

# Federal Judge Rules the False Claims Act's Mandatory Penalties Unconstitutional

February 22, 2012

A prominent federal court has ruled that the minimum mandatory civil penalties of the False Claims Act are unconstitutionally excessive, in certain circumstances. Last week, in *United States ex rel. Bunk v. Birkard Globistics GMBH*, the Eastern District of Virginia denied any civil penalties under the False Claims Act (FCA), holding that even the minimum mandatory civil penalty was unconstitutionally excessive, in violation of the Eighth Amendment. The court also found that it did not have discretion to impose an alternative penalty that would be within constitutional limits. While this is not the first case to have found FCA civil penalties unconstitutional under the Eighth Amendment, it is the first to rule that courts do not have any ability to fashion lesser, alternative penalties. This decision is helpful for any company subject to an FCA investigation, especially where the government received the full value of the goods or services for which it contracted and the threatened penalties far exceed the value of the contract.

The FCA allows the government, or a private individual standing in the shoes of the government, to recover treble damages plus penalties against anyone who, among other things, knowingly presents or causes to be presented a false or fraudulent claim for payment to the government. Even if the government suffers no damages, it can seek penalties against anyone found liable under the act. The FCA requires penalties between \$5,500 and \$11,000 for violations. Courts have interpreted this penalty to be on a per-claim basis. For government contractors who submit frequent invoices, the penalties provision can add up quickly. The Eighth Amendment, however, prohibits the imposition of "excessive fines," or fines that are grossly disproportional to the gravity of the offense.

## Authors

Mark B. Sweet  
Partner  
202.719.4649  
msweet@wiley.law

Brian Walsh  
Partner  
202.719.7469  
bwalsh@wiley.law

Brandon J. Moss  
Partner  
202.719.7554  
bmoss@wiley.law

## Practice Areas

Government Contracts  
White Collar Defense & Government  
Investigations

In *Bunk*, a jury found the defendants liable under the FCA for conspiring to fix prices of subcontracts and then falsely certifying that the pricing in their bids had been independently calculated. After trial, the parties stipulated that the defendants filed 9,136 invoices under the contract at issue; thus, there were 9,136 potential false "claims." In theory, the FCA would require civil penalties amounting to between \$50,248,000 and \$100,496,000 for 9,136 false claims.

In the face of such a large penalty, Judge Anthony Trenga, who wrote the opinion, awarded no civil penalties because even the minimum penalty of \$50 million would be unconstitutionally excessive. The court found no evidence that the defendants' actions caused the government any economic harm. Nothing supported the relator's contention that the government paid more for services or received deficient services because of the subcontract pricing conspiracy. In fact, the government had extended the contract twice. Additionally, the court found the defendants received only a limited benefit from their misconduct. The defendants only realized a \$150,000 profit on \$3.3 million worth of services. Among other key findings, the court determined that there was nothing in the language of the FCA suggesting an intent to impose a \$50 million penalty in these circumstances. Thus, the court ruled that imposition of the minimum required fine under the FCA would result in a disproportionately excessive fine in violation of the Eighth Amendment.

In the most novel portion of the decision, Judge Trenga considered alternative rulings that would have resulted in lesser penalties, but ultimately concluded he lacked discretion to impose them. For example, he highlighted that the plain language of the statute simply requires a penalty, not a penalty for each false claim submitted. Where, as here, the defendants only made one false statement, the penalty could be capped at \$11,000 (though he recognized that Fourth Circuit precedent has imposed penalties per claim). He also considered imposing a penalty up to the constitutional limit for punitive damages, which he thought to be \$1.5 million in this case, based on multiples established by the Supreme Court in other contexts. Finally, he considered imposing a penalty of \$500,000 that he viewed as "appropriate under all of the facts and circumstances." Although all of these penalties were far less than the relators sought, the judge ultimately determined that he did not have discretion to fashion alternative penalties, without further direction from an appellate court, because of the mandatory penalties in the FCA.

Coming from a court in which government contract issues are frequently litigated, this decision may limit the government's ability to recover penalties that are disproportional to the harm caused by the defendants. For government contractors facing FCA allegations, especially in situations where the government received the full value of the contract, this decision could be quite important.