Client Alert

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Debunking *Bunk*: Fourth Circuit Leaves Unresolved "Excessive" Penalties Under the False Claims Act

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On December 19, 2013, in a highly anticipated decision, the Court of Appeals for the Fourth Circuit awarded $24 million in civil penalties under the False Claims Act (FCA), despite the fact that the whistleblower prosecuting the case did not prove at trial that the defendants' conduct had caused a single penny of monetary injury to the government.[1] This decision is part of a growing body of case law regarding the constitutional rights of defendants under the Excessive Fines Clause—rights that are becoming increasingly relevant as the Department of Justice, state attorneys general, and whistleblowers continue their aggressive pursuit of mandatory treble damages and draconian civil penalties under the FCA.

APPLICABILITY OF THE EXCESSIVE FINES CLAUSE TO CIVIL PENALTY AWARDS UNDER THE FCA

The federal FCA and its state equivalents impose liability when false or fraudulent "claims for payment" are presented to the government. In addition to automatic treble damages, the federal FCA imposes a civil penalty of between $5,500 and $11,000, which courts typically impose for each and every false "claim for payment" that a defendant has allegedly submitted or caused to be submitted to the government.

FCA suits often involve millions of allegedly false claims. This is particularly true in the pharmaceutical and medical device industries. As a result, the aggregate amount of civil penalties sought by the government or a whistleblower may far exceed the actual harm inflicted on the government. When this disparity exists in an FCA suit, the Excessive Fines Clause of the Eighth Amendment, which prohibits the imposition of penalties that are "grossly disproportional to the gravity of a defendant's offense," is implicated.[2] Although there is now a consensus that the Excessive Fines Clause applies to civil penalty awards under the FCA, there is no consensus among the courts as to where the line should be drawn between "excessive" penalties and constitutionally permissible penalties. The Fourth Circuit's recent decision in *Bunk* utterly failed to add any clarity to this important legal issue—meaning that civil penalty exposure under the FCA continues to be an unpredictable risk for defendants.

OVERVIEW OF THE *BUNK* DECISIONS

In *Bunk*, the whistleblower alleged that the defendants had engaged in an illegal bid-rigging scheme to obtain an intra-European transportation contract from the Department of Defense. In a related criminal case, the government succeeded in prosecuting several of the corporate defendants for "analogous misconduct" related to a transoceanic shipping contract. The jury found that the defendants had violated the FCA, and the parties stipulated that the defendants submitted 9136 false claims to the government pursuant to the wrongfully obtained

[1] United States ex rel. Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390 (4th Cir. 2013).

[2] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

contract. At trial, the whistleblower only sought civil penalties and did not seek to recover actual damages sustained by the government. The evidence showed that the government had spent about $3.3 million for the intra-European shipping contract at issue. However, because the case involved 9136 "claims," the minimum civil penalties under the FCA totaled over $50 million.

The district court held that, in the absence of proven damages, it would violate the Excessive Fines Clause to impose $50 million in penalties. The court also rejected a proposal by the relators to voluntarily reduce the civil penalties to $24 million. The district court reasoned that the FCA does not afford courts discretion to deviate from the minimum penalties set out in the statute.

On appeal, the Fourth Circuit reversed the decision and instructed the district court to impose $24 million in penalties as requested by the whistleblower. The Fourth Circuit first concluded that the whistleblower could voluntarily limit the amount of penalties that he was seeking in order to lessen the concerns raised by the Excessive Fines Clause. The Fourth Circuit explained that the government, or a whistleblower acting on behalf of the government, has "virtually unbounded" discretion to choose a judgment below that mandated by a jury verdict, or by the statute's minimum penalty provision.

The Fourth Circuit next concluded that the reduced penalties of $24 million were not "excessive" under the Excessive Fines Clause. Although the Fourth Circuit did not dispute the fact that the whistleblower had not proven any damages, the court said that the evidence "revealed" damages "perhaps in excess of $2 million." The Fourth Circuit further explained that "the concept of harm need not be confined strictly to the economic realm," and cited intangible factors to justify the penalty, such as the impact of "the public's faith in the government's competence," the deterrent effect of the penalty, and the severity of the criminal penalties that attach to the defendants' "analogous" criminal misconduct. The Fourth Circuit failed to address several of the factors that the district court had found to potentially mitigate the severity of the defendants' violations, such as the limited benefit that the defendants obtained from the scheme.

BUNK'S ROLE IN FUTURE FCA LITIGATION

By focusing on noneconomic factors to justify the $24 million civil penalty award, the Fourth Circuit missed an opportunity to give litigants a better indication of how courts will resolve challenges to penalties under the Excessive Fines Clause. Astute defendants will point out that, even though the Fourth Circuit highlighted noneconomic factors, it did not ignore the economic analysis that has become the hallmark of litigation related to the Excessive Fines Clause. Instead, the Fourth Circuit sought to make its holding consistent with the traditional economic approach by reassessing the evidence of the government's economic injury. Therefore, nothing in *Bunk* should dispel a future court's reluctance to award penalties that significantly exceed actual damages.

Separately, by giving the government and whistleblowers the discretion to seek penalties that are less than the statutory minimum, courts may now threaten to void as unconstitutional a minimum penalty award in an attempt to induce the government or whistleblowers to "voluntarily" accept reduced penalty awards. Indeed, it is well known that courts often induce plaintiffs to accept remittiturs of jury verdicts by threatening a new trial.

The defendants in *Bunk* have petitioned the Supreme Court to review the Fourth Circuit's decision. The Supreme Court is scheduled to rule on that petition during its September 2014 conference. In the meantime, one thing is certain: unless *Bunk* is reversed by the Supreme Court, the implications of the Fourth Circuit's decision will be hotly debated in every FCA suit that involves civil penalties that significantly exceed the actual injury to the government.

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