ACTUAL LOSS AFTER *SAIC*: A RETURN TO BASICS

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In November 2010, the D.C. Circuit applied Supreme Court precedent and basic compensatory loss principles to hold that the measure of the government's actual loss in an implied-certification based False Claims Act ("FCA") case was the difference between the actual value of the services promised under the government contract at issue and the value of the non-conforming services actually provided. *United States v. Science Applications Intern. Corp.*, 626 F.3d 1257, 1278 (D.C. Cir. 2010) ("*SAIC*"). What makes the decision notable is not that the Court broke new legal ground when it applied traditional principles of compensatory loss to a novel FCA theory; rather, it is that in doing so, the Court had to reverse the trial court and arguably put the D.C. Circuit into conflict with a barely two year-old decision from the Seventh Circuit.[2]

To understand the distinction between the approach the Seventh Circuit took in *Rogan* and the approach applied by the D.C. Circuit in *SAIC,* why *SAIC* got it right, and what is at stake, one needs to consider the approach to damages calculations taken by the Court in each of these cases against the backdrop of the implied-certification based FCA liability that was at issue in each case. As the FCA is used more frequently to enforce violations of *other* statutes and regulations, how to calculate actual damage to the government fisc by claims that are only "legally" false becomes a pressing issue. It is in precisely these kinds of cases – where both the falsity of the claims and the "loss" to the government are potentially purely legal constructs -- that the risk of abuse by the government or relators is high. The method of calculating loss applied in *SAIC* can provide a reasonable and much-needed check on this risk.

I. *SAIC* AND ROGAN

A. The *SAIC* Decision

The D.C. Circuit's decision in *SAIC* 626 F.3d 1257 (D.C. Cir. 2010) properly applies the concept of net loss in the implied certification context. In the lower court, the jury held that Science Applications International Corporation ("SAIC"), a government contractor, violated the FCA by seeking payments from the government (Nuclear Regulatory Commission, "NRC") while knowingly violating provisions in its contract that prohibited conflicts of interest. *Id*. at 1261. The government was permitted to proceed on an implied certification based theory on the strength of its allegations that SAIC made false statements of compliance with "no-conflict" requirements, which "constituted critical information to the government's decision to pay." *Id*.

at 1264. Based on jury instructions that the Circuit Court later said were improper, the jury found that the government suffered damages in the full amount of payments made by the government, and then trebled that figure as provided for by the FCA. *Id*. The trebled damages amounted to nearly $6 million. *Id*. However, the United States had also pursued common law claims in this case and, by contrast, the jury awarded only $78 on the breach of contract claims. *Id.*

On appeal, the D.C. Circuit held that the district court's damages instruction was flawed because it compelled the jury to assess as single damages the full amount of payments that the government had made, and then equated what the government paid with the government's actual damages. *Id*. at 1278. The jury was instructed as follows:

> [T]he damages that the United States is entitled to recover under the False Claims Act are the amount of money that the government paid out by reason of the false claims over and above what it would have paid out had SAIC not made the false claims… Your calculations of damages should be limited to determining what the Nuclear Regulatory Commission paid to [SAIC] over and above what the NRC would have paid had it known of SAIC's organizational conflicts of interest. Your calculation of damages should not attempt to account for the value of the services, if any, that SAIC conferred upon the Nuclear Regulatory Commission."

Id. at 1278. Thus, the jury was instructed not to consider the value of services rendered as an offset to the government's payments. The D.C. Circuit vacated and remanded the decision based on these instructions because the jury was (erroneously) required to assume that the services the contractor provided to the government were of no value, even in the face of possible evidence to the contrary. *Id*. at 1279-1280. The court reasoned that while the government is free to argue that the services were valueless, the evidence should at least be weighed. *Id*.

This reasoning is consistent with traditional concepts of net loss and calculation of compensatory damages.[3] As the defendant/appellant pointed out in its brief, "[a]ccording to the district court, *all* contractual payments that the government made to SAIC during the relevant time periods *necessarily* constitute damages under the FCA – even if SAIC…delivered to the government precisely the product for which it bargained." Brief of Defendant-Appellant at *51, *SAIC*, 626 F.3d 1257 (No. 09-5385). Under this theory, "loss" is a legal fiction, driven by the proposition that if you violate a condition of payment but nonetheless perform, the performance is per se worthless, or deemed worthless as a matter of law. Yet, as the defendant/appellant in

SAIC observed, the government's argument that it *necessarily* incurred damages in the amount of payments made to SAIC "erroneously conflates the materiality of a false statement" – a matter that may be pertinent to liability – "with the separate inquiry into what harm, if any, the government suffered as a result of the false statement." Reply Brief of Defendant-Appellant at *25, *SAIC*, 626 F.3d 1257 (No. 09-5385). False certifications, even material ones, do not relieve the FCA plaintiff from having to prove actual loss.

B. The *Rogan* Decision

In *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2007) the Seventh Circuit chose not to apply the concept of net loss in calculating the government's loss in an Anti-kickback statute and Stark law implied certification-based case. Here, the government alleged that the defendant hospital administrator presented bills to Medicare and Medicaid in violation of the Anti-Kickback statute; it was alleged that some, but not all, of these bills contained charges for services that were unnecessary or had not been performed. *Id*. at 451-452. The court awarded single damages equal to the full amount of the government's payments for the claims on the theory that the government would not have paid any money on the claims had it had known about the defendant's violations of the Anti-kickback statute and false certifications. *Id*. at 453.

The court said explicitly that it was unimportant that "most of the patients for which claims were submitted received some medical care-perhaps all the care reflected in the claim forms," and made no attempt to account for legitimate medically necessary services rendered, for which the government would be responsible in the ordinary course. *Id*. The court reasoned that the provider had conferred no services on the government. *Id*. Truthful certification was a condition to the government's obligation to pay under the contract, and since that condition was not satisfied, nothing was due. *Id*. The court stated:

> Nor do we think it important that most of the patients for which claims were submitted received some medical care-perhaps all the care reflected in the claim forms. (At Rogan's insistence, the district judge excluded as irrelevant any proof that [the provider] billed for unnecessary or non-delivered services.) Now it may be that, if the patients had gone elsewhere, the United States would have paid for their care. Or perhaps the patients, or a private insurer, would have paid for care at Edgewater had it refrained from billing the United States. But neither possibility allows Rogan to keep money obtained from the Treasury by false pretenses, or avoid the penalty for deceit.

Id. The Seventh Circuit did not require the government to prove why the false certification decreased the value of the services rendered, or by how much. This is the fundamental flaw in the Seventh Circuit's approach. It may be that in some circumstances, the entire value of services rendered is eradicated because of the defendant's failure to comply with the other statute or regulation at issue; however, the FCA itself supports the position that the court or jury is required to go through the valuation analysis.[4] FCA plaintiffs should be required to prove actual damage – *i.e*., that, as a result of false certification, the government's payments exceeded the value of services provided.

The Rogan court noted that it was pertinent that the services at issue were provided to a third-party beneficiary, not directly to the government. *Rogan*, 517 F.3d at 453. For all that SAIC got right, it unfortunately distinguished its approach from that taken by the court in *Rogan* by noting that, *Rogan*, unlike *SAIC*, involved services provided to a third-party, not to the government. *SAIC*, 626 F.3d at 1279.[5] On this point, both *Rogan* and *SAIC* are mistaken. The fact that services are rendered to a third-party, rather than to the government directly, should not matter. It is well-settled that a promisor under a contract who agrees to confer a benefit on a third-party owes a duty of performance to both the promisee and the third party. Under Medicare and Medicaid, for example, the provider promises to administer services to a patient, and the government promises to pay for a portion of the services. The patient is like a third-party beneficiary of the arrangement between the government and the provider. *See e.g., Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust Dated June 27, 2002*, 410 F.3d 304, 315 (6th Circ. 2005); *Mallo v. Public Health Trust of Dade County, Fla.*, 88 F. Supp. 2d 1376, 1385 (S.D. Fla. 2000). Because the providers owe a duty of performance to both the government and the patient, it cannot be said that no benefit is conferred upon the government when a provider renders services to a patient under these programs.

II. THE FALSE CLAIMS ACT

The core question at issue in these implied certification based FCA cases is whether single FCA damages should be measured by (1) the actual net loss suffered by the government, taking into account any value received, or (2) the total amount paid by the government without regard to such value. The government has taken the position that, but for the implied certification made by the defendants in submitting their claims, the government would not have paid the claims, and therefore it is entitled to recoup the full dollar amount of its payments on such claims. The defendants' position is that they have provided certain services, and failure to account for the value of such services as an offset to damages is improper.

This issue is particularly important in certification-based cases where the government, or an intended beneficiary of the government's agreement, often may receive the goods or services for which the claims have been submitted. Because the basis for liability is not that any claim was submitted that was false on its face – it is that claim were submitted despite the provider's non-compliance with another statute or regulation, compliance with which is an essential condition of payment –the potential exists for the government to receive the full value of the goods or services promised by the defendant, and treble damages and civil penalties as well. Although the government may advocate for this result, it appears to be inconsistent with the language and legislative history of the FCA, as well as longstanding recognition by courts that the FCA has both remedial and punitive components.

The FCA states that recovery should be based on the "damages the government sustains because of the [defendant's] act." 31 U.S.C. § 3729(a). Historically, courts interpreted the False Claims Act to be a remedial statute designed to make the government whole for injuries to the public fisc caused by fraud. *See United States v. Bornstein*, 423 U.S. 303, 314 (1976); *United States ex rel Marcus v. Hess*, 317 U.S. 537, 551-552 (1943). Under the version of the FCA that was at issue in both *Hess* and *Bornstein*, the consequences of a violation were double damages and civil penalties. In 1986, Congress enacted comprehensive amendments to the FCA that, among other things, increased penalties and the multiplier that may be applied to the loss the government proves it suffered at trial. *See* Public Law 99-562 § 2(7) (increasing penalties and authorizing treble instead of double damages). Since then, courts have emphasized the dual purpose of the treble damages and civil penalties provisions of the FCA, recognizing the remedial and the punitive aspects of the FCA damages and penalties provisions. *See e.g., Cook County v. United States ex rel Chandler*, 538 U.S. 119, 130-131 (2003) (recognizing compensatory and punitive aspects of FCA).[6]

However, while the FCA is meant to punish and deter fraud against the government, the calculation of actual loss in the FCA damages provision is not the mechanism that the statute or its legislative history contemplates will be used to achieve that purpose. The legislative history of the 1986 amendments to the Act reveals that it was the damages multiplier and civil fines provisions of the FCA that Congress viewed as such mechanisms. Thus, the House Judiciary Committee recommended increasing the civil penalty and permitting the recovery of consequential damages in order to both increase the FCA's deterrent effect and ensure that the government was made whole for its losses. *See* H. Rep. No. 99-660 at 18-19.[7] Individual members of Congress expressed similar views during floor debate on the amendments. Representative Fish observed that although the FCA is not a penal statute, it nonetheless serves an important deterrent purpose. 32 Cong. Rec. H6480, Sept. 9 1986 (statement of Rep. Fish). He emphasized that multiple damages along with the civil fine together serve to "forcefully

discourage individuals and companies that do business with the United States from engaging in fraudulent practices." *Id*. In his floor statement, Representative Brooks noted that the amount of the civil fine authorized under the previous version of the FCA ($2,000) had not changed since the FCA was first enacted in 1863. 132 Cong. Rec. H6479, Sept. 9, 1986 (statement of Rep. Brooks). He viewed the increase in the amount of the civil penalty proposed, and later enacted, in the 1986 amendments, as necessary to "keep the deterrent value of the FCA current and effective in our modern world." *Id*.

Courts have also acknowledged that Congress intended the civil penalties and multiple damages provisions of the FCA to deter fraud on the government. *See e.g., Vermont Agency of Natural Resources v. U.S. ex rel Stevens*, 529 U.S. 765, 786 (2000), quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("the very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct"); *United States ex rel Burlbaw v. Orenduff*, 548 F.3d 931, 956 (10th Cir. 2008) (the False Claims Act "seeks to sanction and deter wrongful conduct through the imposition of up to treble damages"); *United States v. Sforza*, 326 F.3d 107, 113 (2d Cir. 2003) (False Claims Act "allow[s] for the full recovery of benefits obtained by fraud, and for the deterrence of fraud by including treble damages and civil penalties ranging from $5000 to $10,000 per violation"); *United States ex rel Rosales v. San Francisco Housing Authority*, 173 F. Supp. 2d 987, 1019 (N.D. Cal. 2001) ("In providing for treble damages and mandatory penalties under the FCA, Congress intended a complex mix of compensation, punishment, and deterrence").

Recently, the proposed False Claims Act Correction Act of 2007 in the 110th Congress proposed changes to the damages provisions of the Act, which never became law. The bill, which was reported to the floor by the Senate Judiciary Committee but was never voted on by the full Senate, proposed modifying the Act to provide a remedy of "3 times the amount of money or property paid or approved because of the act of" the person making the false claim. *See* Substitute S. 2041, § 2, 110th Congress (2008). This amendment to the FCA would have provided a statutory basis – for the first time – for the kind of damages approach that the *Rogan* court applied.

According to the Senate Judiciary Committee's report, the proposed change to the damages provision was motivated by the "narrow[]" manner in which some courts calculated damages under the FCA. *See* S. Rep. No. 110-507 at 19. As an example of the "narrow[]" construction of the damages provision of which it disapproved, the Committee described a provider who "received payments from Medicare and Medicaid despite being disqualified from participating in the programs because they received kickbacks from referring physicians." *Id*. The Committee noted that in many cases, such providers argue that the government suffered no

damages because the defendant provided services. *Id*. While the Committee noted its view that the government does suffer some actual damages for violations of the Anti-kickback statute, such as damage to the integrity of Medicare and Medicaid and through medical decisions made outside of a patient's best interest, the change to the damages provision proposed in the False Claims Correction Act of 2007 would have made damages awarded under the FCA independent of the amount of the government's actual loss. Whether the government received the full value it bargained for or no services at all, had the proposed amendment become law, the government would have been entitled to damages equal to three times the amount it paid to the defendant who violated the FCA. The fact that this proposed change to the FCA's damages provision did *not* become law indicates that the method of calculating damages proposed by the amendment should not be applied by the courts in the absence of further action by Congress.

III. NET LOSS AND TRADITIONAL CONCEPTS OF DAMAGES AT COMMON LAW

The SAIC court's approach to calculating actual loss as loss net of value received has the further virtue of being consistent with traditional common law concepts of damages. Thus, theories of damages under the common law of contracts are based on making the aggrieved party whole, rather than on punishing the breaching party. *See Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 94, 900 P.2d 669 (1995) (damages serve a compensatory, rather than punitive, purpose); *Situation Management Systems, Inc. v. Malouf, Inc.*, 430 Mass. 875, 880, 724 N.E.2d 699 (2000) (awarding expectation damages, placing plaintiff in the position plaintiff would have been in if contract had been fully performed); *Applied Equipment Court v Litton Saudi Arabia, Ltd.*, 7 Cal. 4th 503, 515, 869 P.2d 454 (1994) (awarding expectation damages); *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379, 382, 314 N.E.2d 419 (1974) (awarding nominal expectation damages and holding that plaintiff was not entitled to any amount above what makes her whole); *Ficara v. Belleau,* 331 Mass. 80, 82, 117 N.E.2d 287 (1954) (plaintiff not entitled to any amount above what makes her whole); *Schwartz v. Rose*, 418 Mass. 41, 47, 634 N.E.2d 105 (1994) (explaining that damages for rescission should place both parties, as nearly as possible, in the position they were in before a contract was formed); *Schwartz v. National Computer Corp.*, 42 A.D.2d 123, 125 (N.Y. App. Div. 1973) (stating that rescissory damages must restore both parties to status quo); *Bellefeuille v. Medeiros*, 335 Mass. 262, 266, 139 N.E. 2d 413 (1957) (recipient of benefits under a rescinded contract must reimburse the defendant for the amount of those benefits to restore both parties to the status quo ante, when possible); Williston on Contracts § 64:2 (4th ed.).

The same concept is also seen, to a certain extent, in the common law of unintentional torts. Damages in such cases serve, first and foremost, a compensatory purpose -- to restore the injured party to the position she occupied prior to the infliction of the injury. *See Metz v. Soares*,

142 Cal. App. 4th 1250, 1255 (2006); *McDougald v. Garber*, 73 N.Y.2d 246, 254, 536 N.E.2d 372 (1989); *Rodgers v Boynton*, 315 Mass. 279, 280, 52 N.E.2d 576 (1943). *See also* Restatement (Second) of Torts § 903 cmt a. With respect to torts involving more egregious conduct by the defendant, such as conduct involving fraud, malice, oppression, or other aggravated circumstances, a plaintiff may be entitled to receive punitive damages in addition to compensatory damages. *See Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 479, 626 N.E.2d 34 (1993) quoting Prosser & Keeton, Torts § 2 at 9 (5th ed. 1984); (in tort actions, punitive damages awarded for "intentional and deliberate" conduct that has the "character of outrage frequently associated with a crime") *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D.2d 52, 58 (N.Y. App. Div. 1990); *College Hospital, Inc. v. Superior Court*, 8 Cal. 4th 704, 712, 882 P.2d 894 (1994). However, punitive damages are separate from and serve different purposes than, compensatory damages. "Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this tortfeasor and other similarly situated from indulging in the same conduct in the future." *Ross. v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 489, 868 N.E.2d 189 (2007). See also *Burt v. Meyer*, 400 Mass. 185, 189, 508 N.E.2d 598 (1987); Restatement (Second) of Torts § 908(1).

Conduct that falls under the FCA often involves hybrid tort and contractual concepts with an element of fraud. This hybrid quality can be likened to fraud in the inducement of contract. Indeed in some FCA cases based on false certification, analogies have been drawn to fraud in the inducement. The traditional remedy in such cases is rescission. When this occurs, courts will restore plaintiffs to their pre-contract positions. The basic formula for recovery is the amount paid under the contract, less the value of what was provided. Thus, in *Leaf v. Phil Rauch, Inc.*, 47 Cal. App.3d 371 (1975), a traditional fraud in the inducement case, the plaintiff bought a car from defendant car dealership for about $7,000. *Id*. at 374. The defendant manufacturer offered an express written warranty that contributed to inducing plaintiff to purchase the car. *Id*. The car subsequently developed serious mechanical problems, but the manufacturer refused to honor the warranty. *Id*. The plaintiff sued and the trial court ruled that the failure to honor the warranty entitled the plaintiff to rescind the contract. *Id*. As a remedy the court ordered that the dealership return the purchase price and pay consequential damages, but that as an offset, the plaintiff was required to pay $2,300 – the amount representing the value of the plaintiff's use of the car. *Id*. *See also Ann & Hope, Inc. v. Muratore*, 42 Mass. App. Ct. 223, 224, 226, 676 N.E.2d 478 (1997).

IV. THE CONCEPT OF NET LOSS APPLIES IN FCA CASES

The False Claims Act states that parties liable under the statute are responsible for civil penalties "plus three times the amount of damages which the government sustains because of the

act of that person." 31 U.S.C. § 3729(a). Courts have interpreted this to mean that single damages should be measured according to the amount the government has paid "over and above what it would have paid if the claims had been truthful." *See, e.g., United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966). Such damages are then subject to multiplication under the statute. The calculation of single damages depends on how the courts interpret this principle. In each of the situations discussed below, courts base single damages on the concept of actual loss net of value received.

A. Damages When Goods Delivered Are Worth Less Than What Was Promised

In many cases, courts' calculations of FCA damages are consistent with the common law principles discussed above. For example, in *United States v. Bornstein*, 423 U.S. 303 (1976), the Supreme Court analyzed how to compute damages under the False Claims Act when a contractor promised to deliver a specific item, but instead substituted a different item of lesser value. In *Bornstein*, the government ordered radio kits from a contractor, who hired a subcontractor to provide tubes used in manufacturing the kits. *Id*. at 307. The subcontractor used tubes of lower quality than the contract required but represented that it had used the required tubes. *Id*. The Court held the subcontractor liable for actual damages equal to the difference between the value of the tubes the government was promised and the value of the tubes the government actually received. *Id*. at 316 n.13. This loss was then multiplied under the FCA. *Id*. at 316.

Numerous other cases have followed the same rule. *See United States v. United Technologies Corp.*, 626 F.3d 313, 316, 321-323 (6th Cir. 2010) (damages for false statements made by aircraft engine manufacturer in procuring government contract equal difference between what government paid and what it should have paid); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1361-1362, 1372 (Fed. Cir. 1998) (where contractor falsely certified that it performed work meeting contract specifications, measure of damages was difference in value between what the government was supposed to have received and what it actually received); *United States v. Ehrlich*, 643 F.2d 634, 636, 638 (9th Cir. 1983) (when sponsor of low-income housing covered by government-insured mortgages overstated construction costs, computation of damages begins with amount costs were overstated); *United States v. Advance Tool Co.*, 902 F. Supp. 1011, 1015, 1017 (W.D. Mo. 1995) (where supplier impermissibly substituted tools that did not meet contract specifications, damages equal difference in market value of the tools requested and the tools supplied). Under this framework, it is only when the product actually supplied is valueless that the government receives damages equal to the full contract price. *See U.S. ex rel Roby v. Boeing Co.*, 302 F.3d 637, 639-640, 646-647, 648-649 (6th Cir. 2002) (government entitled to recover entire purchase price of helicopter when defective part that caused the aircraft to crash rendered it valueless).

B. Damages Based on False Certification

In cases where liability is based on a false certification of compliance, the certification issue adds a wrinkle to the analysis. Cases such as *U.S. v. Cooperative Grain and Supply Co*., 476 F.2d 47 (8th Cir. 1973) and *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (Ct. Fed. Clms. 1994) illustrate, however, that damages in the false certification context are also calculated based on net loss.

In *Cooperative Grain*, the government alleged that various grain producers submitted false claims to the government and obtained price support payments to which they were not entitled. 476 F.2d at 50-51. The purpose of the government's price support program was to provide aid to the *producers* of certain agricultural commodities. *Id*. at 52.

In this case, certain producers applied for and received price support payments secured by grain, a portion of which they *purchased*, rather than produced. *Id*. at 53-54. However, they certified that the grain was produced by them. *Id*. Terms of the purchase agreements specified that in the event of false certification, the producers would be liable for the amount of the loan [or government payment], charges, and all costs the government would not have incurred had it not been for the producer's fraudulent representation, less the market value of the grain on the date of delivery. *Id*. at 62 n.13. The issue was whether, under this contractual provision, the producers were responsible for the full amount of the warehousing charges paid by the government for storage of the grain, or just charges paid for the portion of the stored grain that was purchased, not produced. *Id*. at 63. The court holding that the government was only entitled to reimbursement of warehousing charges for improperly purchased corn. *Id*.

The government argued that, but for fraudulent representations by the claimant, "it would not have dealt with a 'fraudulent' producer at all, and therefore, any payments made to such a producer would have been payments that would not have been made." *Id*. The Eighth Circuit rejected this argument, correctly noting that "this reasoning ignores fundamental principles in computing damages." *Id*. The court stated:

> The Government should be allowed to recover only the damages that it has actually suffered after having entered into a transaction, plus the statutory penalties. No one wants to deal with a 'fraudulent' party to a contract. However, the Government has contracted with the producers, has received the benefit of the properly produced and delivered corn, and has received the benefit of the warehouse charges on the [properly produced corn] . . . .

> Second, it must be remembered that double damages and the forfeiture allowed under the False Claims Act are further sanctions that aid in making the government 'whole.'

Id. at 63.

In *Ab-Tech*, 31 Fed. Cl. 429 (Ct. Fed. Clms. 1994), a construction company had been awarded a subcontract by the Small Business Administration for the construction of a facility for the Army Corps of Engineers. *Id*. at 430-431. The government alleged that payment vouchers submitted by the construction company impliedly certified that the company adhered to certain requirements for participation in the government program. *Id*. at 432-434. Due to the nature of the construction company's relationship with one of its principal subcontractors, the government alleged, the company actually did not meet the requirements of the program. *Id*. at 432-434. The court held that this false information was critical to the governments' decision to pay the claim and found the company liable under the Act and held the defendant liable. *Id*. at 434.

The court said that damages should represent compensation for loss or injury sustained by the government, and concluded that no proof had been offered to show that the government suffered any detriment to its contract interest because of the company's falsehoods – "[r]ather, viewed strictly as a capital investment, the government got essentially what it paid for – a . . . facility built in accordance with the contract drawings and specifications." *Id*. at 434. Accordingly, the court could "discern no basis upon which to uphold the government's demand for treble damages." *Id*. The court did authorize statutory penalties, stating: "[W]e see the total penalty amount as an approximation based on rough justice, and, on this ground, deem it allowable." *Id*. at 435.

C. Damages for Overbilling

In Medicare and Medicaid overbilling cases, damages are again based on net loss. In these cases, single damages are the difference between the amount the government paid to the provider and the amount the government should have paid for the actual services performed. *See, e.g*., *United States v. Sriram*, 147 F. Supp. 2d 914, 924-925 (N.D. Ill. 2002) (for each day, single damages equal to the amount billed to Medicare above the amount billed for the ten hours in which the doctor actually provided services); *United States v. Halper*, 490 U.S. 435, 437 (1989) (single damages equal to the amount Medicare overpaid for laboratory services); *U.S. v. Bourseau*, 531 F.3d 1159, 1164, 1172 (9th Cir. 2008) (single damages equal to amount defendant saved in payments to Medicare by overstating its costs); *Visiting Nurse Association of Brooklyn v. Thompson*, 378 F. Supp. 2d 75, 84-85 (E.D.N.Y. 2004) (when provider billed for covered and

non-covered services, single damages equal to the amount above what provider was entitled to for covered services); *United States v. Cabrera-Diaz*, 106 F. Supp. 2d 234, 237, 244-245 (D. Puerto Rico 2000) (single damages equal to the amount provider received beyond what he was entitled to based on services he provided). *But see United States v. Krizek*, 909 F. Supp. 32, 33 (D.D.C. 1995) (assessing as single damages all amounts received on days where the provider billed for more than nine hours of services).

As in the other types of cases discussed *supra*, if the provider bills the government for a service that is worthless, the government's actual loss equals the entire amount paid. *See United States ex rel Woodard v. Country View Care Center, Inc.*, 797 F.2d 888, 890-891 (10th Cir. 1986) (single damages equal to entire amount Medicaid reimbursed healthcare provider for non-reimbursable kickbacks disguised as consulting costs); *United States v. Lorenzo*, 768 F. Supp. 1127, 1129-1130, 1132 (E.D. Pa. 1991) (where providers performed non-covered dental services and billed the appointments to Medicare as different, covered services, the government's loss was the entire amount it paid the providers).

V. CONCLUSION

The D.C. Circuit's decision in *SAIC* applied traditional principles of net loss to calculate damages in an implied certification based FCA case. In light of precedent under the FCA and common law, as well as the FCA's legislative history and that of recent efforts to amend the FCA, this is surely the correct method to apply. It remains to be resolved whether *Rogan's* novel approach to loss calculation for Anti-kickback or Stark based cases gains hold outside the Seventh Circuit. Based on the vulnerable rationale offered by the *Rogan* court – that the involvement of third-party beneficiaries somehow changes the calculus – it may yet prove to be an outlier.

ENDNOTES

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2. United States v. Rogan, 517 F.3d 449, 452 (7th Cir. 2008). While SAIC distinguished Rogan, see SAIC, 626 F.3d at 1279, the principle SAIC proposed to use to establish the distinction has no grounding in the contract law concepts SAIC cites. See infra at Section 1.B.

3. As the appellant/defendants also asserted, the district court's approach contradicted previously decided cases where FCA damages were calculated. Brief of Defendant-Appellant at *51-52, SAIC, 626 F.3d 1257 (No. 09-5385) (citing United States v. TDC Mgmt. Corp., 288 F.3d 421 (D.C. Cir. 2002); United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908 (4th Cir. 2003)). In TDC and Harrison, the courts engaged in the process of valuing the goods and services delivered by the defendant, although, in TDC, the resulting conclusion was that the value of those services was zero. The D.C. Circuit's holding is in line with those cases.

4. See infra at Section 2.

5. It appears that the court's finding was based, at least in part, on an argument by defendant/appellant that Rogan was distinguishable because "the government did not itself receive any good or services from the defendant." Reply Brief of Defendant-Appellant at *27, SAIC, 626 F.3d 1257 (No. 09-5385).

6. Recent decisions have noted the FCA's remedial and compensatory purposes. See United States ex rel Grubbs v. Kanneganti, 565 F.3d 180, 184 (5th Cir. 2009) (purpose is to protect the public fisc); United States ex rel Colucci v. Beth Israel Medical Center, 603 F. Supp. 2d 677, 681 (S.D.N.Y. 2009) (purpose is remedial); United States ex rel Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 57 (D.D.C. 2007) (purpose is to protect the public fisc), quoting United States ex rel K&R Limited Partnership v. Massachusetts Housing Finance Agency, 456 F. Supp. 2d 46, 54 (D.D.C. 2006); United States ex rel Rosales v. San Francisco Housing Authority, 173 F. Supp. 2d 987, 1019 (N.D. Cal. 2001) ("preeminent concern" of 1986 amendments was protecting federal fisc). The legislative history of the 1986 amendments supports this view. Both the House and Senate committee reports emphasized the remedial character of the False Claims Act. See H. Rep. No. 99-660 at 22 ("False Claims Act is basically a remedial statute"); S. Rep. No. 99-345 at 23 ("False Claims Act proceedings are civil and remedial in nature and are brought to recover compensatory damages").

7. The version of the 1986 amendments reported by the House Judiciary Committee would have permitted the government to recover consequential damages plus two times its actual damages. See H. Rep. 99-660 at 2. Before the bill's final passage, the provision authorizing the recovery of consequential damages was removed and the multiplier applicable to actual damages was increased from two to three. See Pub. L. 99-562 sec. 2(7).