



U.S. Department of Justice

Office of the Solicitor General

*The Solicitor General*

*Washington, D.C. 20530*

July 24, 2024

The Honorable Mike Johnson  
Speaker  
U.S. House of Representatives  
Washington, DC 20515

Re: *United States ex rel. Fesenmaier v. Cameron-Ehlen Group, Inc.*, No. 13-cv-3003  
(D. Minn. Feb. 8, 2024)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to seek review of the above-referenced decision of the United States District Court for the District of Minnesota. A copy of the decision is enclosed.

1. This case involves submissions to the Medicare program that falsely claimed compliance with the Anti-Kickback Statute (AKS), 42 U.S.C. 1320a-7b(b). As relevant here, the AKS prohibits “knowingly and willfully offer[ing] or pay[ing] any remuneration \* \* \* to any person to induce such person \* \* \* to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program.” 42 U.S.C. 1320a-7b(b)(2). The False Claims Act (FCA) comprehensively addresses fraudulent efforts to obtain government funds or property and it prohibits “knowingly” submitting or causing the submission of “false or fraudulent claim[s] for payment or approval.” 31 U.S.C. 3729(a)(1)(A); see 31 U.S.C. 3729(b)(2) (FCA definition of “claim”). FCA actions may be brought by the Attorney General or by a private qui tam relator in the name of the United States. 31 U.S.C. 3730(a), (b)(1).

A person who violates the FCA is “liable \* \* \* for a civil penalty of not less than \$5,000 and not more than \$10,000,” adjusted for inflation, “plus 3 times the amount of damages which the Government sustains because of the act of that person.” 31 U.S.C. 3729(a)(1). The statute mandates that a separate penalty be imposed for each false claim or false statement submitted. See *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 (2000).

2. A qui tam relator brought this action under the FCA. After certain defendants settled, the United States filed a complaint in intervention alleging that the remaining defendants—a distributor of ophthalmological equipment and its owner—had violated the AKS by paying remuneration to ophthalmologists to induce them to use the company’s products. The United States further alleged that the defendants’ violations of the AKS had rendered false certain claims

and statements made to the government in connection with requests for payment from the Medicare program.

A jury returned a verdict in the government's favor. The jury found that the defendants had caused the submission of 64,575 false claims and determined the amount of damages to be \$43,694,641.71. As required by 31 U.S.C. 3729(a)(1), the district court trebled the damages, and it applied a per-claim civil penalty at the inflation-adjusted statutory minimum, producing a total judgment of \$487,048,705.13.

On the defendants' motion, however, the district court reduced the judgment to \$216,675,248.55 on the ground that any greater figure would be unconstitutional. The court concluded that, under the circumstances of the case, the amount of civil penalties against the defendants could not constitutionally exceed two times the amount of actual damages found by the jury. The court thus imposed a judgment of five times the amount of actual damages (treble damages plus civil penalties in the amount of two times the actual damages).

3. The Department of Justice disagrees with the district court's decision. "The Excessive Fines Clause applies to civil penalties that are punitive in nature," and the Eighth Circuit has held that "[t]he FCA's treble damages in combination with the per-claim penalties" prescribed by the statute "are punitive for the purposes of the Excessive Fines Clause." *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014). But a civil penalty exceeds the limits of the Excessive Fines Clause only "if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). That is the same lenient "standard of gross disproportionality articulated in" the Supreme Court's other "Cruel and Unusual Punishments Clause precedents." *Id.* at 336. Thus, in *Bajakajian*, the Court held unconstitutional the forfeiture of the full amount of cash carried by a person who had failed to disclose it to a customs inspector, on the view that the amount of the forfeiture had nothing to do with the gravity of the failure-to-report offense. 524 U.S. at 337-340. But the Court did not call into question the constitutional validity of civil penalties specified by Congress as appropriate for particular violations of the law.

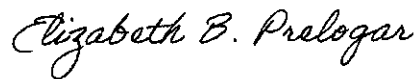
To the contrary, courts applying *Bajakajian* have placed heavy emphasis on Congress's specification of a particular penalty for a given offense as evidence that the penalty is appropriate for the nature of the offense. They have thus repeatedly upheld the constitutionality of statutorily prescribed FCA penalties. See, e.g., *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1188, 1314 (11th Cir. 2021) (holding, in an FCA case, that a "monetary award \* \* \* at the statutory minimum" carries "a strong presumption of constitutionality"); *United States v. Bourseau*, 531 F.3d 1159, 1173 (9th Cir. 2008) ("[W]e have found no law requiring a district court to award less than treble damages and the maximum amount of allowable civil penalties in an FCA case in order to satisfy the Excessive Fines Clause."); *United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 387-390 (4th Cir. 2015); *Aleff*, 772 F.3d at 512-513; *United States ex rel. Bunk v. Gosselin World Wide Moving, NV*, 741 F.3d 390, 405-410 (4th Cir. 2013). The Eighth Circuit recently held invalid a statutorily prescribed award of FCA penalties, see *United States ex rel. Grant v. Zorn*, \_\_\_ F.4th \_\_\_, 2024 WL 3309763 (8th Cir. July 5, 2024), but the government disagrees with that decision and is considering whether to intervene under 28 U.S.C. 2403(a) for the purpose of filing a petition for rehearing en banc.

Here, although the district court professed to be “mindful” that its role was “not to determine the *appropriate* punishment,” Op. 35, it assessed the reprehensibility of the defendants’ conduct in terms more appropriate for a criminal sentencing than for determining whether the statutorily prescribed award was “grossly disproportional to the gravity of” the conduct, *Bajakajian*, 524 U.S. at 336. The court also erred in focusing on the mathematical ratio between the civil-penalty figure and the amount of actual damages. It based that analysis on decisions concerning the permissible amount of punitive-damages verdicts under the Due Process Clause, but “one would think that a fine expressly authorized by statute could be higher than a penalty selected *ad hoc* by a jury,” *United States v. Rogan*, 517 F.3d 449, 454 (7th Cir. 2008), and the Supreme Court in *Bajakajian* expressly refused to require “strict proportionality between the amount of a punitive [judgment] and the gravity of a[n] \* \* \* offense,” 524 U.S. at 336. Even if it could otherwise be appropriate to apply a mathematical ratio in excessive-fines analyses, moreover, that approach is unsound in the FCA context because “[f]raud harms the United States in ways untethered to the value of any ultimate payment,” such as by diminishing “the public’s confidence in the government.” *Yates*, 21 F.4th at 1316; see *Bunk*, 741 F.3d at 409 (excessive-fines analysis of FCA judgments cannot “confine[]” the “concept of harm \* \* \* strictly to the economic realm”).

4. The Department of Justice has nonetheless determined that an appeal from the district court’s constitutional ruling would be unwarranted given the circumstances of this case. As the district court explained, the defendants “will be unable to satisfy even the compensatory damages” award “in this matter, much less any penalties imposed in addition to those compensatory damages.” Op. 40. An appeal in this case therefore would consume resources of the parties and the court, without any prospect of a financial benefit for the government. The Department has accordingly entered into a settlement of this matter on the basis of the defendants’ ability to pay. Consistent with that settlement, the Department intends to dismiss on July 31, 2024, the protective appeal that it filed on April 5, 2024.

Please let me know if we can be of any further assistance in this matter.

Sincerely,



Elizabeth B. Prelogar  
Solicitor General

Enclosure