Valuing Services Provided: FCA Damages in the Wake of United States v. Anchor Mortgage Corp.

BY GEORGE B. BREEN, DANIEL C. FUNDAKOWSKI, AND JENNIFER L. WEAVER

Introduction

In United States v. Anchor Mortgage Corp., 1 the U.S. Court of Appeals for the Seventh Circuit endorsed net trebling over gross trebling as a measure of calculating False Claims Act damages. Although not all circuits have confronted it, the majority of circuits to consider the issue have endorsed this approach.2

Drawing on this and other recent decisions, this article makes the case for why net trebling is the more sensible approach to FCA damages calculation and why courts should assign some value to the services the government received even if the services failed to comply with a particular regulation, rather than accede to the notion that the government would have paid nothing for services tainted by a regulatory violation.

This article then explores whether this reasoning could extend to FCA cases involving allegations that the provider submitted claims for payment for services provided in violation of the Stark Law and/or the Anti-Kickback Statute (“AKS”).

I. Damages Under the False Claims Act

Penalties and damages under the FCA can be enormous. The FCA imposes two types of liability—a statutory penalty and the potential for treble damages. First, the statutory penalty imposes a $5,500 to $11,000 civil fine per violation on any defendant who submits a false claim or makes a false statement for payment of a false

---

2 Other circuits endorsing net trebling include the Second, Sixth, D.C., and Federal Circuits. See, e.g., United States ex rel. Feldman v. Gorp, 697 F.3d 78, 87-88 (2d Cir. 2012); United States v. United Technologies Corp., 626 F.3d 313, 321-22 (6th Cir. 2010); United States v. Anchor Mortgage Corp., Nos. 10-3122, 10-3342 & 10-3423, 2013 WL 1150213, at *3 (7th Cir. Mar. 21, 2013); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1279 (D.C. Cir. 2010); Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1372 (Fed. Cir. 1998). Although the Fifth Circuit has not squarely addressed the issue, it appears that there would be precedent to support a gross trebling approach. See, e.g., United States v. Eghbal, 548 F.3d 1281, 1285 (9th Cir. 2008). Although the Fifth Circuit has not squarely addressed the issue, it appears that there would be precedent to support a gross trebling approach. See, e.g., Faulk v. United States, 198 F.2d 169, 172 (5th Cir. 1952) (in conspiracy prosecution where defendant wrongfully substituted reconstituted milk for fresh milk, jury not instructed to consider market value of reconstituted milk in measuring damages) (case cited in Bornstein).
This treble damages provision is particularly important to the government, not only because it provides an opportunity for lucrative recoveries but because treble damages affect the dynamic of litigation. When facing both treble damages and penalties, parties have a strong incentive to settle claims rather than defend them in court. Treble damages penalties may vary depending on what trebling method the government advances.

Two approaches have emerged—known as “gross trebling” and “nettrebling.” Although the FCA is silent on the appropriate trebling method, the gross trebling approach combines all amounts that the United States paid as a result of the alleged false claim, trebles that total, and subtracts any offsetting amounts that had been realized by the government.9

That approach is endorsed by the Department of Justice and favored by whistleblowers because the resulting damages amount is greater.

On the other hand, the net trebling approach combines all amounts that the United States paid as a result of the alleged false claim, subtracts any offsetting amounts that had been realized by the government, and then trebles that total. This approach is more akin to the actual losses incurred by the government.

II. Why Gross Trebling Is Inconsistent With FCA Damages

The FCA’s damages multiplier has both compensatory and punitive roles.9 However, despite punitive attributes, gross trebling is excessive and inconsistent with the meaning of the FCA.

Under the gross trebling approach, neither the government nor the defendant is ultimately in a just position. Trebling prior to subtracting offsetting amounts realized by the government leads to windfall recoveries and increases the likelihood that defendants will mitigate damages (since any offsetting amounts conferred to the government are marginalized by not being factored in until post-trebling). Gross trebling provides a recovery to the government that significantly exceeds any amount needed to make the government whole.

Using a net trebling or gross trebling approach can have enormous impact on the evolution and outcome of FCA cases. Recent decisions, discussed below, show that courts are increasingly keen on the actual impact of a defendant’s false or fraudulent claims, and will not impose grossly exaggerated damages while ignoring the value of the goods and services provided by the defendant to the government, even if the provision of such goods fails to comport with an applicable statute or regulation.

Because the government will likely continue to argue for gross trebling in jurisdictions without firmly ensconced net trebling jurisprudence, it is important to underscore the various net trebling decisions when litigating FCA damages calculation.

A. United States v. Anchor Mortgage Corp.

The Seventh Circuit squarely decided the trebling issue in United States v. Anchor Mortgage Corp.7 After a bench trial, the lower court found the defendants, Anchor Mortgage Corp. and its chief executive officer, liable under the FCA for lying in connection with applying for federal guarantees of home mortgage loans and paying kickbacks for client referrals.8

A main issue before the Seventh Circuit was the proper approach to trebling of damages and whether a net or gross trebling method was the more appropriate interpretation of § 3729(a)(1). The district court’s approach, endorsed by the United States in the case, called for gross trebling.

This approach combined all amounts that the United States paid to lenders under the guarantees, trebled that total, subtracted any offsetting amounts realized by the government from sales of collateral securing the loans, and then added the statutory penalty of $5,500 for each offending loan.9

The Seventh Circuit rejected the gross trebling approach in favor of a net trebling approach.10 In doing so, the court emphasized that the FCA, though silent on the appropriate trebling method, does not signal a departure from the norm, which is net trebling.11 For example, the Clayton Act12 (another federal statute) provides for treble damages as a remedy for various antitrust violations, which are calculated using net trebling.13

Moreover, the court found that quantifying damages using net (as opposed to gross) loss is the norm in civil litigation.14 For example, according to the Uniform Commercial Code, when a seller tenders nonconforming goods, damages are calculated as the difference between the contract price and the value of the goods received.15 The gross trebling equivalent would

---

3 Penalty amounts are adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note). Statutory penalties may be imposed without the government proving damages caused by the false claim.

4 31 U.S.C. § 3729(a). Damages are reduced from treble to double if the defendant voluntarily discloses a violation as described in § 3729(a)(2) of the FCA.

5 As discussed above, the FCA provides that damages awarded be “3 times the amount of damages which the Government sustains” but does not provide any additional guidance on the proper meaning of “damages.”

payments made by the government. Under the benefit-of-the-bargain framework, the fact finder awards an amount of damages that “puts the government in the same position as it would have been if the defendant’s claims had not been false.”

Accordingly, the D.C. Circuit held that the damages should have been measured as the difference between the value of SAIC’s services—compromised by the appearance of bias in the undisclosed conflict of interest—and the value of conflict-free services that were promised. Additionally, the D.C. Circuit found that the jury should have been instructed to account for the value of services SAIC provided to the government.

C. United States ex rel. Davis v. District of Columbia

Less than two years after SAIC, the D.C. Circuit highlighted and expanded SAIC’s damages holding in United States ex rel. Davis v. District of Columbia. In Davis, the relator’s firm prepared the Medicaid reimbursement claims for the District of Columbia Public Schools ("DCPS") for fiscal years 1995, 1996, and 1997. While Davis’s firm was preparing the fiscal year 1998 form, DCPS hired a new firm to prepare the claims, replacing Davis’s firm.

Davis’s firm retained key supporting documentation for the fiscal year 1998 form, and the new firm submitted DCPS’s fiscal year 1998 Medicaid reimbursement claim without the required documentation. Davis alleged that submitting the fiscal year 1998 form without the required documentation violated the FCA and that the United States would not have paid DCPS anything had it known that the reimbursement documentation was absent.

Relying on benefit-of-the-bargain framework articulated in SAIC, the D.C. Circuit held that the government sustained no damages because the purpose of the document-ation requirement is to ensure services were actually provided, and there was no dispute in the case that the services were in fact provided. There was no allegation that the performance received by the government was worth anything less than what was paid for the services.

Finally, the court noted that although treble damages were unavailable, statutory penalties would be appro-

---

17 Id. at 316.
18 Anchor Mortgage Corp., 2013 WL 1150213, at *4. The Bornstein footnote reads, “The Government’s actual damages are equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality.” 423 U.S. at 316 n.13.
20 Id. at 1260.
21 Id. at 1278.
prie against DCPS if a violation was proved on re-
mand (and that Davis may be eligible to share in that
recovery, penalties without damages, if he proves his
claims).32

III. FCA Damages Implications on Stark Law
and Anti-Kickback Statute

Although recent federal cases have made consid-
erable progress in sorting out the damages analysis under
the FCA, it remains to be seen whether the same rea-
soning could extend to FCA cases involving allegations
that the provider submitted claims for payment for ser-
vices provided in violation of the Stark Law and AKS.

Traditionally, the government has argued that dam-
ages must be based on the entire amount of the pay-
ment for all services provided in violation of Stark
and/or AKS.33 Indeed, courts have routinely adopted
the government’s position that damages in FCA cases
based on Stark or AKS violations equal the entire
amount of all government payments for services pro-
vided in violation of Stark and/or the AKS.34

For example, in United States v. Rogan, the govern-
ment sued the owner of a medical center under the FCA
alleging that the defendant participated in a scheme to
submit claims for payment to Medicare and Medicaid in
violation of the Stark Law and the AKS.35

Following a bench trial, the court ruled in favor of
the government, finding that compliance with Stark and the
AKS was a condition of payment, rendering the under-
lying claims false.36

In calculating damages, the court made no findings
regarding the value of the underlying services, or
whether such services were medically necessary. In-
stead, the court simply calculated damages as the whole
amount paid by the government for services rendered
in violation of Stark and the AKS.37

However, as pointed out in SAIC and Davis, the lower
court’s reasoning in Rogan conflates causation with
damages.38 The total amount paid by Medicaid for the
medical services in question totaled $16.5 million,
which was trebled, resulting in a damages award of
over $50 million.39 Despite this massive damages
award, there were no findings that the services were not
actually provided, or were medically unnecessary, or
were of poor quality. In other words, the government
received $16.5 million worth of medical care that was
reasonable and necessary, and for which it likely would
have paid another provider had it discovered the under-
lying Stark and AKS violations at the time.40

The court gave no consideration to the government’s
actual loss as a basis for damages, instead allowing the
government to reap a windfall. The Seventh Circuit af-

40 At least one court has tried to justify the apparent wind-
fall to the government in this context by explaining that if it
were otherwise, the government would be “in the position of
funding illegal kickbacks after the fact.” U.S. ex rel. Bidani v.
Lewis, 264 F. Supp. 2d 612, 616 (N.D. Ill. 2003). In this respect,
calculating damages in Stark/AKS-based FCA cases as the en-
tire amount paid for all services provided in violation of Stark
and/or the AKS ends up functioning as a restitution or dis-
gorgement model for damages, designed to punish the defen-
dant rather than make the plaintiff whole.

41 United States v. Rogan, 517 F.3d 449, 453 (7th Cir. 2008).

42 Davis, 679 F.3d at 840.

43 Id. at 834.

44 Davis, 679 F.3d at 840.

45 Id.

46 Am. Lithotripsy Soc’y v. Thompson, 215 F. Supp. 2d 23,
hypothetical case, the Stark Law was designed to prevent medically unnecessary services from being billed to federal healthcare programs.

Since there is no dispute the services in question were medically necessary, the Stark Law violation caused no economic loss to the government. Similar to the Davis case and its benefit-of-the-bargain approach, the court could justifiably calculate damages as zero.

That does not mean that all FCA cases involving Stark and/or AKS violations should result in a finding of zero damages. Presumably, the evidence in some cases would show overutilization and lack of medical necessity.

Further, the taint of a more serious AKS violation would presumably reduce the value of the services the government received more than the taint of a relatively minor Stark violation. But courts should analyze value in calculating FCA damages, even if the underlying violation is serious enough to render the services of no value, rather than basing damages on the entire amount of the government payment.

IV. Conclusion

Between the net and gross trebling approaches to FCA damages calculation, net trebling is the more sensible. It makes the government whole without excessively penalizing the defendant and providing a government windfall.

Given the enormity of the potential damages in FCA cases, it should be incumbent on courts to engage in a more thorough analysis of the government’s actual economic loss, instead of advancing a theory which summarily aggregates all government payments.

A proper accounting of benefits conferred on the government by the defendant rectifies the government’s actual loss. This approach should also apply to FCA cases involving allegations that a provider submitted claims for payment for services performed in violation of the Stark Law and/or the AKS.