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D.C. Circuit May Decide How to Calculate FCA Offsets in Interlocutory Appeal

By Tirzah S. Lollar, Christian D. Sheehan, and Megan Pieper*

The authors consider the U.S. District Court for the District of Columbia's certified interlocutory appeal on the question of the appropriate method for calculating damages offsets for False Claims Act defendants.

The U.S. Court of Appeals for the D.C. Circuit soon may determine how to calculate damages offsets for False Claims Act ("FCA") defendants after a recently certified interlocutory appeal. The appeal arises out of a longstanding FCA case involving Zylon body armor shields ("Z Shield"), which were incorporated as part of bulletproof vests. The vests were sold to law enforcement agencies, which were eligible for partial reimbursement from the federal government.

BACKGROUND

In 2008, the United States filed separate FCA suits against several defendants related to the Z Shield vests. Some defendants have settled, but litigation remains ongoing.

One Z Shield manufacturer moved for summary judgment on numerous grounds, including that it was entitled to a *pro tanto* offset for the government's settlements with other defendants, which would reduce the FCA damages recoverable from the manufacturer to zero. A *pro tanto* offset would allow a dollar-for-dollar credit for other defendants' settlements. Under this theory, once the government has recovered the full amount it is due for its injury (here, the amounts the government paid or reimbursed for the allegedly defective vests), it cannot recover from additional defendants.[1] One U.S. District Court for the District of Columbia ("DDC") judge previously endorsed this

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[1] Even if an offset reduces the damages owed by a defendant, that defendant still faces statutory penalties.

approach: Judge Royce Lamberth held that a *pro tanto* credit is appropriate when FCA defendants share "common damages."[2]

JUDGE FRIEDMAN'S VIEW

But Judge Paul Friedman disagreed with Judge Lamberth's reasoning and held that courts should apply a proportionate share approach for offsets.[3] Under this approach, prior settlements reduce a defendant's liability based on each defendant's degree of fault. And, since the FCA authorizes treble damages, the government can ultimately recover more than triple its actual loss.

Judge Friedman acknowledged that a proportionate share approach could result in the government being overcompensated for its loss if a jury decides the remaining defendant's share is greater than the total loss minus the prior settlement amounts, but he concluded that other factors, such as promotion of settlement and the importance of making a tortfeasor pay for the damage they caused, outweighed this concern.

Judge Friedman's opinion may not be the final word on this issue, at least in the District of Columbia. He recently certified for an interlocutory appeal the question of the appropriate method for calculating damages offsets.[4] Under 28 U.S.C. § 1292(b), a district court may certify orders for interlocutory appeal only when the order involves a controlling question of law, there is a substantial ground for difference of opinion, and an immediate appeal would materially advance the ultimate termination of the issue.

Judge Friedman held that there is a substantial ground for difference of opinion on the question, noting that while he believes the proportionate share approach leads to a "more equitable result" between defendants, "concerns related to overcompensating the United States could weigh in favor of the *pro tanto* approach."[5] He also determined that the other elements of § 1292(b) were met because the method of calculating damages is a purely legal issue, and because a determination that the *pro tanto* method applies would narrow the issues for trial and advance the termination of litigation since the Z Shield

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[2] *See Miller v. Holzmann*, 563 F. Supp. 2d 54, 144 (D.D.C. 2008). The offset in *Miller* did not reduce the remaining defendant's damages to zero. The settling defendants' payments reflected liability for several different claims, and the share of the settling defendants' liability attributable to "common damages" with the remaining defendant was less than the total amount owed to the government.

[3] *United States v. Honeywell Int'l Inc.*, 502 F. Supp. 3d 427, 480 (D.D.C. 2020).

[4] *See United States v. Honeywell Int'l, Inc.*, No. CV 08-0961 (PLF) (D.D.C. June 18, 2021).

[5] *Id.*

manufacturer's statutory damages would reduce to zero and the jury would not need to determine its share of fault.[6]

When denying summary judgment, Judge Friedman reasoned that "to the extent that the FCA is punitive, concern for the one satisfaction rule [that a plaintiff should not be permitted to recover more than the loss it actually suffered] diminishes," so he determined that other considerations—for example, fairness among defendants and ensuring defendants do not "escape damages liability altogether"—were more pressing than overcompensation.[7]

CONCLUSION

Many FCA practitioners remain concerned that a proportionate share approach allows for the government to recover more than it is due. This approach undermines case law clearly stating that FCA damages are those "*actually* caused the Government because of the submission of the false claim,"[8] but not more. Now we wait to see if the D.C. Circuit will permit the appeal, since it has discretion to permit or deny the appeal under Section 1292(b).

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[6] *Id.*

[7] *See Honeywell*, 502 F. Supp. 3d at 483–85.

[8] *U.S. ex rel. Fago v. M & T Mortg. Corp.*, 518 F. Supp. 2d 108, 120 (D.D.C. 2007).