



HEALTH CARE FRAUD REPORT



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Under False Claims Act: Many Damage Formulas Used to Make Government Whole

With regard to damages under the False Claims Act, various formulas have emerged over the years for computing damages to make the government whole, according to Stephen Altman, assistant director of the Department of Justice Civil Division's Commercial Litigation Branch.

Altman, as moderator, joined Roger S. Goldman, an attorney with Latham & Watkins, Washington, D.C., Marc S. Raspanti, an attorney with Miller Alfano & Raspanti PC, in Philadelphia; and Suzanne Durrell, chief of the Civil Division in the Office of the U.S. Attorney for the District of Massachusetts, to discuss "Recent Developments on Damages and Penalties."

Discussing the calculation and proof of False Claims Act damages, particularly in cases where the damages are not easily ascertainable, Altman said that, over the years, various formulas have been devised to compute actual damages in determining how to make the government whole.

Clear Formula. "In *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966), the Ninth Circuit put forth a rule that, I think, is the best and clearest general statement of the damage formula and that is that the computation should be what the government paid over and above what it would have paid if the claims had been truthful.

The 1976 case, *United States v. Bornstein*, 423 U.S. 303 (1976), focused on the value of products that the United States bought. In *Bornstein*, the court said the damage formula was the difference between the market value of the defective product and the value of the product as specified in the contract.

"Now, it sounds easy, but in the last two or three years, most courts have [included] inspection repair costs in the damage calculation," Altman said. In some cases, he said, courts have awarded damages amount-

ing to the full contract price, even though the United States did make some use of the product and in other cases they refused to award the government any damage after the government proved a breach of contract.

The courts also have been called on to determine more nebulous theories of the value of services, particularly in the health care field and improper or inadequate services in nursing home facilities. "How do you put a value on that?" Altman asked.

Government Intervention. Altman asked Raspanti to discuss when a relator presents a case, how he would view the case if there were no damages, but instead penalties, a breach of someone's obligation, or false statements to the United States. Altman also asked Raspanti to comment how he would convince the government to intervene in the case.

As a *qui tam* plaintiff's counsel, Raspanti said he would think about theories and damages. "Most of these cases, although we talk about the trial, we settle," he said.

A case that is going to end up in a settlement discussion, "and really much of what we do is geared to the settlement discussion" because there haven't been that many cases that have gone to trial, Raspanti said. So, when settling a case, certain factors determine how the government will look at the case.

"Most plaintiff lawyers do want to see some damages because that is always the easiest place to start; it's the easiest discussion to have with the government; and it's the easiest discussion to have with the defendant," Raspanti said.

Nonmonetary Interest. "If there is no easy way to define out-of-pocket damages, then I look for a nonmonetary interest that I can hook the government on," Raspanti said. "I think a good example, not the only

one, is some of these quality of care cases where initially the loss may be very small or it may be very hard to find the loss.”

Years ago, the government said those cases were really like medical malpractice claims and questioned whether they could be brought under the False Claim Act, Raspanti said. Then, the government began to see that harm that was not easily quantified did occur and that was the way to bring them under the FCA.

If relators counsel could not find an avenue, then he would look for a policy reason, although that particular reason may not be the one the government wants, Raspanti said.

“[A]lthough there may be issues that the government may want to advance in a different way than the *qui tam* relator, I think, in the first level of analysis, coming to a relator’s assistance, he or she is going to be asking the same thing, ‘Can I get a recovery, am I going to get any money?’” Raspanti said.

Unless there is something that is a hook that can prove a particular theory that the government thinks is a good one to advance, then counsel might look at how that relationship is being impacted and if it is being impacted in a deleterious way, then maybe that’s something the government wants to get behind, Raspanti said.

Harm to Government. Durrell said the main thing she looks at is how the case will look to a jury, “and I’m also thinking someone’s got to articulate how the government was harmed either out of pocket or in an intangible way.” As chief of the civil division, with a very active *qui tam* task force, Durrell said she is willing to be creative and aggressive in pursuing what she believes are the government’s policies.

“I’m also very practical,” Durrell said, and looks for damages to the government and damages to the relator. She may also need an explanation about the particular industry in which the relator is working.

“We need to understand the industry, the players, the sources, and the kind of fraud in order to understand how the government could be damaged,” Durrell said. “I’m going to question the relator’s counsel about whether they’ve done everything they can to think about the damages.”

“I’m going to consider whether there is a criminal remedy,” Durrell said. Another consideration is whether the company is already under a corporate integrity agreement, “because if they are, the CIA is going to have certain remedies, and I’m going to wonder if there are alternatives to the *qui tam* action.”

Tainted Claims. Responding to Altman’s question on whether there could be an FCA case with no damages, Goldman said that where there are no damages under

the FCA, the government tends to react with a lot of time and energy on the notion that because of the violation, all the claims are “tainted” and, therefore, all the amounts that were paid out are damages.

Although the FCA is an extremely broad statute, it clearly strikes a balance between the multiple damage provisions and the burdens imposed on the plaintiffs, including proving damages that are consistent with the hundreds of years of the common law meaning of the word “damage,” Goldman said.

The government may argue that once it establishes the existence of an underlying violation, the burden will be on the defendant to establish that the government suffered no damages, Goldman said. The FCA, however, clearly places the burden on the government to prove all elements of the FCA cause of action, including damages.

The notion of the burden shift, that somehow the defendant has to prove the value of services received, is inconsistent with the statutory language of the FCA, Goldman said. The legislative history of the 1986 amendments speak specifically to the concern about the burden of proof evolution.

Preponderance of Evidence. Congress created a solution in the 1986 amendments with new language that Goldman quoted as the “United States shall be required to prove all essential elements of a cause of action, including damages, by preponderance of the evidence.”

“Here we have that rare specific allocation, where Congress has said, ‘On the one hand, we’re going to up the ante to triple damages; on the other hand, in the same statute, [the government has] the burden,’” Goldman said. The government bears the burden of presenting enough evidence to demonstrate the extent of its loss from the alleged fraudulent conduct, he said.

Even under common law, where there is no statutory direction as to the burden of proof on damages, courts have routinely held that a plaintiff’s failure to prove the value of what it received is a failure of proof, Goldman said. The explicit burden in the FCA makes obvious that damages should not be awarded unless the government establishes its actual damages in terms of the difference between the value it received and what it would have received if the violation had not occurred.

Without the evidence, courts do not and should not award damages, Goldman said. When the government seeks recovery under the FCA based on regulatory violations, it faces the burden of proving that the violations resulted in actual loss to the government, and if the government fails to meet its burden, courts should reject any claim for damages under the FCA.