

# False Claims Act and *Qui Tam* Quarterly Review

## INSIDE... 1 FALSE CLAIMS ACT AND QUI TAM DECISIONS

### FCA Liability of Government Entities

*Cook County v. U.S. ex rel. Chandler, cert. granted* (U.S. June 28, 2002) ..... p. 1

*U.S. ex rel. Wood v. American Institute in Taiwan* (D.C. Cir. Apr. 16, 2002) ..... p. 1

*U.S. ex rel. Battle v. Board of Regents* (N.D. Ga. May 8, 2002) ..... p. 3

### FCA Liability of Amtrak Contractors

*U.S. ex rel. Totten v. Bombardier Corp.* (D.C. Cir. Apr. 16, 2002) ..... p. 4

### False Certification

*U.S. ex rel. Augustine v. Century Health Services, Inc.* (6th Cir. May 7, 2002) ..... p. 6

*U.S. v. Southland Management Corp.* (5th Cir. Apr. 11, 2002) ..... p. 7

*U.S. ex rel. Riley v. St. Luke's Episcopal Hospital* (S.D. Tex. Apr. 3, 2002) ..... p. 11

### Public Disclosure Bar and Original Source Exception

*U.S. ex rel. Kinney v. Stoltz* (D. Minn. Apr. 5, 2002) ..... p. 13

### Rule 9(b)

*U.S. ex rel. Clausen v. Laboratory Corp. of America* (11th Cir. May 9, 2002) ..... p. 14

### Section 3730(h) Retaliation Claims

*Storey v. Patient First Corp.* (E.D. Va. June 14, 2002) ..... p. 17

*U.S. ex rel. DeCalonne v. G.I. Consultants, Inc.* (N.D. Ind. Apr. 10, 2002) ..... p. 18

## 20 LITIGATION DEVELOPMENTS

29

### SPOTLIGHT

**The Excessive Fines Clause of  
the Eighth Amendment and the  
Civil False Claims Act:  
To *United States v. Bajakajian*  
and Beyond**

*Suzanne E. Durrell*

## 46 INTERVENTIONS AND SUITS FILED/UNSEALED

## 48 JUDGMENTS AND SETTLEMENTS

## THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT AND THE CIVIL FALSE CLAIMS ACT: TO *UNITED STATES V. BAJAKAJIAN* AND BEYOND

*Suzanne E. Durrell\**

### INTRODUCTION

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

U.S. CONST., amend. VIII

“There is moderation even in excess.”

*Benjamin Disraeli*

In 1993, the Supreme Court held that the Excessive Fines Clause (the “Clause”) of the Eighth Amendment applies not only to “fines” imposed in connection with criminal proceedings or under criminal statutes but also to “fines” imposed under or in connection with civil proceedings and laws, including *in rem* civil forfeitures. See *Austin v. United States*, 509 U.S. 602, 606-610 (1993). Under *Austin*, the test was not whether a forfeiture is “civil” or “criminal” but rather “whether it is a punishment.” If so, it constitutes a “fine” for purposes of the Clause. *Id.* at 610. In *Austin*, the Court, drawing explicitly on the Double Jeopardy Clause analysis it adopted in *United States v. Halper*, 490 U.S. 435 (1989), for determining what constitutes a “punishment,” held that an *in rem* civil forfeiture of real property used or intended for use in a drug crime was subject to the Clause. *Id.* at 621.

Four years after *Austin*, the Supreme Court “largely disavowed” the *Halper* method of determining what is “punishment” for purposes of the Double Jeopardy Clause of the Fifth Amendment. Under *Halper* the key was to distinguish between “punitive” and “non-punitive” penalties. Finding this test “ill conceived” and “unworkable,” the Court in *Hudson v. United States*, 522 U.S. 93 (1997), returned to the Court’s pre-*Halper* method of

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analysis under which the Court evaluates the statute on its face using a multifactor test to determine if it provides for what amounts to a criminal sanction. *Compare Austin*, 509 U.S. at 610 n.6 (*Halper* is test, not prior cases) *with Hudson* (disavowing *Halper* and returning to earlier method of analysis).

Then, one year after *Hudson*, a sharply divided (5-4) Supreme Court held in *United States v. Bajakajian*, 524 U.S. 321 (1998), that a nominally civil *in rem* forfeiture of money mandated a criminal offense was a “punitive” rather than a “nonpunitive” or “remedial” forfeiture and thus was a “punishment” and a “fine” covered by the Excessive Fines Clause. In doing so, the Court explicitly relied on *Austin*, yet, at the same time, in the view of the four dissenters, the Court injected new factors that were “inconsistent with or at least in tension with *Austin*.” 524 U.S. at 355 (Kennedy, J., dissenting). The Court also found the forfeiture in that case “excessive” because it was “grossly disproportional to the gravity of the offense.”

Following the Court’s decision in *Austin*, a few lower courts considered whether the Clause covers the damages and/or penalty portions of the False Claims Act and, if so, whether either or both are “excessive.” After *Bajakajian*, however, the pace quickened. The Eighth Circuit considered and refused to decide an analogous issue regarding the Anti-Kickback Act in *United States v. Lippert*, 148 F.3d 974, 977-78 (8th Cir. 1998). In August of 2001, however, the Ninth Circuit was not so reluctant. In *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001), it held that both the treble damages *and* the civil penalty provisions of the False Claims Act constitute “punishments” and thus “fines” subject to review under the Excessive Fines Clause. It remanded the case to the district court to determine whether the damages and penalties were “excessive.” The district court has not yet ruled on remand.

This article examines these and other cases and explores several important questions raised by the current state of the case law. These include:

- Does the Excessive Fines Clause apply to all or part of the multiple damages and/or civil penalty provisions of the False Claims Act (FCA)?
- If so, does it also apply when the case is brought and/or prosecuted not by the Government, but by a relator under the *qui tam* provisions of the FCA?
- In an FCA case, what factors will the lower courts deem relevant to the *Bajakajian* “gross disproportionality” test, and how much deference will the lower courts give to Congress’ judgment?
- Who has the burden of proof in the lower courts?
- Do the lower courts have the discretion and authority to tailor the FCA’s mandatory damages and penalties downward to bring them within the boundaries of the Excessive Fines Clause?
- Does the Clause protect corporations or only individuals?

## DISCUSSION

### The Supreme Court's Decision in *United States v. Bajakajian*

In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Supreme Court held in a 5-4 decision that a nominally civil *in rem* statutorily mandated forfeiture of all the money Bajakajian was trying to carry out of the United States without declaring it as required by federal criminal law violated the Excessive Fines Clause because: (1) the forfeiture was “punitive”; and (2) a full forfeiture “would be grossly disproportional to the gravity of [Bajakajian’s] offense.” *Id.* at 324, 334. Until this decision, “the Court had had little occasion to interpret, and [had] never actually applied, the Excessive Fines Clause.” *Id.* at 327.

Citing its prior Excessive Fines Clause decisions in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal*, 492 U.S. 257 (1989), and *Austin v. United States*, 509 U.S. 602 (1993), the Court reasoned that since the Excessive Fines Clause “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense,’” a forfeiture must be a “fine” if it constitutes punishment for an offense. 524 U.S. at 328 (internal citations omitted).

The Government argued that forfeiture of the currency after criminal conviction served “important remedial purposes” and was a civil *in rem* forfeiture, not a criminal *in personam* forfeiture, and thus was not a “punishment”. The Court rejected this argument, concluding instead that this particular type of forfeiture: (1) was not a traditional *in rem* civil forfeiture (which was historically treated as “nonpunitive”), but rather was derived from and akin to *in personam* criminal forfeitures (which had historically been treated as “punitive”); (2) served *no* remedial purpose; and (3) was designed to punish the offender, and thus was a “punishment. *Id.* at 329-332. While emphasizing several times that the forfeiture in question served *no* remedial purpose, the Court reaffirmed the test adopted in *Austin*, where the Court “held that a modern statutory forfeiture is a ‘fine’ for Eighth Amendment purposes if it constitutes punishment *even in part*,” regardless of how the proceeding is styled and regardless of whether it serves *some* remedial purpose. 524 U.S. at 329 n.4, 331 n.6 (emphasis added). *Cf. Austin*, 509 U.S. at 610, 621-22. At the same time, however, the Court seemingly contradicted its own rationale (derived from *Austin* and *Browning-Ferris*) when it recognized repeatedly that certain forfeitures that are punishments for an offense can nevertheless be classified as “nonpunitive” (and thus not “fines” subject to Eighth Amendment analysis) if they serve in part a remedial purpose. *Compare id.* at 329-333 and n.4, 340-344 *with* Justice Kennedy’s dissenting opinion discussed below.

Having determined that the particular forfeiture in question was “punitive” and thus a “fine” subject to the Excessive Fines Clause, the Court next set forth the test for determining if a fine is “excessive.” “The touchstone of the constitutional inquiry under the . . . Clause is the principle of proportionality: The amount of the forfeiture must bear *some* relationship to the gravity of the offense that it is designed to punish.” *Id.* at 334 (emphasis added). With this in mind, the Court held that a fine is “excessive” if it

is “grossly disproportional to the gravity of the defendant’s offense.” *Id.* Thus, “the district courts in the first instance, and the courts of appeals, reviewing the proportionality determination *de novo*, must compare the amount of the forfeiture to the gravity of the defendant’s offense.” *Id.* at 336-337. If they are in gross disproportion, the forfeiture is excessive and unconstitutional. *Id.* at 336-337 & n.10.

Finding little guidance in the language or the history of the Clause as to what would be considered “excessive” under this test, the Court identified two considerations that it found “particularly relevant.” The first is that “judgments about the appropriate punishment for an offense belong in the first instance to the legislature”. Views on the “severity of punishment, . . . are peculiarly questions of legislative policy” and “Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.” *Id.* at 336 (internal citations omitted). The second is “that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.” *Id.* at 334-337. “Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents.” *Id.* at 336.

The district court had concluded that full forfeiture of the \$357,144 Bajakajian had been carrying and failed to report would be excessive and instead had ordered forfeiture of \$15,000 (in addition to three years’ probation and the maximum fine of \$5,000 under the Sentencing Guidelines). The Court of Appeals for the Ninth Circuit had affirmed. Rather than remand to either court, the Supreme Court applied its “gross disproportionality” standard itself. In holding that the forfeiture violated the Clause, the Court highlighted several facts, many of which the dissenters vigorously took issue with. These included: that the crime was solely a reporting offense—it was permissible to transport the currency out of the country so long as one reported it; that the violation was unrelated to any other illegal activities (e.g., drug trafficking, money laundering, tax evasion); that under the Sentencing Guidelines the maximum sentence was six months while the maximum fine was \$5,000; that the defendant caused minimal harm, no loss to the public fisc, and no fraud on the United States; and that the forfeiture was larger than the \$5,000 fine imposed by many orders of magnitude, and bore *no* “articulable correlation to *any* injury suffered by the Government.” *Id.* at 337-340 (emphasis added).<sup>1</sup>

The Government argued that the “proportionality of full forfeiture was demonstrated by the fact that” numerous statutes authorizing full forfeitures existed or were enacted at roughly the same time as the Eighth Amendment. *Id.* at 340. The Court rejected this argument, declining to give any deference to such legislative judgments because

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<sup>1</sup> The Court did not decide whether a defendant’s wealth or income or whether full forfeiture would deprive him of his livelihood were relevant factors. *Id.* at 340 n.15.

in its view those forfeitures were irrelevant to the case at hand. “[T]hey were not considered at the founding to be punishment for an offense . . . they therefore indicate nothing about the proportionality of the punitive forfeiture at issue here.” *Id.* at 340-341 (emphasis added). Similarly, the Court noted that other monetary forfeitures were not considered punishments for criminal offenses, *id.*, because, for example, they were brought as civil actions and thus were distinguishable from the punitive criminal fine in *Bajakajian*, *id.* at 343 & n.18, or were entirely remedial because they “provide[d] a reasonable form of liquidated damages” to the Government and serve[d] to reimburse the Government for investigation and enforcement expenses,” *id.* at 343-344 & n.19, citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 323, 237 (1972) (*per curiam*).

In a stinging dissent (Justice Kennedy, with the Chief Justice, and Justices O’Connor and Scalia), Justice Kennedy took issue with virtually every aspect of the majority’s decision and reasoning:

For the first time in its history, the Court strikes down a fine as excessive under the Eighth Amendment. The decision is disturbing both for its specific holding and for the broader upheaval it foreshadows. At issue is a fine Congress fixed in the amount of the currency respondent sought to smuggle or to transport without reporting. If a fine calibrated with this accuracy fails the Court’s test, its decision portends serious disruption of a vast range of statutory fines. The Court all but says the offense is not serious anyway. This disdain for the statute is wrong as an empirical matter and disrespectful of the separation of powers. The irony of the case is that, in the end, it may stand for narrowing constitutional protection rather than enhancing it. *To make its rationale work, the Court appears to remove important classes of fines from any excessiveness inquiry at all.* This, too, is unsound.

*Id.* at 344 (emphasis added). The dissent pointed out what it considered to be the many anomalies in the majority’s reasoning and opined that the majority’s notion that *in rem* forfeitures (and perhaps most civil forfeitures) may not be fines at all, “is inconsistent with or at least in tension with *Austin*.” *Id.* at 355. In conclusion, the dissent said:

The majority’s holding may not only jeopardize a vast range of fines but also leave countless others unchecked by the Constitution. Non-remedial fines may be subject to deference in theory but overbearing scrutiny in fact. *So-called remedial penalties, most in rem forfeitures, and perhaps civil fines may not be subject to scrutiny at all.* I would not create these exemptions from the Excessive Fines Clause. I would also accord genuine deference to Congress’ judgments about the gravity of the offenses it creates.

*Id.* at 355-356 (emphasis added).

## Does the Excessive Fines Clause Apply to the FCA's Damages or Penalty Provisions?

The threshold question of whether the Clause applies to civil proceedings at all, or is limited solely to criminal offenses, was answered in *Austin*, where the Court concluded that the Clause covers civil as well as criminal laws, and the test instead is whether a sanction is a “punishment” and thus a “fine” under the Clause. 509 U.S. at 606-610.<sup>2</sup> While seemingly clear on this question at the time, however, the *Austin* decision (which relied in part on *Halper*, a False Claims Act case) is now confused by, and possibly undermined by, the Court's subsequent decisions in *Bajakajian* and *Hudson v. United States*.

Nevertheless, it appears that whether one uses the approach of *Halper* or *Hudson* or *Austin* or *Bajakajian*, or some combination, the mere fact that a statute or sanction is denominated as, and even perhaps intended by the legislature to be, civil, will not be dispositive. Under any approach, the Court will proceed beyond that point to see if the sanction is “punitive”. What is unclear, however, is what approach the Court would use to analyze a civil statute such as the FCA with its Congressionally mandated treble damages and mandatory civil penalties to determine if it is “punitive”. The approach it uses could be critical to the outcome of the issue.

In *Hudson* (decided one year before *Bajakajian*), the Court largely disavowed the *Halper* method of determining what constitutes “punishment” for purposes of the Double Jeopardy Clause of the Fifth Amendment (relied on in *Austin* for the Excessive Fines Clause analysis), which involved courts attempting to distinguish between “punitive” and “non-punitive” penalties. Instead, the Court returned to its pre-*Halper* method of analysis contained in such cases as *United States v. Ward*, 448 U.S. 242 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Under that line of cases, the Court considers the statute on its face, not as applied. It considers first the threshold question of whether the legislature intended the particular punishment to be “civil” or “criminal” in nature, *i.e.*, whether it either expressly or impliedly indicated a preference for one label or the other. *Hudson*, 522 U.S. at 99. Then, even where the legislature has indicated the penalty is civil, the court looks to see if a statute intended to be civil is actually so punitive as to transform it into a criminal penalty. To decide this question, the Court uses a multifactor test<sup>3</sup>; these

<sup>3</sup> These factors include: “(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.” *Hudson*, 522 U.S. at 99-100 (internal citations and quotations omitted).

<sup>2</sup> Since the Clause limits the government's power to extract payments “as punishment for some offense”, citing *Browning-Ferris*, *supra*, and since “civil proceedings may advance punitive as well as remedial goals, and, conversely that both punitive and remedial goals may be served by criminal penalties,” citing *United States v. Halper*, 490 U.S. 435, 447 (1989), the question is not, as the United States argued, whether a forfeiture is civil or criminal, but rather “whether it is punishment.” *Austin*, 509 U.S. at 610. In *Browning-Ferris*, *supra*, the Court had left open the question of whether the Excessive Fines Clause could ever apply to a civil case, however, the dissent (Justices O'Connor and Stevens) concluded that it could apply to civil penalties such as punitive damages awarded in an antitrust suit between only private parties. *Id.* at 285-297.

factors are to be considered in relation to the statute on its face “and ‘only the clearest proof’ will suffice to override legislative intent and transform what has been denominat- ed a civil remedy into a criminal penalty.” *Hudson*, 522 U.S. at 99-100.

The *Hudson* Court criticized *Halper* for ignoring all but one or two of these fac- tors:

We believe that *Halper’s* deviation from longstanding double jeopardy principles was ill considered . . . *Halper’s* test . . . has proved unworkable. We have since recognized that all civil penalties have some deterrent effect. If a sanction must be ‘solely’ remedial (*i.e.*, entirely nondeterrant) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause. . . . [I]t should be noted that some of the ills at which *Halper* was directed are addressed by other constitu- tional provisions. The Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irra- tional. The Eighth Amendment protects against excessive civil fines... [citing *Austin*] The additional protection afforded by extending double jeopardy protections to proceedings [under the False Claims Act] heretofore thought to be civil is more than offset by the confusion creat- ed by attempting to distinguish between ‘punitive’ and ‘nonpunitive’ penalties.

*Hudson*, 522 U.S. at 101-103 (internal citations omitted).<sup>4</sup> The *Hudson* Court did not explicitly say how, if at all, its disavowal of *Halper* affected its Excessive Fines jurispru- dence in cases such as *Austin*, which had relied so heavily on *Halper*.

Then in *Bajakajian*, one year later, the Court seemingly returned to the *Halper/Austin* concept of “punitive” and “non-punitive” penalties for purposes of Excessive Fines Clause analysis. *See, e.g.* 509 U.S. at 609-10 & n.6, 621-22 n.14. It was roundly criticized by the four dissenters (who had been in the majority in *Hudson*), but it is unclear if the dissenters’ concern is that the test should still be that articulated in *Austin* and the majority did something to undermine that, or if they see the “unwork- able” and “ill considered” *Halper* approach looming too large in the majority’s foray into which forfeitures or penalties are “remedial” and which are “punitive” and thus “fines” under the Clause.

Regardless, despite its broad language in *Austin* and some other opinions, the only cases where the Court has to date actually decided that the Clause applies are for-

<sup>4</sup> It is beyond the scope of this article to explore in any depth how, if at all, any Due Process or Equal Protection chal- lenge such as noted in *Hudson* would fare if raised by an FCA defendant. Suffice it to say that it seems implausible that the Court would find a statutorily mandated civil remedy that has been on the books since the Civil War to be “down- right irrational” unless it were applied in some completely absurd and unforeseeable way.

feiture cases where the forfeiture (whether civil *in rem*, criminal *in personam*, or however characterized) was directly related to a criminal proceeding/offense. See *Austin, supra* (*in rem* civil forfeiture of real property used or intended for use in a drug crime); *Alexander v. United States*, 509 U.S. 544 (1993) (*in personam* criminal forfeiture under RICO); *Bajakajian* (forfeiture mandated by a criminal statute for a currency reporting violation of federal criminal law).

The Court's cases leave open two fundamental questions. First, would its analysis of a given statute such as the FCA focus on the statute on its face and as a whole, or instead on the statute as applied in the particular case? It appears that it would use a facial approach. See *Austin* 409 U.S. at 621 n.14 (comparing *Halper* "as applied" approach to *Austin* "on its face" approach); *United States v. Ursery*, 518 U.S. 267, 287 (1996) (in Excessive Fines Clause cases, look at statute on its face and as a whole); *Hudson*, 522 U.S. at 103 (in Double Jeopardy cases, look at statute on its face and as a whole); *United States v. Lippert*, 148 F.3d 974, 977 n.2 (8th Cir. 1998) (noting uncertainty but concluding that "whether the Excessive Fines Clause applies to a type of civil penalty should be based on a facial evaluation of the statute.")

Second, what method would the Court use to determine whether the civil sanctions or remedies constitute "punishment" in light of *Halper*, *Austin*, *Hudson*, and *Bajakajian*? The dilemma posed by this second question is illustrated by the Eighth Circuit's ruminations in *U.S. v. Lippert*.<sup>5</sup> On the one hand,

*Austin* relied heavily on the now discredited Double Jeopardy Clause analysis of *Halper*. We infer from the citation to *Austin* in *Bajakajian* that *Halper's* emphasis on punishment, while rejected as a basis for applying the Double Jeopardy Clause, remains appropriate for applying the Excessive Fines Clause. That inference is supported by the fact that the Court in *Hudson* commented 'some of the ills at which *Halper* was directed are addressed by other constitutional provisions', citing as example the Excessive Fines Clause as applied in *Austin*. . . . If we apply *Austin's* expansive test for identifying punishment, it seems apparent that the civil penalty [in the Anti-Kickback Act] is punitive because it is intended to serve in part as punishment . . .

On the other hand, there is a strong conflicting signal from *Bajakajian*. . . . If the *Bajakajian* dissenters have properly construed the majority opinion,

<sup>5</sup> Prior to *Bajakajian*, two reported district court opinions concluded the civil penalty provision of the FCA was subject to the Excessive Fines Clause, relying in part on *Austin*. See *United States v. Advance Tool Company*, 902 F. Supp. 1011 (W.D. Mo. 1995); *U.S. ex rel. Smith v. Gilbert Realty*, 840 F. Supp. 71 (E.D. Mich. 1993). Since *Bajakajian*, in one reported district court opinion, the court assumed, without deciding, that the FCA is subject to the Clause. See *U.S. v. Byrd*, 100 F. Supp. 2d 342 (E.D.N.C. 2000).

then civil penalties imposed [under the Anti-Kickback Act] may not be subject to the Excessive Fines Clause at all, because like customs forfeitures they serve the remedial purpose of reimbursing the government for losses accruing from kickbacks.

148 F.3d at 977-78 (citations omitted). Uncertain how the Supreme Court would resolve these seemingly inconsistent approaches, the Eighth Circuit decided “we need not hazard an answer” and instead decided that the civil penalty was not constitutionally excessive. *Id.* at 978.

Faced with this same issue in *United States v. Kruse*, 101 F. Supp. 2d 410 (E.D. Va. 2000), the court recognized that the *Lippert* court had refrained from ruling “in part because of the murkiness surrounding Supreme Court decisions in this area.” *Id.* at 412. The district court’s opinion reflects some of the same confusion, but the court appears to rely on *Bajakajian* in concluding that the Anti-Kickback Act *on its face may not* be subject to the Excessive Fines Clause “insofar as the penalties . . . reimburse the Government, if roughly.” *Id.* at 413. The court then went on to conclude that one type of “civil penalty” in the statute, *as applied* in that case, passed constitutional muster, but that the second type of “civil penalty” did not. The penalty that passed muster essentially provides that the Government shall recover twice the amount of each kickback. The other “per occurrence” penalty failed. In reaching its decision, the court found persuasive evidence on the amount of the kickbacks as well as on the Government’s investigative and audit costs and other costs.

The dilemma posed in *Lippert* also gave the Ninth Circuit little pause. In *United States v. Mackby*, 261 F.3d 821 (replacing 243 F.3d 1159) (9th Cir. 2001), the Ninth Circuit held that the treble damages *and* civil penalties provisions of the FCA fall within the scope of the Excessive Fines Clause. The Ninth Circuit’s confident decision belies what appears to be the confused state of the law. While the court appears to construe the FCA on its face (an approach urged by the Government), it seemingly makes no attempt to reconcile the above Supreme Court precedents. Rather, it forges ahead and uses solely the *Austin/Halper* test for determining what constitutes “punishment” under the Excessive Fines Clause; it does not delve into the *Bajakajian* realm of “punitive” versus “non-punitive” penalties or the *Hudson* realm of considering multiple factors and then concluding that a statute the legislature intended to be civil is in fact “punitive” only if confronted with “the clearest proof” of such. *Cf. Myrie v. Commissioner*, 267 F.3d 251, 261-262 (3d Cir. 2001) (using *Hudson* test to conclude a surcharge is not subject to Excessive Fines Clause).

The court, finding references in FCA case law and legislative history to the deterrent and punitive purposes of the FCA, and noting that penalties are to be awarded even where there is no loss to the Government, concluded that “the civil sanctions provided by the False Claims Act are subject to analysis under the Excessive Fines Clause because the sanctions represent a payment to the government, at least in part, as punishment.” *Id.* at 830.

The court then turned to the treble damage provision of the FCA. Again, using the *Austin/Halper* test, the court, citing to Supreme Court cases referring to treble damages as punishment in antitrust cases, and to the Court's recent statement in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-86 (2000), that FCA treble damages, at least in combination with the civil penalties, are "essentially punitive in nature," concluded that "the FCA's treble damages provision, at least in combination with the Act's statutory penalty provision, is not solely remedial and therefore is subject to an Excessive Fines Clause analysis." 261 F.3d at 830-31. See also *U.S. ex rel. Satalich v. City of Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Cal. 2001) (relying on *Stevens* and other cases, including *Mackby*, to conclude that City is not a "person" under the FCA and enjoys immunity from suit, because FCA damages and penalty provisions impose "punitive liability").

In doing so, the Ninth Circuit apparently never considered whether something less than trebles or the \$10,000 civil penalty would not be "punishment." See, e.g., *Stevens*, *supra* at 784-786 (while the Court characterized the current version of the FCA as imposing damages that are essentially punitive in nature, it also noted that there was Supreme Court precedent that the damages and penalties under the pre-1986 FCA were remedial rather than punitive); *Halper*, 490 U.S. at 449 (in ordinary case, fixed penalty plus double damages provisions, as in the FCA, can be said to do no more than make the government whole and thus are remedial) and Kennedy, J., concurring at 452-53 ("Our rule permits the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount, plus double damages"); *United States v. Lippert*, 148 F.3d at 978.<sup>6</sup>

Nor did the Ninth Circuit even acknowledge that the four dissenters in *Bajakajian* construed the majority's opinion as treating many fines as "remedial" penalties, and thus not subject to the Excessive Fines Clause, "even though they far exceed the harm suffered . . . and even if they amount to many times the duties due on the goods." 524 U.S. at 344-345. According to the dissenters, the majority's approach means that the centuries old "*in personam* customs fines equal to one, two, three or even four times the value of the goods at issue," none of which depended on a compensable monetary loss to the Government, are now considered "non-punitive and thus not subject to the Excessive Fines Clause." *Id.* at 345-346. The Ninth Circuit did not explain why FCA civil penalties (or treble damages) are not "remedial" under this analysis. See also *Browning-Ferris*, 492 U.S. at 273-274 (awards of double or treble damages authorized by statute date back to the thirteenth century).

As demonstrated by the Eighth Circuit in *Lippert*, whether one uses the *Austin/Halper* approach, the *Hudson* or the *Bajakajian* approach may well determine

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<sup>6</sup> It could have failed to do because it was considering the FCA on its face and as a whole.

whether the FCA or Anti-Kickback Act penalties provisions fall within the Excessive Fines Clause. 148 F.3d at 977-78 (under *Austin's* expansive reading for identifying punishment it seems apparent the Anti-Kickback Act civil penalty is punitive, but if the *Bajakajian* dissenters have properly construed the majority opinion, the civil penalties may be remedial).

For example, there is ample support in FCA case law, statutory language, legislative history and historical context and underpinnings, and case law interpreting other civil penalty multiple damages statutes and their historical origins, to support the argument that the FCA, a clearly civil statute, is *on its face and as a whole* in essence remedial and the treble damages and penalties are both “remedial” not punitive. *See generally, Bajakajian; Halper*; S. Rep. No. 99-345 at 30-31 (indicating that FCA is civil and remedial, not penal, and provides for compensatory damages); 99th Cong., 2d Sess., Hearing Before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, February 5-6, 1986 (Statement of Rep. Glickman), *reprinted in* A&P FALSECLM Hearings (6) \*158 (increase in civil penalties from \$2,000 to \$5,000-\$10,000 did not serve a punitive purpose but rather was intended to adjust for inflation since the original FCA was passed in 1863). However, if all that must be shown is that the FCA damages and/or penalties on their face serve at least *in part* to punish (i.e. to deter), it may be hard to quarrel with the Ninth Circuit’s decision in *Mackby*.

#### Applicability of the Excessive Fines Clause to FCA *Qui Tam* Actions

The Supreme Court has left open the question of whether an FCA *qui tam* action is subject to the Excessive Fines Clause. *See Browning-Ferris, supra* at 275-276 n.21 (In *Halper* “we left open the question whether a *qui tam* action . . . would implicate the Double Jeopardy Clause. We leave the same question open for purposes of the Eighth Amendment’s Excessive Fines Clause.”) (citation omitted), *and* O’Connor’s dissent at pp. 298-299 (her general approach suggests that she would apply the Excessive Fines Clause to a *qui tam* action — if it applies to the FCA at all). *See also Austin*, 509 U.S. at 607 n.3 (“In *Browning-Ferris* we left open the question . . . we have no occasion to address that question here.”); *Hays v. Hoffman*, 2001 WL 1141827 (D. Minn. Sept. 26, 2001) (in *qui tam* action in which Government declined to intervene, whether Excessive Fines Clause applies “is murky at best”); *U.S. ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 74 (E.D. Mich. 1993) (concluding that FCA civil penalties in a *qui tam* action are subject to Excessive Fines Clause).

However, given the Court’s language in *Browning-Ferris* and subsequent cases, and the language and purpose of the FCA, it seems very likely that should the Court conclude the Excessive Fines Clause applies to the FCA cases brought by the Government, it will also find it applies to *qui tam* actions, even ones in which the United States declines to intervene. In *Browning-Ferris*, the majority stated that the Clause does not apply “when the government has neither prosecuted the action nor has any right to

recover a share of the damages awarded.” 492 U.S. at 273. Clearly, in an FCA *qui tam* action, even one which is declined, the Government not only shares in the recovery, but is entitled to the bulk of the recovery. See 31 U.S.C. § 3730(d) (Where U.S. intervenes, relator’s share is generally between 15%-25%; where U.S. declines to intervene, share is generally between 25%-30%). See also *Stevens*, 529 U.S. at 773 & n.4 (“relator is, in effect, suing as a *partial* assignee of the United States.”).

### Who has the Burden of Proving That the “Fine” is “Excessive”?

If the Clause applies at all, it appears that the burden of proving that the fine is excessive rests, in the first instance, at least, with the defendant. See *Bajakajian*, 524 U.S. at 348 (Kennedy, J., dissenting) (“the majority states the test: A defendant must prove a gross disproportion before a court will strike down a fine as excessive”); *U.S. v. Wagoner County Real Estate*, 278 F.3d 1091 (10th Cir. 2002); *U.S. v. Alexander*, 32 F.3d 1231, 1234-36 (8th Cir. 1994) (holding the defendant had the initial burden of showing gross disproportionality; if the defendant satisfies his burden, then the Government must show “just proportionality”). See also *U.S. v. Alexander*, 108 F.3d 853, 855 (8th Cir. 1997) (defendant failed to demonstrate disproportionality).

The Eighth Circuit has explicitly rejected the argument that placing this burden on the defendant violates due process. See *U.S. v. Alexander*, 108 F.3d 853, 858 (8th Cir. 1997). See also *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 73 (E.D. Mich. 1993) (rejecting FCA defendant’s argument that because the fine is essentially punishment the standards of a criminal jury trial are required to impose the fine).

### What Factors are Relevant to Determining “Excessiveness”?

The majority in *Bajakajian* gave some guidance on this point, listing several relevant considerations, and settling on a test that weighs “gross disproportionality” to the “gravity of the offense it is designed to punish.” See discussion *supra*. The Eighth and Third Circuits have characterized “gross disproportionality” as requiring “disproportionality to reach such a level of excessiveness that in justice the punishment is more criminal than the crime.” *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995) (internal citations and quotations omitted).

Among the factors highlighted in *Bajakajian* were: substantial deference to the legislature’s judgment about the appropriate punishment, the gravity of the offense, the other penalties allowed under the statute, the nature of the offense, the harm caused by the offense, involvement in other illegal activity, and the “correlation” between the offense and the sanction imposed. 524 U.S. at 336-40.

Of particular interest in FCA cases should be deference to Congress’ judgments, as generally noted by both the majority and the dissent in *Bajakajian*. Many statutes provide for heavy civil penalties, as an alternative to criminal punishment, to deter misconduct and to insure the Government is adequately and wholly compensated, and it is

well-settled that Congress can calibrate a civil penalty or assessment that exceeds the amount of actual damages. See, e.g., *Chapman v. United States*, 821 F.2d 523, 528-29 (10th Cir. 1987). Numerous courts have held that Congress' judgment is critical under the doctrine of separation of powers, and that where Congress has exercised its judgment the court will defer to it and find that the penalty is not "grossly disproportional to the gravity of the offense" sought to be punished. See, e.g., *Balice v. Dept. of Agriculture*, 203 F.3d 684, 698 (9th Cir. 2000) (court deferred to Congress' judgement about administrative civil penalties); *Kelly v. Environmental Protection Agency*, 203 F.3d 519, 524 (7th Cir. 2000) (court deferred to Congress' judgment about appropriate penalties for violation of Clean Water Act); *United States v. Bieri*, 68 F.3d at 238 (where a fine is legislatively authorized, a successful Excessive Fines Clause challenge will be rare); *United States v. Byrd*, 100 F. Supp.2d 342, 345 (E.D.N.C. 2000)(in FCA Congress set forth penalties that appropriately reflect the frequency and extent of a defendant's false claims); *United States ex rel. Trice v. Westinghouse Hanford Company*, U.S. Dist. Ct. Lexis 8838 at \*66-\*68 (E.D. Wash. Mar. 1, 2000) ("Unlike the mere reporting violation in *Bajakajian*, a violation of the FCA involves scienter and an affirmative act, i.e., submission of a claim. A more severe remedy seems appropriate. Congress determined that this was the proper penalty, and [it] does not seem 'grossly disproportional' to defendant's violation.").

Fraud against the Government is a serious offense, which "could be costing taxpayers anywhere from \$10 to \$100 billion annually." S. Rep. No. 345 at 3. In addition to tangible financial loss, "fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs." *Id.* Fraud is easy to commit and difficult to detect. E.g., *Barren Island Marina, Inc. v. United States*, 44 Fed. Cl. 252, 257-258 (1999). While easy to commit, it can entail great investigative, audit, and prosecutorial resources and expense to find, prove, and rectify.

While deference to the legislature should be of prime concern, particularly in an FCA case, a review of decisions pre- and post-*Bajakajian* shows that the courts have also considered numerous other factors including the following:

- Whether the criminal activities were extensive and occurred over a substantial period of time, *Alexander v. U.S.*, 509 U.S. 544, 599 (1993) (in remanding to court of appeals in this criminal forfeiture case); *U.S. v. Emerson*, 107 F.3d 77, 80 (1st Cir. 1997) (defendant engaged in repeated highly culpable conduct), and the defendant's motive and culpability. *U.S. v. Alexander*, 32 F.3d at 1236-1237; see also *U.S. v. Alexander*, 108 F.3d at 855-858. See also *Grid Radio v. FCC*, 278 F.3d 1314 (D.C. Cir. 2002)(\$11,000 statutory penalty for continued and willful violation of the FCC's radio licensing requirement).

- The value or amount of property forfeited. *U.S. v. Alexander*, 32 F.3d at 1236-1237; *see also U.S. v. Alexander*, 108 F.3d at 855-858.
- The personal benefit reaped by the defendant. *U.S. v. Alexander*, 32 F.3d at 1236-1237; *see also U.S. v. Alexander*, 108 F.3d at 855-858.
- The extent that the defendant's interest and the enterprise itself are tainted by criminal conduct (*i.e.*, does the dollar amount of the fraud constitute a small fraction of the legitimate business of the enterprise?). *Id.*
- The value of forfeited property in relation to the total dollar volume of the criminal activity. *United States v. Bieri*, 68 F.3d 232, 237 (8th Cir. 1995); *U.S. v. One Parcel of Property*, 2000 WL 1336473 (D. Conn. July 31, 2000) (drugs sold were worth far more than the properties forfeited—Excessive Fines claim rejected).
- The defendant's ability to pay. *U.S. v. Lippert*, 148 F.3d at 978; *U.S. v. Emerson*, 107 F.3d 77, 81 (1st Cir. 1997); *Hays*, 2001 WL 1141827 at \*3 n.6. *Cf. Bajakajian*, 524 U.S. at 340 n.15 (not reaching this issue).
- Whether a fine of the size sought is necessary to achieve the desired deterrence. *U.S. v. Mackby*, 261 F.3d 821, 830 (9th Cir. 2001); *U.S. v. Emerson*, 107 F.3d at 81 (size of penalty and continuing nature of defendant's obligation to pay "is a sobering reality that should discourage him (and deter others) from committing future violations.")
- The other monetary awards being made. *U.S. v. Mackby*, 261 F.3d at 831 ("the amount of the [FCA] civil penalty and the amount of treble damages need not be considered in isolation as if the other did not exist. To the contrary, the amount of one will no doubt bear upon the district court's excessive fines analysis with regard to the other").
- Loss to the Government or the attempted harm to the Government and/or the harm caused to a relator. *Compare Hays* (retaliation against relator, attempted harm to U.S., and government's lengthy audit process among factors considered in concluding defendant's conduct resulted in harm both real and substantial), *and Kruse* (Government's audit and investigative costs, and prosecution and judicial resources, costs of incarceration, and intangible/unquantifiable damages to the procurement system are all relevant factors) *with Austin*, 509 U.S. at 621 (*in rem* forfeiture of property at issue has "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law"), *and United States v. Advance Tool Company*, 902 F. Supp. 1011, 1018 (W.D. Missouri 1995) (finding FCA civil penalties excessive based upon the Government's "inability to prove actual damages at trial, . . . poor investigative procedures, and its confusing regulatory and contractual purchasing agreements which virtually encourage the type of conduct at issue here").
- The value of the property being forfeited in comparison to the Sentencing

Guidelines fines range. See *U.S. v. Sherman*, 262 F.3d 784, 794 (8th Cir. 2001) (forfeiture of defendants' \$750,000 house not "grossly disproportional" when the Sentencing Guidelines permitted a fine of up to \$4 million as to each defendant).

- Perhaps certain "intangible factors, including the property's character as a residence or the effect of forfeiture on innocent occupants and children" may be relevant in some cases, particularly civil *in rem* forfeitures where the owner has not been convicted of any crime. See *Bieri*, 68 F.3d at 237.

### Tailoring the FCA Award to Avoid "Excessiveness"

Generally, under the FCA the courts have some discretion in what they count as a false "claim" subject to the civil penalty provision. See, e.g., *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 552 (1943) (under circumstances of this case, each project can be counted separately, rather than every form submitted); *United States v. Bornstein*, 423 U.S. 303 (1976) (three shipments, not twenty-five separate invoices, constitute the number of false "claims"); *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001) (counting one Medicare claim per patient per year is within discretion); *United States v. Krizek*, 111 F.2d 934 (D.C. Cir. 1997) (count each HCFA 1500 claim form per patient, not each CPT code/statement on the claim form); *United States ex rel. Garibaldi v. Orleans Parish School Board*, 46 F. Supp.2d 546, 554-555 (E.D. La. 1999), *rev'd on other grounds*, 244 F.3d 486 (5th Cir. 2001) (defendant made a "claim" every time it requested money from the government — it is the number of applications for funds, not the number of coded items on each application, or the number of invoices generated, or the number of contracts); *United States ex rel. Augustine v. Century Health Services, Inc.*, 136 F. Supp. 2d 876, 895 (M.D. Tenn. 2000) (holding that each cost report, not each false statement on the reports, is a "claim"), *aff'd*, 289 F.3d 409 (6th Cir. 2002).

However, courts have generally held that they have no discretion not to award the mandated statutory civil penalties or to award less than the minimum per each such false "claim," unless doing so would run afoul of the Constitution. For example, in *United States v. Bieri*, the district court determined that forfeiture was discretionary under the statute and it ordered no forfeiture. The Eighth Circuit reversed, holding that there was no such discretion under the statute. However, the district court could order forfeiture of less than the whole if necessary to tailor the forfeiture to fit within the broad boundaries of constitutional proportionality under the Excessive Fines Clause of the Constitution. 68 F. 3d at 234-235. "To sustain a forfeiture of less than the whole on this circumstance, the Constitution imposes an additional layer of analysis." *Id.* at 235-236. See also *United States v. Killough*, 848 F.2d 1523, 1533-34 (11th Cir. 1988) (imposition of FCA statutory forfeitures is not discretionary, but is mandatory for each claim found to be false); *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975) (in case where district court limited penalties to 50 claims, instead of the 120 claims found false, court commented in *dicta* that it would not address the issue because Government had not

cross appealed and, in any event, “the Government tacitly admits that the court may exercise discretion where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government. The forfeiture should reflect a fair ratio to the damages to insure that the Government completely recoups its losses.”); *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 74-75 (E.D. Mich. 1993) (where ratio of actual damages to civil penalty was 1:178, court reduced civil penalty by counting as a “claim” each of seven false certifications made by defendant directly to the housing authority rather than each of fifty-one separate rent checks endorsed by defendant and concluded that reduced penalty was not excessive under Excessive Fines Clause); *United States v. Advance Tool Company*, 902 F. Supp. 1011 (W.D. Mo. 1995) (court lacks discretion or coherent power under the FCA to award damages below the statutory range, but under Excessive Fines Clause, it may reduce penalty; court imposed a civil penalty for each of 73 different types of tools at issue, rather than for each invoice). See generally *Bajakajian*, 524 U.S. at 337 n.11 (court did not have before it the propriety of the district court’s order of less than a full forfeiture of \$357,144 as dictated by the statute; nor did the court address whether the reduced forfeiture of \$15,000 would have suffered from “gross disproportion”); *Kruse* (in holding \$10,000 “per occurrence” civil penalty under the Anti Kickback Act, which would have resulted in a \$590,000 penalty, “excessive”, the court never considered reducing the penalty so as to avoid running afoul of the Excessive Fines Clause).

### Are Corporations Protected by the Excessive Fines Clause?

No court, including the Supreme Court, has held that the Clause applies to a corporation. In *Browning-Ferris*, the majority of the Supreme Court left the question open, 492 U.S. at 276 n.22, while the dissent (O’Connor, J. and Stevens, J.) concluded that it does apply to a corporation. *Id.* at 284-285.<sup>7</sup> See also *Hays v. Hoffman*, 2001 WL 1141827 (declining to reach question). See generally *Consolidated Edison Company of New York, Inc. v. Pataki*, 2002 WL 1207514 at \*3-\*6 (2d Cir. June 5, 2002) (in concluding that the constitutional provision against bills of attainder applies to corporations, the court discusses which constitutional amendments corporations have received protection under and what test(s) have been used to decide).

<sup>7</sup> While the Court has held that the Due Process Clause of the Fourteenth Amendment applies to corporations, and protects them from excessive punitive damages awards, this constitutional protection should not be confused with the Eighth Amendment protection. For example, in *Watson v. Johnson Mobile Homes*, 282 F.3d 568, 572 (5th Cir. 2002), the court assumed that both Amendments apply, but as the Supreme Court cases show, only the Fourteenth Amendment is relevant in punitive damages cases. See *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991) (recounting history of the Court rejecting the Eighth Amendment argument in punitive damages cases, and holding that the Fourteenth Amendment does apply). The Court does, however, use many of the same factors in determining whether there is “excessiveness” under each Amendment. See, e.g., *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (using *Bajakajian* and Fourteenth Amendment cases to decide “grossly excessive” question in a Fourteenth Amendment case).

## CONCLUSION

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It remains unclear what standard or method of analysis the Supreme Court would use in determining whether the False Claims Act is subject to the Excessive Fines Clause. The approach it ultimately chooses may well be dispositive of the question. If the Clause does apply, it presumably will also apply to FCA *qui tam* actions. Defendants will bear the burden of proving “gross disproportionality”, a burden that is likely to be extremely difficult to sustain given the relevant factors, including deference to Congress’ judgment. The Government and the courts will have the authority and the discretion under the FCA to tailor the damages and/or penalties so as not to be “grossly disproportional.” It remains to be seen whether any Excessive Fines Clause protections the Supreme Court places on the FCA will inure to the benefit of corporate defendants, or will benefit only individual defendants.