed as essential to complete contract performance could also trigger application of this measure of damages. In *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998), the U.S. Court of Appeals for the Sixth Circuit awarded the Government the full contract price where the defendant failed to provide the contractually mandated inspection for brake-shoe kits for jeeps for the U.S. Army, holding that "the government is entitled to full damages where it proves it received no value at all." *Id.* at 304. Significantly, in *Compton*, the Sixth Circuit rejected the argument that a defendant should be entitled to a set off or credit for any value received by the Government:

> [A] setoff based on value purportedly received would create a perverse incentive system in which government contractors could endanger the lives of American soldiers by providing substandard materiel [sic], and the Army would be deterred from correcting the danger because it would be forced to bear the cost of any use it received from the substandard goods before their defects were discovered.

Id. at 305 n.8. Of importance as well is the district court's opinion in *Compton* where, as held by the court:

> [M]easuring damages by the contract price comports with the FCA's goal. Congress intended for the FCA to help throttle rampant defrauding of the government. No contractor should expose the government to the risk of untested brake components. Nor should a restrictive judicial view of damages allow a government contractor to easily risk that its failure to test will go undetected, or that even upon detection it will not suffer sever consequences.

United States ex rel. Compton v. Midwest Specialties, Inc., No. 3:91CV7095, 1995 WL 811966, at *3 (N. D. Ohio Sept. 27, 1995) (citation omitted).

In *United States ex rel. Roby v. Boeing*, 302 F.3d 637 (6th Cir. 2002), the Sixth Circuit, following its previous decision in *Compton*, held that "the Government may recover damages under the FCA for the loss of a helicopter that results from the failure of a defective flight-critical component part." *Id.* at 648. Again, the Sixth Circuit rejected the defendant's attempt to restrict damages based on the "value received" by the Government or the defendant's attempt to limit damages solely to the cost of the defective part or component:

> The fact that every component but one conformed to contract requirements is not legally significant when the defective gear was "flight critical" and thus necessary for flight. Because the Speco gear was defective, Aircraft 89-0165 was defective, making Boeing's entire claim for payment false for purposes of the FCA.

Id. at 647. In FCA cases, therefore, parties must be aware that when defective or modified goods are delivered, the courts may choose to award damages based on the entire contract price.

B. Damages Based on Defendant's Ineligibility for Any Payment

A review of FCA cases reveals that, in certain instances, an additional measure of potential damages is the additional remedy of the recovery of all payments received by the defendant.[5] The basis of this measure of damages is that a defendant was simply "ineligible" to receive any payment under the particular Government program and, thus, regardless of whether services or products were actually provided, the defendant is liable potentially for all funds received. This measure of damages will likely arise in the FCA context in those cases where the claim is that the defendant is liable under the FCA for "false certification" of compliance with federal or state law as a condition of payment. *See, e.g., United States ex rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 243 (3d Cir. 2004) ("'[A] false *certification* of compliance [with applicable law] creates liability [under the FCA] when certification is a prerequisite to obtaining a government benefit.'") (citations omitted) (emphasis in original); *Shaw v. AAA Engineering and Drafting, Inc.*, 213 F.3d 519, 532 (10th Cir. 2000) ("the language and structure of the FCA itself supports the conclusion that, under 31 U.S.C. § 3729(a)(1), a false implied certification may constitute a 'false or fraudulent claim.'"); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 786 (4th Cir. 1999) ("A number of courts in a variety of contexts have found violations of the False Claims Act when a government contract or program required compliance with certain conditions as a prerequisite to a government benefit, payment, or program; the defendant failed to comply with those conditions; and the defendant falsely certified that it has complied with the conditions in order to induce the government benefit."); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1998) ("Thus, where the government has conditioned payment of a claim upon a claimant's certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation.") *See also Hunt*, 336 F. Supp. 2d at 439 ("Medco was required to submit certifications of its performance which were used to assess contractual penalties and to determine whether its contract with Blue Cross would be renewed. To the extent that these certifications were false, they could have fraudulently induced Blue Cross to renew its contract with Medco.").

This concept has support in the Legislative History of the 1986 Amendments to the FCA:

> A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the act . . . and such claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program. . . .

S. Rep. No. 99-345 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274, 1986 WL 31937. It is equally important to recognize that this measure of damages may potentially be applied regardless of the actual products or services provided by a defendant. As stated in *United States v. Mackby*, 221 F. Supp. 2d 1106 (N.D. Cal. 2002):

> The measure of the Government's damages is not a function of the value of the underlying services provided nor

> the amounts that it would have legitimately paid to another authorized provider of those services. Instead, the amount the Government paid in response to the false claims is an appropriate measure of damages.

Id. at 1112 (citations omitted).

In understanding the contours of this possible measure of damages, the holding of the U.S. Court of Appeals of the Fifth Circuit in *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1978) is instructive. In Peterson, the defendants sought to avoid liability under the False Claims Act by arguing that defendants' false certification as to eligibility under the Medicare Program was immaterial and, therefore, the defendants were entitled to payment. *See id.* As stated by the court:

> As a common defense [the defendants] urge that the Act was not violated because the physical therapy services were performed by qualified people, the patients receiving these services were entitled to them under Medicare, there was no financial loss to the Government, and the monies paid by the Government were therefore a liability which the Government was statutorily obligated to pay.

Id. at 52. The Fifth Circuit rejected the assertion holding that:

> This argument is unsound. . . . In short, the services billed were plainly not 'covered' services, and the Government thus paid on the basis of the false claims presented . . . . It was entirely reasonable and necessary for the Government to require such a certification on the claim forms to implement the Act and at the same time protect public funds. Obviously, a false certification on the claim form frustrated the Government's attempt to process only valid claims and led to the payment for services which were not covered or payable under the Act.
>
> *Id.*[6]

The fact that a defendant actually provided the products or services, therefore, may be irrelevant. If a defendant failed to provide or falsely claimed it had provided, in all respects, products or services consistent with the requirements of the enumerated Government program, federal law, or state law, a defendant may arguably be held liable for the full amount of funds received for the product or service.[7]

Additional court decisions support a measure of damages based on all funds received by a defendant. For example, in *United States v. TDC Management Corp.*, 288 F.3d 421 (D.C. Cir. 2002), the U.S. Court of Appeals for the District of Columbia Circuit rejected a defendant's assertion that "the government's net damages were zero because [the government] 'got what it paid for' under the 'best efforts' agreement." *Id.* at 427. In determining the appropriate measure of damages for defendant's violation of the FCA, the court in *TDC* rejected the defendant's attempted reliance on the Supreme Court's *Bornstein* decision finding that the traditional FCA measure of damages was inappropriate because: "[the] [Government] Program at issue, however, did not call for [the defendant] to produce a tangible structure or asset of ascertainable value. . . ." *Id.* at 428. Accordingly, the *TDC* court found:

> Once [the defendant] deviated from its contracted role as impartial ombudsman by seeking a financial stake in joint ventures with private investors and by charging fees for the provision of material assistance to minority entrepreneurs, the district court then could properly find that the Program no longer had any value to the government.

Id. at 428.[8]

Similarly, in *United States ex rel. Schweldt v. Planning Research Corp.*, 59 F.3d 196 (D.C. Cir. 1995), the District of Columbia Circuit also held that if the Government can establish that it relied on a defendant's progress reports in making payment "those payments may constitute damages under the Act [FCA]." *Id.* at 200. *See also Thompson*, 20 F. Supp. 2d at 1048 ("[I]n light of the legislative history and the purpose of the FCA . . . submission of such claims for services that were statutorily ineligible for payment under the Medicare Act constitutes a false claim within the ambit of the FCA.").

Recently, in *McNutt v. Haleyville Medical Supplies, Inc.*, 423 F.3d 1256 (11th Cir. 2005), the U.S. Court of Appeals for the Eleventh Circuit, while not specifically addressing the issue of the available damages under the FCA, nevertheless, in a broad holding, stated the following:

> When a violator of government regulations is ineligible to participate in a government program and that violator persists in presenting claims for payment that the violator knows the government does not owe, that violator is liable, under the Act, for its submission of those false claims . . . .

Id. at 1259. Again, therefore, a defendant deemed ineligible to participate in a Government program as a result of conduct violative of the FCA, may be held liable for a

measure of damages based on all funds received under the Government program at issue.

C. Unjust Profits as Measure of Damages

If the recovery of the full contract price or all payments received was not enough of a concern to a defendant, one last possible measure of damages that must be addressed is an attempt to disgorge all profits received by a defendant. In *United States v. Gabelli*, Civ. A. No. 03 CIV 8762(PAC), 2005 WL 2978921 (S.D.N.Y. Nov. 4, 2005), a relator under the FCA asserted that a proper measure of damages under the FCA was the disgorgement of all profits received by the defendant. *Id.* at *1. The *Gabelli* court rejected the argument holding that disgorgement of profits does *not* constitute damages under the FCA:

> Assuming the FCA liability in this instance, the . . . profits unquestionably constitute unjust enrichment, and, arguably, such unjust gains would warrant restitution in the form of disgorgement. Such disgorgement, however, cannot be construed as compensation for "damages sustained" by the Government under the False Claims Act: the Government, while perhaps harmed by defendants' unjust enrichment, sustained no actual damages or monetary losses by virtue of the defendants' purportedly wrongful gains.

Id. at *5. After an extensive review of existing precedent, the text of the FCA and the legislative history of the 1986 amendments to the FCA, the *Gabelli* court concluded that disgorgement of profits was unavailable as damages under the FCA:

> The Court must give effect to the clear and unambiguous text of the Act. This Act expressly provides for civil penalties and damages alone-and not for restitution. Moreover, governing precedents have typically construed FCA narrowly—permitting recovery when litigants sought actual damages, denying prejudgment interest, and ultimately looking with disfavor on consequential damages. No court has ever granted restitution—whether as disgorgement of profits or as contribution or indemnification—as a remedy under the Act and this Court declines to do so in this case.

Id. at *13.

Significantly, however, while the court precluded a private relator under the FCA from seeking profits as damages, the *Gabelli* court specifically held that the Government *could* seek those profits as damages in connection with other, non-FCA claims:

> This does not mean that the Government is without remedy, however. The Government is fully entitled to bring its own action and assert causes of action that provide for disgorgement of unjust profits. The issue here is more narrowly focused on whether such disgorgement is an available remedy under the FCA.

Id. at *6. *See also id.* at *13. ("In circumstances involving unjust enrichment warranting disgorgement of profits, the Government can choose from a panoply of options including pursuing administrative proceedings . . . and bringing common law unjust enrichment claims.") (citations omitted). *14 ("the Government may at any time opt for any number of mechanisms to disgorge unjust gains") (citations omitted).

It is, therefore, small solace to a defendant that profits may not be recoverable under the FCA (with the required trebling). The recovery of profits, however, may be sought in addition to any FCA damages. *See generally United States v. Sillman*, 167 F.2d 607, 611 (3d Cir. 1948) ("Nor do we think that the fact that The Congress passed a statute applicable to those who make false claims is to be interpreted as depriving the United States as plaintiff of remedies which it has for violation of a common law right."). In fact, the Government has brought claims seeking the disgorgement of profits in addition to its FCA claim.

For example, in *United States ex rel. Zissler v. Regents of the University of Minnesota*, 992 F. Supp. 1097 (D. Minn. 1998), the United States intervened in an employee's action against a state university and alleged claims for violation of the False Claims Act, unjust enrichment, payment by mistake, breach of fiduciary duty, and disgorgement of profits. *Id.* at 1101. As to the claim for illegal profits, the government alleged that the university had used federal grant money to illegally sell a drug for profit in violation of the Public Health Service Act (PHSA) and the Federal Food, Drug and Cosmetic Act (FDCA). *Id.* at 1108. As stated by the court: "The government has brought two claims requesting the divestment of profits from the University . . . a claim for equitable relief ancillary to the FCA [False Claims Act] . . . and a claim for disgorgement of illegal profits . . . ." *Id.* at 1108. The defendant moved for summary judgment on the claim for disgorgement alleging that it was barred by the six-year limitations period set forth in 28 U.S.C. § 1415(a). *Id.* at 1109. The *Zissler* court held that:

> Disgorgement of illegal profits, however, is an equitable remedy, not a request for money damages. . . . Even if this Court were to construe the government's request

> for disgorgement as a remedy for its claims for unjust enrichment and breach of fiduciary duty, those claims would not be claims for money damages, but for equitable relief. By the statute's plain meaning, § 2415(a) does not apply to the government's claim for disgorgement of illegal profits. . . . In the instant case, the University has not identified a statute of limitations that applies to the government's request for disgorgement of illegal profits, whether it be a remedy for its other claims or a separate cause of action, and therefore, the Court concludes that no statute of limitations applies to it.

Id. (citations omitted) (footnote omitted).

In reaching its decision, the court relied on *United States v. Incorporated Village of Island Park*, 791 F. Supp. 354 (E.D.N.Y. 1992). In *Island Park*, the government sought to impose a constructive trust and "to force them to disgorge any 'profits' they have realized through their misdeeds." *Id.* at 369. The court rejected the defendant's argument that the claim was barred by the statute of limitations holding that: "an action for constructive trust and for disgorgement is not for 'money damages'; rather, it is an action for equitable relief, and Congress has prescribed no statute of limitations." *Id.* at 370. In any FCA case in which the Government has intervened in the action, therefore, the profits received by a defendant will likely be at issue as an element of damages.

IV. CONCLUSION

Historically, the potential measure of damages applicable to an FCA action was easily articulated but difficult to apply in particular cases. However, as the FCA's reach has been applied to an ever increasing number of defendants, industries, and complex and ever changing fact patterns involving Government funds, the traditional measure of damages has given way to more expansive damage theories. Simply stated, for FCA damages, "one size doesn't fit all." Rather, damages are more likely to be "custom tailored" to the facts and circumstances of the particular FCA case.

The result is that FCA litigation, particularly in the damages area, has been and will become exceedingly fact-sensitive. For the Government and relators, the task will become to focus discovery (including likely expert testimony) on the lack of value received, the defendant's failure to comply with either federal or state law (resulting in false certifications of compliance) or, at a minimum, the profits generated by a defendant. In contrast, a defendant's efforts (apart from defenses to liability under the FCA) must focus on the substantial benefits provided under any government funded benefit regardless of any technical or perceived minor non-compliance with state or federal law. Simply stated, a defendant must marshal all significant evidence to establish that the government received "everything it paid for and then some" such that, at worst, the traditional measure of FCA damages should be applied in a particular FCA case. In sum, the emerging damage theories under the FCA have resulted in greater risk and reward for all concerned parties.

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END NOTES

[1] *See, e.g., Anco Corp. v. United States Dep't of Justice*, 884 F.2d 621, 622 (D.C. Cir. 1989) ("The False Claims Act is the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government") (citing S. Rep. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266 (1986)). *See also* James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks, Marc S. Raspanti, *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465 (2005).

[2] The *Amedex* court's reference to "double damages" refers to a prior version of the FCA. The current version of the FCA, as noted above, provides for treble damages. *See* 31 U.S.C. § 3729(a).

[3] Parties, however, must be aware that, while a court may recognize certain theories of liability, the court may also signal possible proof issues as well. *See, e.g., United States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C.*, 336 F. Supp. 2d 430 (E.D. Pa. 2004). *See also id.* at 437-38 ("[p]laintiffs will certainly be required to refine their allegations as trial day approaches, if for no other reason than to calculate damages."); *id.* at 439 n.7 ("recognizing possible FCA claim of fraud in the inducement but stating that "[t]he Court is aware of the problems of proof and causation that this theory of fraud would invite."); *id.* at 445 n.11 (recognizing potential claim under 31 U.S.C. § 3729(a)(7) but noting that "[t]he

Court will not deprive the Government of the opportunity to make its case just because it has a hard job ahead.").

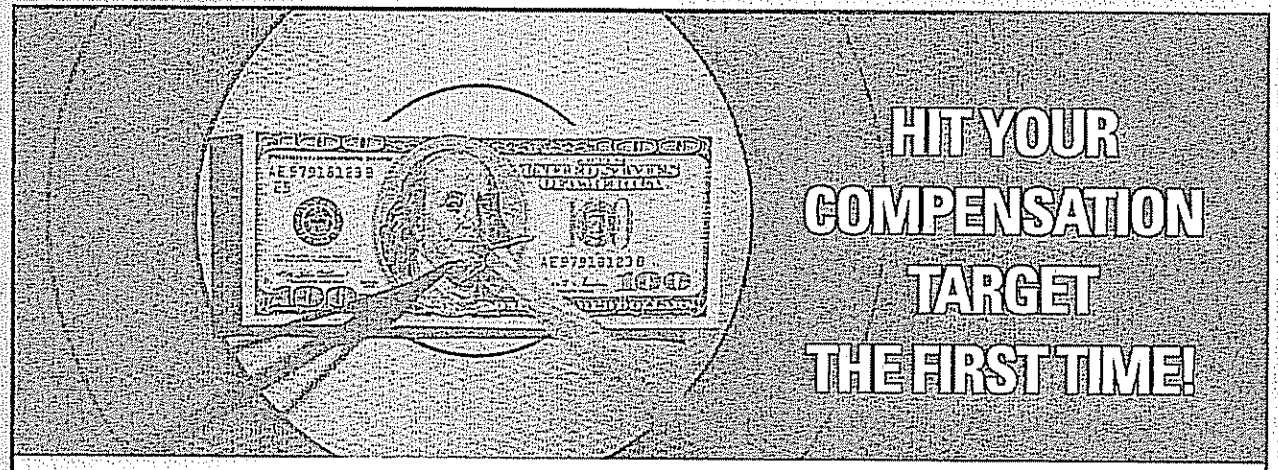
[4] It cannot be overlooked that, in addition to damages, the FCA also imposes a statutory civil penalty as well. Pursuant to 31 U.S.C. § 3729, a person who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000. . . ." 31 U.S.C. § 3729. By amendment, the penalties have been increased to between $5,500 and $11,000 for those violations occurring on or after September 29, 1999. *See* 28 C.F.R. § 85.3(a)(9) (2006).

[5] This measure of damages may equal the "contract price" or encompass one particular time period of a contract. In some instances, however, there may not be a formal contract governing the transaction(s) at issue.

[6] The Fifth Circuit affirmed the award of damages for the amount of the claims billed. *Id.* at 49-50.

[7] *See generally Hunt*, 336 F. Supp. 2d at 439 ("Medco billed Blue Cross and hence the Government for services it was required to render in accordance with contract and with state law—any claims submitted that do not fulfill these prerequisites are false."). *See also United States ex rel. Holder v. Special Devices Inc.*, 296 F. Supp. 2d 1167, 1176 (C.D. Cal. 2003) ("Defendant SDI may be liable under the FCA for failure to comply with federal regulations, whether or not affirmative certification of compliance was required."); *United States ex rel. Franklin v. Parke-Davis, Div. of Warner-Lambert Co.*, 147 F. Supp.2d 39, 51 (D. Mass. 2001) (holding that alleged impermissible conduct in connection with off-label prescriptions was potentially actionable under FCA because "the FCA *can* be used to create liability where failure to abide by a rule or regulation amounts to a material misrepresentations [sic] made to obtain a government benefit.") (citations omitted) (emphasis in original).

[8] The damages awarded by the district court included the amount "in vouchers paid by the government." *TDC*, 288 F.3d at 427.



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