Fourth Circuit Oral Argument Considers Questions Concerning Constitutionally Problematic FCA Fines

The Fourth Circuit recently heard oral argument in *United States ex rel. Bunk v. Gosselin World Wide Moving* (12-1369).[1] During oral argument, the panel explored, among other issues, how to calculate fines under the FCA when the minimum fine called for by the statute violates the Eighth Amendment of the Constitution. While the panel in *Bunk* did not address the Eighth Amendment issues directly, it is poised to answer a series of questions that will have considerable practical significance for FCA defendants. Indeed, as much as $50 million rests on the court's decision, and the Fourth Circuit's ruling has the potential to be an important guidepost as courts around the country grapple with potential constitutional limits to FCA fines.

District Court's Decision in Bunk

In *Bunk*, relators brought a complaint alleging that several defendants violated the FCA by participating in bid rigging and price fixing in obtaining contracts for transporting household goods for U.S. military and civilian personnel stationed overseas. The allegations involved multiple different claims, some of which the government intervened with respect to, and one which the relators were left to pursue. With respect to the claim for which the relators were responsible, a jury found that certain defendants, including Gosselin Worldwide Moving, N.V. and Gosselin Group, N.V (collectively "Defendants"), knowingly submitted a false Certificate of Independent Bid Pricing to the government. The district court found that there was adequate evidence to support this finding and that each of the 9,136 invoices submitted to the government pursuant to the Defendants' contract with the government amounted to a violation of the FCA. Multiplying the number of false invoices by the minimum fine of $5,500 per violation under the FCA, the district court later determined that the minimum fine it could impose was approximately $50 million. The district court held that this fine was excessively high because there were a number of mitigating factors and no proven economic harm to the government. Although the government contended that it was only seeking sanctions for about half of the proven false claims, for a total fine of $24 million, the district court held that it had no authority to impose a fine below the FCA's statutory minimum, so it severed the penalty provision as applied, which resulted in no fine.[2] The court entered judgment accordingly pursuant to Fed. R. Civ. P. 54(b). Both relators and the government appealed.[3]

Oral Argument before the Fourth Circuit

At oral argument, the discussion focused on (1) what number should be analyzed to evaluate the constitutionality of a fine under the FCA and (2) what is the right remedy if a court determines that a fine is, in fact, constitutionally excessive.

As to the first issue, the parties disagreed about what fine was required by the FCA in this case. Defendants argued that because $50 million was the statutory minimum fine for the number of false claims found at the

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[1] The appeal was consolidated with 12-1494, which arose from the same consolidated district court proceeding.

[2] The court also issued a ruling in the alternative and construed the statute so as to avoid the constitutional issue by interpreting Defendants' conduct to consist of only one false claim (submission of the Certificate of Independent Bid Pricing) and imposed a fine of $11,000 (the statutory maximum for one violation). As a second alternative, the court considered what penalty it could impose if its decision was untethered from the statute. It determined that the "outer limits" of the permissible range is $1.5 million (ten times the financial gain to Defendants), but because the FCA's intent is to impose only an "appropriate" penalty, it would impose a sanction of $500,000.

[3] On appeal, the government also challenges the district court's rulings concerning a separate claim with respect to which the government intervened in the district court. This issue did not receive much attention during oral argument and is not addressed here.

district court level, no lower fine could be imposed under the statute. The government, intervening with respect to the remaining claim on appeal, argued that a lower fine could be imposed. Specifically, the relators, exercising a form of prosecutorial discretion on behalf of the government and as the "master of his complaint" in their individual capacity, could seek (and had sought) penalties for only *some* of the false claims, for a total fine of $24 million, thus eliminating the need for the court to weigh in on the constitutionality of the $50 million figure. The government argued that the proposed $24 million fine was less than nine times the loss to the government and was thus constitutional under *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). In support, the government cited *United States v. Mackby*, 339 F.3d 1015 (9th Cir. 2003), in which the Ninth Circuit reviewed reduced penalties suggested by the government rather than the minimum authorized by statute. The panel repeatedly asked the government why the Court should be bound by a number arbitrarily chosen by the relators and whether the relators could exercise prosecutorial discretion on the government's behalf.

The parties also debated what remedy could be imposed if the court did find that the applicable fine (whether $50 million or $24 million) was constitutionally excessive. The government, citing *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328-329 (2006), argued that the district court erred by severing the penalty provision of the FCA rather than reducing the fine, because a district court is obligated to fashion a remedy for a constitutional violation that will preserve as much of the statute as practicable. In a position not adopted by the government, the relators also argued that the criminal sentencing guidelines control the excessive fine analysis under the FCA and provide a constitutional ceiling for what fine may be imposed. Defendants contended that the criminal sentencing guidelines do not apply to a civil FCA suit and also argued that the district court reached the correct result when it severed the penalty provision and imposed a fine of zero dollars.[4] When the panel questioned Defendants about their argument that since the fine was unconstitutionally high, no fine could be imposed – creating an incentive to submit additional false claims – Defendants argued that such concerns were baseless, because a high fine is constitutionally permissible if a defendant purposefully submits additional false claims to evade sanctions and lacks the substantial mitigation present here, where the government was not harmed and Defendants derived no financial benefit. [5]

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Over the last several years, courts have paid increased attention to the applicability of the Excessive Fines clause to fines under the FCA. In *Bunk*, the court has the opportunity to go one step further and address how constitutional questions interact with a key component of the structure of the FCA. The decision will have the potential to greatly affect the actual amount that FCA defendants who successfully raise constitutional objections will actually have to pay. If, as the government contends, courts have wide discretion to select constitutionally appropriate fines regardless of the FCA's statutory minimums, or if the government and relators have discretion simply to seek fines for only a certain number of proven claims in an effort to manipulate the minimum fine, then FCA defendants may still have to pay sizeable fines regardless of any constitutional victories they secure. But if, as the district court held, and as the Defendants in *Bunk* ambitiously argue, the panel rules that the FCA's minimum fine provisions effectively require either

[4] In the alternative, Defendants argued that the court should impose the $11,000 fine proposed as the district court's first alternative. Defendants also argued that the $24 million fine was unconstitutionally excessive.

[5] On a topic subject to extensive briefing but receiving minimal attention at oral argument, Defendants argued on cross-appeal (12-1417) that the relators lacked Article III standing because they sought to vindicate only a sovereign interest of the United States, and not a proprietary interest so that the main precedent in this area, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), did not apply.

an unconstitutional (and therefore unimposable) fine or nothing, then FCA defendants could potentially avoid what could otherwise be enormous liability.

We will continue to monitor this case. If you would like further information, please contact one of the attorneys in our False Claims Act practice or the Ropes & Gray attorney who usually advises you.