True Damages for False Claims: Why Gross Trebling Should Be Adopted

Paden M. Hanson[*]

ABSTRACT: The False Claims Act aids the government in combating fraud by imposing heavy penalties for parties attempting to defraud the government. The False Claims Act specifies that damages assessed for violating the Act are trebled but does not make it clear how a court should calculate damages. Under gross trebling, damages are tripled before subtracting any benefits a defrauding party may have conferred on the government. Under net trebling, benefits are subtracted prior to trebling. This Note discusses the differences in damage calculation and how it impacts parties under the False Claims Act. It concludes by arguing that gross trebling should be adopted either by legislation or by the Supreme Court in order to best protect the public interest and further the purpose of the False Claims Act.

[*] J.D. Candidate, The University of Iowa College of Law, 2019; B.A., Brigham Young University, 2014.

I. INTRODUCTION

Fraud has been a plague on the government since our nation's founding. Commentators have suggested that as much as ten percent of the government's spending is procured fraudulently.[1] Since its enactment, the False Claims Act ("FCA") has served as a useful tool for government prosecutors and private plaintiffs to combat fraud. The FCA provides for hefty monetary penalties for parties who fraudulently obtain government funds.[2] The FCA is particularly effective at combating fraud because it allows private

1. *False Claims Act Whistleblower Rewards Statistics Through FY 2017*, HESCH FIRM LLC, http://www.howtoreportfraud.com/false-claims-act-general-information-and-statistics (last visited Feb. 28, 2019).

2. 31 U.S.C. § 3729(a)(1) (2012) (providing for penalties between $5,000 and $10,000 "plus 3 times the amount of damages which the Government sustains").

citizens, sometimes called relators, to sue on behalf of the government.[3] For their efforts, relators are given a portion of the damage award.[4]

Recently, the proper method courts use to calculate damages under the FCA has become unclear.[5] The statute provides for the trebling (tripling) of damages but does not specify what constitutes damages under the Act.[6] Two major theories have developed as a result of the ambiguity. Under gross trebling, any benefits of a defrauding party's performance on a government contract are subtracted from the government's loss after damages are trebled.[7] Under net trebling, benefits are subtracted before multiplying the government's loss.[8] This difference poses a problem, as it creates uncertainty

---

3. *Id.* § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government."); *see also* U.S. DEP'T OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER SUITS) 1 (2012), https://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20upddate.pdf (explaining the process for a private plaintiff to file a qui tam suit pursuant to a False Claims Act cause of action).

4. 31 U.S.C. § 3730(d). The relevant text as it relates to awarding relators with a portion of a judgment is as follows:

> (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action . . . .
>
> (2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

Id. § 3730(d)(1)–(2).

5. *See* Andrew W. Schilling, *FCA Allows Treble Damages—'But Treble What?,'* LAW360 (Mar. 26, 2013, 11:22 AM), https://www.law360.com/articles/427278 ("Anchor Mortgage therefore creates a split in the circuits on an issue of significant importance to the Justice Department. Notably, the Ninth Circuit barely paused over the issue when it was presented to that court, citing Bornstein for the proposition that gross trebling applied—a proposition even the defendants in that case did not seriously dispute. And, in Anchor Mortgage, the government's brief to the trial court spent barely a sentence on the proper calculation of treble damages, resting comfortably on what had appeared to be the settled strength of Bornstein.").

6. 31 U.S.C. § 3729 (2012); *see also* United States v. Anchor Mortg. Corp., 711 F.3d 745, 749 (7th Cir. 2013) ("Section 3729(a) calls for trebling 'the amount of damages which the Government sustains'. That's an unfortunate expression, because 'damages' usually represents the amount a court awards as compensation."). *See generally* Schilling, *supra* note 5 (discussing the difference between gross and net trebling and providing examples in the context of a recent FCA damages decision).

7. *See* Robert T. Rhoad et al., *Tainted Love—Plaintiffs' Increasing Reliance on the 'Tainted Claim' Theory of Damages*, 58 GOV'T CONTRACTOR 1, 2 (2016).

8. *See id.*

in the outcome of FCA for relators, the government, and defendants. This Note proposes that gross trebling should be adopted in order to best protect the public and further the intent of the Act.

Part II of this Note introduces the FCA, emphasizes the importance of qui tam relators, explains the different ways damages are calculated under the Act, and analyzes the most important court decisions touching on damages under the Act. Part III addresses the problems that come from the current ambiguity, including its impact on relators, the government, and defendants. Part IV proposes that Congress intervene as it has in the past when problems with the FCA undermined its efficacy and adopt gross trebling. It also argues that if Congress does not act, the Supreme Court could resolve the issue. Part V concludes.

II. BACKGROUND: THE FALSE CLAIMS ACT FOUNDATIONS AND KEY COURT CASES

This Part contains important background information necessary to fully understand the FCA and the problems that emerge from the current ambiguity regarding damage calculations. Section A addresses the historical foundations of the FCA, as well as an overview explaining how the Act works. It continues by highlighting the provisions of the FCA that address private (qui tam) suits on behalf of the government. It concludes with an in-depth explanation of gross and net trebling. Section B explores the most significant court cases addressing the question of damages under the FCA.

A. THE FALSE CLAIMS ACT[9]

1. History and Overview of the FCA

The FCA, originally enacted in 1863, was passed to combat the actions of fraudulent contractors during the Civil War.[10] Upon discovering that contractors were selling "the Union Army decrepit horses and mules in ill health, faulty rifles and ammunition, and rancid rations," President Lincoln urged Congress to pass the FCA.[11] The original Act made it illegal "to present false statements in writing (claims) to the United States government to obtain

9. The relevant text of the False Claims Act reads as follows:

> [A]ny person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410), 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) (footnote omitted).

10. David L. Haron et al., *Bad Mules: A Primer on the Federal and Michigan False Claims Acts*, MICH. B. J., Nov. 2009, at 22, 22.

11. *Id.*

money or reimbursements to which the claimant was not entitled."[12] The modern text of the FCA makes a person liable for damages to the government as a result of knowingly making "a false or fraudulent claim."[13] The statute later defines claim in a way that limits the application of the Act to claims submitted to the United States Government or to a recipient acting on the government's behalf.[14] The statute provides that violators are "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person."[15] The Act also provides for penalties to be adjusted for inflation.[16] As of January 29, 2018, the minimum per claim civil penalty is $11,181 with the maximum being $22,363 per claim.[17]

An FCA claim is typically thought of as "a false invoice or bill for goods or services."[18] The Court of Appeals for the Fourth Circuit has declared that an FCA violation occurs "any time a false statement is made in a transaction involving a call on the U.S. fisc."[19] In less abstract terms, a false claim occurs anytime someone misrepresents to the federal government that he or she is entitled to government funds. An example might be a contractor submitting a bill to the government for work he or she did not complete. False claims may also include false applications for government loans and government assistance.[20] However, not any old claim fits the bill. In order to prove an FCA violation, a government prosecutor or private relator most show "(1) a false statement or fraudulent course of conduct; (2) made or carried out with knowledge of the falsity; (3) that was material; and (4) that involved a claim (i.e., a request or demand for money or property from the United States)."[21]

While the FCA requires "a false or fraudulent claim," the statute itself does not define what a false claim is.[22] Courts interpret the falsity element of the FCA to include claims "aimed at extracting money the government

12. *Id.*

13. 31 U.S.C. § 3729(a)(1)(A).

14. *Id.* § 3729(b)(2).

15. *Id.* § 3729(a)(1).

16. *Id.*

17. 28 C.F.R. § 85.5 (2018).

18. United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995).

19. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999).

20. *Rivera*, 55 F.3d at 709 (citing United States v. Neifert–White, 390 U.S. 228, 230 (1968)); Sell v. United States, 336 F.2d 467, 474 (10th Cir.1964).

21. SEAN J. HARTIGAN ET AL., SMITH PACHTER MCWHORTER PLC, FALSE CLAIMS ACT PRACTICE GUIDE 2016, at 3 (2016) (emphasis omitted) (citing United States v. Bollinger Shipyards, Inc., 775 F.3d 255, 259 (5th Cir. 2014)), http://www.smithpachter.com/files/Smith%20Pachter%20McWhorter%20FCA%20Practice%20Guide%202016.pdf.

22. *See* 31 U.S.C. § 3729(a)(1)(A) (2012).

otherwise would not have paid."[23] Courts have further divided falsity into two categories: factually false and legally false.[24] Factually false claims involve making a factually incorrect assertion on a claim.[25] Examples of factually false claims include physicians billing government health care programs for services that were never performed[26] or billing for a service that is worthless.[27] Legally false claims occur "where a party merely falsely certifies compliance with a statute or regulation as a condition to government payment."[28] An example of a legally false claim would be a contractor falsely certifying that it pays all of its workers' wages the government required as a condition of granting the contract.[29] Legally false claims are further complicated, since courts have found that certifications of compliance can be either explicit or implied.[30] Whereas an explicit certification of compliance entails an acknowledgement of compliance through something akin to a verbal or written affirmation, an implied certification of compliance can exist simply by submitting a claim.[31]

The other elements of an FCA violation are less complex and, in some cases, defined by the statute. The statute defines knowingly to "mean that a person, with respect to information—(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information . . . ."[32] The FCA defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money

23. United States *ex rel.* Kester v. Novartis Pharms. Corp., 41 F. Supp. 3d 323, 328 (S.D.N.Y. 2014) (quoting Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001)).

24. HARTIGAN ET AL., *supra* note 21, at 11; *see also Kester*, 41 F. Supp. 3d at 328–29 ("There are two types of 'falsity'—*i.e.*, two reasons that the government would not pay the claim if it knew the true facts. One is factual falsity; the other is legal falsity.").

25. HARTIGAN ET AL., *supra* note 21, at 3.

26. *See generally* United States v. Speqtrum, Inc., 47 F. Supp. 3d 81 (D.D.C. 2014) (granting plaintiff's motion for summary judgment in a suit where defendant billed a federal healthcare program for services never rendered).

27. United States *ex rel.* Mikes v. Straus, 274 F.3d 687, 703 (2d Cir. 2001).

28. United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1171 (9th Cir. 2006).

29. *See generally* United States *ex rel.* Wall v. Circle C Constr., LLC, 813 F.3d 616 (6th Cir. 2016) (finding an FCA violation where prime contractor certified compliance with statute specifying required wages for government contracts).

30. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1995–96 (2016). In *Escobar*, the Court upheld implied certification theory, but added the requirement that the certification be material to the government's decision to pay a claim. *Id.* at 2001. Since the ruling, several cases have been remanded to address whether a defendant's certification was material to the government's decision to pay. Greg Herbers, *After SCOTUS' 'Escobar' Decision, Courts Increasingly Sink Implied–Certification FCA Suits*, FORBES (Mar. 17, 2017, 8:53 AM), https://www.forbes.com/sites/wlf/2017/03/17/after-scotuss-escobar-decision-courts-increasingly-sink-implied-certification-fca-suits.

31. *See Universal Health Servs., Inc.*, 136 S. Ct. at 1995.

32. 31 U.S.C. § 3729(b)(1)(A) (2012).

or property."[33] Finally, the Act requires that the suit must be based on a claim actually submitted to the government.[34] A claim need only be submitted and not necessarily paid on to violate the FCA.[35]

2. Qui Tam Actions

Since its inception, the FCA has been especially useful in combating fraud, because it allows private citizens to bring suits on behalf of the government.[36] In 1863, due to the Civil War, the government lacked the resources to investigate and prosecute fraudulent contractors.[37] The FCA resolved this problem by permitting private plaintiffs to sue on behalf of the government in an action known as a qui tam lawsuit.[38] The impact of qui tam suits cannot be easily understated. An amendment in 1943 restricted qui tam suits by requiring relators to submit their evidence to the appropriate federal prosecutor and then wait sixty days for a response.[39] Relators could only continue by themselves if they received no response from the prosecutor.[40] In addition, rewards for successful actions dropped to no more than 10 percent of the final award where the government intervened and no more than 25 percent of the final award where the government declined to intervene.[41] As a result, qui tam suits plummeted and government fraud increased.[42] However, an amendment in 1986, spurred by "reports of $900 toilet seats and $500 hammers" restored the incentives for qui tam actions.[43]

A private citizen may choose to sue on the government's behalf, because, if successful, he or she will receive a portion of the damage award.[44]

---

33. *Id.* § 3729(b)(4).

34. *Id.* § 3729(b)(2).

35. United States *ex rel.* Sheldon v. Kettering Health Network, 816 F.3d 399, 411–12 (6th Cir. 2016).

36. 31 U.S.C. § 3730(b).

37. Haron et al., *supra* note 10, at 23.

38. *Id.*

39. Act of Dec. 23, 1943, ch. 377, Pub. L. No. 213 ("An Act [t]o limit private suits for penalties and damages arising out of frauds against the United States.").

40. *Id.*

41. *Id.*

42. Haron et al., *supra* note 10, at 23; *History of the False Claims Act—The Whistleblower Act*, BERNSTEIN LIEBHARD LLP, http://www.bernlieb.com/whistleblowers/History-Of-The-False-Claims-Act/index.html (last visited Feb. 28, 2019) ("As a result of the 1943 amendments, the False Claims Act fell into almost complete disuse."). While it appears that official records of the number of FCA claims were not kept until 1986, a search for "False Claims Act" in Lexis Advance showed only three cases prior to 1986 resulted in only 379 cases, whereas the same search from 1986 to the present resulted in nearly 10,000 cases. A similar search in Westlaw resulted in only 342 cases prior to 1986 and 10,000 cases after 1986. *See also* U.S. DEP'T OF JUSTICE, FRAUD STATISTICS–OVERVIEW 1–2 (2016), https://www.justice.gov/opa/press-release/file/918361/download (showing the number of FCA claims from 1987 to 2016).

43. Haron et al., *supra* note 10, at 23; False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3730(c), 100 Stat. 3153, 3155–58; *see also* 131 CONG. REC. 22,322–23 (1985) (detailing that a major function of the 1986 amendment was to restore qui tam incentives).

44. 31 U.S.C. § 3730(d) (2012).

Depending on the contributions made to the suit by the private plaintiff, he or she can expect between 15 and 30 percent of the total award.[45] Due to the statute's trebling provision, qui tam plaintiffs can recover huge damage awards.[46] Data regarding qui tam suits since the 1986 amendment show just how important qui tam suits are to combating fraud. Since 1987, there have been over ten thousand qui tam suits brought on behalf of the government by private plaintiffs.[47] Qui tam suits represent roughly two-thirds of all fraud suits brought by the government.[48] Private plaintiffs have been awarded over six billion dollars in these suits.[49] In 2012, whistleblowers received a portion of a three billion dollar settlement for their assistance in uncovering health care fraud.[50] In short, relators are invaluable in discovering and aiding the government in recovering fraudulently obtained funds. While stopping fraud is (or should be) in and of itself a great reward for relators, the truth is, without the damage-based rewards of the FCA, there would be few qui tam suits. To that end, one must understand the way damages are calculated under the FCA to fully appreciate the incentives at stake.

3. Damages Under the False Claims Act

Courts and commentators alike have discussed the way damages should be calculated for violating the FCA. In particular, the FCA's provision that a violator of the FCA pay "3 times the amount of damages which the Government sustains because of the act of that person"[51] is a source of confusion. The question, caused by the wording of the statute, is what should be tripled? The statute dictates that damages should be tripled, but it does not specify how to calculate damages in the first place. In a typical breach of contract case, courts calculate damages based on a "benefit of the bargain" theory, where damages are calculated based on the difference between what was received and what was promised.[52] Adopting a "benefit of the bargain" analysis makes sense in the FCA setting, because many FCA claims look like typical breaches of contract. Courts differ, however, as to whether any benefits

45. *Id.*

46. *See id.* § 3729(a)(1).

47. U.S. DEP'T OF JUSTICE, *supra* note 42, at 1–2.

48. *Id.*

49. *Id.*

50. Press Release, U.S. Dep't of Justice, GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report.

51. 31 U.S.C. § 3729(a)(1).

52. *See How Should False Claims Act Damages Be Calculated?*, BERGER MONTAGUE, https://www.bergermontague.com/practice-areas/whistleblowers,-qui-tam-false-claims-act/whistleblowers,-qui-tam-false-claims-act-legal-blog/how-should-false-claims-act-damages-be-calculated (last visited Feb. 28, 2019) (explaining the "benefit of the bargain" contract theory in terms of the False Claims Act cases).

offered to the government should be subtracted from the damage award before or after damages are tripled.[53] This has led to two theories of damage calculation: gross trebling and net trebling.

Under gross trebling, courts calculate damages based on the total amount paid by the government because of the violation.[54] Courts do not subtract benefits the government may have received on a contract until after the damage amount is tripled.[55] Gross trebling is argued under a "tainted claim" theory.[56] Under the tainted claim theory, contracts made in violation of the FCA are tainted by fraudulent activity and are therefore worthless.[57] As a result, the government's actual damage is the value of the whole contract.[58] Tainted claim theory argues that gross trebling is appropriate, because had the government known a claim was false, it would not have paid it.[59] In benefit of the bargain terms, when courts subtract the benefit conferred by the offending party to the government as part of the benefit of the bargain analysis, nothing should be subtracted because the value of rendered services is zero. Additionally, supporters of gross trebling argue that calculating damages any other way results in the government funding unapproved, and in many cases illegal, behavior.[60] Moreover, gross trebling creates increased incentives to comply with government regulations, as damage awards calculated with gross trebling will be much greater than those under net trebling and thereby create a greater deterrent effect.[61] Gross trebling is naturally favored by private relators and government prosecutors because it results in the largest damage awards.[62]

---

53. *Compare* United States v. Eghbal, 548 F.3d 1281, 1285 (9th Cir. 2008) (accepting gross trebling), *with* United States v. Anchor Mortg. Corp., 711 F.3d 745, 751 (7th Cir. 2013) (discussing gross and net treble damages under the FCA and concluding that net trebling is the appropriate way to calculate damages).

54. George B. Breen et al., *Valuing Services Provided: FCA Damages in the Wake of* United States v. Anchor Mortgage Corp., HEALTH CARE FRAUD REP., May 15, 2013, at 2, http://m.wallerlaw.com/portalresource/lookup/wosid/cp-base-4-76508/media.name=/PDFArtic.pdf.

55. Rhoad et al., *supra* note 7, at 2. Rather than treating performance on a contract as a benefit, courts applying gross trebling treat benefits akin to payments toward the final damage judgment. *See* United States v. Bornstein, 423 U.S. 303, 314 (1976) (calling benefits conferred on the government "compensatory payments").

56. Rhoad et al., *supra* note 7, at 1–2.

57. *Id.*

58. *Id.*

59. *Id.* at 1.

60. *See* Rachel L. Grier et al., *False Claims Act Damages in Antikickback and Self-Referral Cases*, BERG & ANDROPHY (June 2011), https://www.bafirm.com/publication/false-claims-act-damages-in-antikickback-and-self-referral-cases ("The courts are increasingly focused more on discouraging criminal behavior than with actual economic loss to the Government. Otherwise, as one court has noted, the government would be 'in the position of funding illegal kickbacks after the fact.'" (quoting United States *ex rel.* Bidani v. Lewis, 264 F. Supp. 2d 612, 616 (N.D. Ill. 2003))).

61. *See* Rhoad et al., *supra* note 7, at 2.

62. *Id.*

Under net trebling, damages are limited to the total amount expended less any benefit conferred by the violating party.[63] Net trebling argues that violations of the FCA are more akin to contract violations and courts should thus remedy breaches in a similar manner.[64] Traditional contract law suggests that damages are limited to actual loss, rather than the value of the entire contract.[65] Unlike gross trebling, the relevant question is not whether the government would have entered into an agreement had it known of fraudulent activity, but rather whether the government gained the benefit it was seeking.[66] In other words, in net trebling, the fact that the government would not have entered into the contract does not render the contract worthless. Thus, when a court conducts the benefit of the bargain analysis, any benefit conferred upon the government is subtracted from the loss to the government. Defendants naturally favor net trebling, as it produces much smaller damage awards.[67]

A hypothetical example may be helpful to understand how the two methods differ and to highlight just how different the penalties can be under each of the two calculation methods. Suppose Company A procures a government contract worth $10 million to produce widgets. As part of the contract, Company A is required to use component X to manufacture the widgets. Instead of using component X, Company A uses component Y, because it is cheaper. The value of widgets made with component X is $10 million and the value of widgets made with component Y is $8 million. Under gross trebling, damages would be calculated by trebling the value of the contract ($10 million) to reach $30 million, then subtracting the value of the goods received ($8 million). Under gross trebling, the damages would be $22 million plus the additional penalty per offense mandated by the statute. Net trebling produces a much smaller reward. Under net trebling, the value of the goods ($8 million) would be subtracted from the value of the contract ($10 million), then trebled. Damages would thus equal $6 million plus the additional penalty. The disparity between the two methods is no small thing and unsurprisingly has not escaped the review of courts.

B. COURT CASES ADDRESSING DAMAGES QUESTION

The question as to whether courts should use gross or net trebling was considered as early as 1976. In *United States v. Bornstein*, the Supreme Court

63. *Id.*

64. *See* Nicole Henning et al., *Keeping the False Claims Act Civil: Why FCA Damages Should Be Based on the Government's Actual Losses*, 22 WESTLAW J. HEALTH CARE FRAUD 3, 4 (2016).

65. RESTATEMENT (SECOND) OF CONTRACTS § 347 (AM. LAW INST. 1981).

66. *See* Rhoad et al., *supra* note 7, at 2.

67. *See How Should False Claims Act Damages be Calculated*, *supra* note 52 (suggesting that defendants will argue that courts that have adopted net trebling have adopted the correct calculation method).

seemingly ruled on the side of gross trebling.[68] However, recent decisions reveal a circuit split that has not been resolved.[69] This section first reviews the Supreme Court's decision *United States v. Bornstein*, then continues to review two more recent circuit-splitting opinions in *United States v. Eghbal* and *United States v. Anchor Mortgage*.

1. *United States v. Bornstein*: A Seemingly Settled Matter

In *Bornstein*, the government contracted with a prime contractor to provide radio kits.[70] The prime contractor, in turn, contracted with a subcontractor to provide electron tubes that had to meet certain specifications.[71] The subcontractor falsely certified that the tubes it provided met the required specifications.[72] The government learned of the false certification and received compensation from the prime contractor and kept the tubes.[73] The government subsequently sued the subcontractor for violating the FCA.[74]

The district court calculated the loss to the government as $40.82 per tube (the cost to replace each tube) minus $40.72 for the compensation from the prime contractor.[75] The court doubled the difference ($0.10), then multiplied the amount by the number of violations for a total of $79.40.[76] The government appealed the damage calculation and the appellate court affirmed.[77] The Supreme Court was faced with the question of whether the value of the compensation received from the prime contractor should be subtracted from the damage amount owed by the subcontractor before or after multiplying the damages.[78] The Court reversed the lower court and held "that the Government's damages should be doubled before any compensatory payments are deducted, because that method of computation most faithfully conforms to the language and purpose of the Act."[79] It reasoned that the purpose of the Act was to ensure that the government was fully compensated

68. United States v. Bornstein, 423 U.S. 303, 314 (1976).

69. *Compare* United States v. Eghbal, 548 F.3d 1281, 1285 (9th Cir. 2008) (accepting gross trebling), *with* United States v. Anchor Mortg. Corp., 711 F.3d 745, 751 (7th Cir. 2013) (discussing gross and net treble damages under the FCA and concluding that net trebling is the appropriate way to calculate damages).

70. *Bornstein*, 423 U.S. at 307 (1976).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 308.

75. *Id.* at 307–08.

76. *Id.* at 308.

77. *Id.*

78. *Id.*

79. *Id.* at 314. Prior to 1983, the FCA required double, rather than treble damages. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153 (amending 31 U.S.C. § 3729 to include treble damages).

"for the costs, delays, and inconveniences occasioned by fraudulent claims."[80] Moreover, the Court reasoned that the subcontractor did nothing to provide the third-party payment and that by subtracting the payment, the subcontractor would be benefitting from the fortuitous acts of others.[81] In addition, the Court reasoned that subtracting third-party payments before multiplying could provide a loophole, wherein defendants could commit fraud, then have a third party make a settlement payment and thereby avoid multiplied damages.[82] The Court added that multiplying damages before subtracting benefits would deter wrongdoers from submitting fraudulent claims.[83]

A casual reader of the *Bornstein* opinion would likely conclude that the Court held that gross trebling was the correct calculation method. Indeed, prosecutors and plaintiffs cite *Bornstein* as settled law in favor of gross trebling.[84] District courts as recently as 2016 have cited *Bornstein* for the same purpose.[85] However, the question presented and subsequently addressed by the *Bornstein* court was not whether courts should use gross or net trebling, but rather whether a third-party payment should be subtracted from the liable party's liability before multiplying.[86] Moreover, in a footnote, the Court gave additional commentary on the amount of the government's damages: "The Government's actual damages are equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality."[87] This should mean that the value of the tubes the government kept should have been subtracted from government's loss in a way that looks a lot like net trebling. Despite this dictum, the Court gave no instructions to the lower court to subtract the value of the original tubes kept by the government on remand.[88] The resulting lack of clarity has caused lower courts to split on the issue, as is manifested in the *Eghbal* and *Anchor Mortgage* opinions.

2. *United States v. Eghbal*: Interpreting *Bornstein* as Requiring Gross Trebling

Over 30 years after *Bornstein*, the Court of Appeals for the Ninth Circuit ruled that *Bornstein* demanded the use of gross trebling. In *Eghbal*, defendants sought secured mortgage loans insured by the Department of Housing and

80. *Bornstein*, 423 U.S. at 315.

81. *Id.* at 315–16.

82. *Id.* at 316.

83. *Id.* at 316–17.

84. Schilling, *supra* note 5.

85. *See, e.g.*, United States *ex rel.* Mooney v. Americare, Inc., 172 F. Supp. 3d 644, 645–46 (E.D.N.Y. 2016).

86. *Bornstein*, 423 U.S. at 307.

87. *Id.* at 316 n.13.

88. *Id.* at 316–17.

Urban Development ("HUD").[89] As part of obtaining HUD insured loans, defendants were required to certify that the money the buyer used to provide a down payment on a home did not come from the seller.[90] Defendants falsely certified the loans met HUD requirements, and the government subsequently sued under the FCA.[91]

Defendants pleaded guilty and were fined under the FCA.[92] They argued that the fines imposed, while correct under *Bornstein*, violated the Eighth Amendment.[93] The Ninth Circuit upheld the damage calculation, reasoning that gross trebling was required under *Bornstein*.[94] It further stated that the defendants' argument concerning constitutionality was without merit because the damages were "not so grossly disproportionate to the gravity of the offense as to violate the Eighth Amendment."[95]

The decision in *Eghbal* shows that courts still view the holding in *Bornstein* as good law. However, in recent years, some courts have rejected the gross trebling in favor of net trebling.[96] Recently, the Seventh Circuit court cited *Bornstein* in concluding that net trebling was the appropriate method of calculating damages.[97]

3. *United States v. Anchor Mortgage Corp.*: Does *Bornstein* Actually Demand Net Trebling?

In *Anchor Mortgage Corp.*, defendants supplied false certificates to secure HUD loans.[98] After finding the defendants guilty of false claims, the court turned to the question of damages.[99] The court noted that net trebling was the norm in antitrust and civil litigation.[100] With this in mind, the court turned to the *Bornstein* case and interpreted the holding as not requiring gross trebling.[101] Instead, the court concluded that *Bornstein* stands for the principle "that 'damages' depend on the acts of the person committing the fraud."[102] It distinguished *Bornstein* from the cases before it by explaining that the amount

89. United States v. Eghbal, 548 F.3d 1281, 1282 (9th Cir. 2008).

90. *Id.*

91. *Id.* at 1282–83.

92. *Id.*

93. *Id.* at 1285.

94. *Id.*

95. *Id.*

96. *See, e.g.*, United States v. Anchor Mortg. Corp., 711 F.3d 745, 751 (7th Cir. 2013); United States *ex rel.* Feldman v. van Gorp, 697 F.3d 78, 87–88 (2d Cir. 2012); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1277–78 (D.C. Cir. 2010); United States v. United Techs. Corp., 626 F.3d 313, 321–22 (6th Cir. 2010).

97. *Anchor Mortg. Corp.*, 711 F.3d at 750.

98. *Id.* at 747.

99. *Id.* at 748.

100. *Id.* at 749.

101. *Id.* at 750.

102. *Id.*

to be subtracted in *Bornstein* came from a third party.[103] The Court further reasoned that the *Bornstein* opinion actually demanded the use of net trebling.[104] The Court emphasized the previously referenced footnote in *Bornstein*, stating:

> Although the Department of Justice maintains that this language specifies a gross trebling approach, we do not read it so. Instead it sounds like a conclusion that "damages" depend on the acts of the person committing the fraud. Any doubt is resolved by footnote 13, which is attached to the word "source" in the language quoted above: "The Government's actual damages are equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality." . . . Footnote 13 in *Bornstein* unambiguously uses the contract measure of loss, supporting a net trebling approach.[105]

The Court rejected the government's argument that the footnote was only dictum, stating "it is not as if some law clerk were off on a lark and the Justices missed the error."[106] It remanded the case to the lower court to calculate damages under the net trebling method.[107]

At first glance, the *Anchor Mortgage* court's adoption of net trebling seems at odds with the decision in *Bornstein*. However, in *Bornstein*, a critical factor in the Court's decision was that the defendant did not provide the mitigating settlement that would be subtracted from the damage award.[108] The court in *Anchor Mortgage* used this distinction to conclude that *Bornstein* did not demand gross trebling.[109] The court's interpretation of *Bornstein* is reasonable. Much of the *Bornstein* opinion addresses the problems that would arise if prime contractor settlements were subtracted from subcontractor penalties before multiplying damages.[110] Thus, it is reasonable to narrowly interpret *Bornstein* to apply only to third-party payments.

The government did not appeal the decision of the *Anchor* court, and no other cases are currently pending review by the Supreme Court. As a result, a Circuit split remains between courts that embrace gross trebling and those

103. *Id.* at 749–50.

104. *Id.* at 750.

105. *Id.* (citation omitted).

106. *Id.*

107. *Id.* at 751.

108. United States v. Bornstein, 423 U.S. 303, 314–17 (1976).

109. *Anchor Mortg. Corp.*, 711 F.3d at 750 ("The question presented was whether third-party payments should be subtracted before doubling, not whether the market price should be subtracted from the contract price before doubling.").

110. *Bornstein*, 423 U.S. at 315–16.

that use net trebling.[111] With no definitive answer, prosecutors and private plaintiffs will likely continue to argue for gross trebling and defendants will argue for net trebling.

III. UNCERTAINTY REGARDING TREBLING RESULTS IN DAMAGE DISPARITIES, CREATES UNCERTAINTY FOR LITIGANTS, AND WASTES RESOURCES

The problem with the FCA is that it is not clear how courts should calculate damages. The FCA explains only that the offending party should be liable for "3 times the amount of damages which the Government sustains because of the act of that person."[112] The problem is with the word "damages." As one court pointed out, the word "damages" is typically used to describe the award at the end of litigation.[113] If the meaning of damages were to take on its traditional meaning, the language of the statute would become circular —to reach the final award, the court must triple the damages, but if damages are the final award, then it is unclear what is meant to be trebled.[114] This ambiguity in the statute has led to the split mentioned above.

The split between gross and net trebling should not be ignored. This Part addresses some of the problems that the damage ambiguity creates. Section A addresses the damage disparities between the two methods and its implications on the notion of fairness within the legal system. By not addressing which method should be used, the Supreme Court is allowing large disparities that ought to be avoided.[115] Section B addresses the problems with uncertainty and its effect on the parties involved, including defendants, prosecutors, and private plaintiffs and their respective decisions to litigate, settle, or even bring suit. Finally, Section C addresses the resources litigants waste by arguing over which method should be used.

---

111. *Compare* United States *ex rel.* Feldman v. van Gorp, 697 F.3d 78, 87–88 (2d Cir. 2012) (adopting net trebling), United States v. United Techs. Corp., 626 F.3d 313, 321–22 (6th Cir. 2010) (adopting net trebling), United States v. Anchor Mortg. Corp., 711 F.3d 745, 751 (7th Cir. 2013) (adopting net trebling), *and* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1278 (D.C. Cir. 2010) (adopting net trebling), *with* United States v. Eghbal, 548 F.3d 1281, 1282 (9th Cir. 2008) (adopting gross trebling), *and* Faulk v. United States, 198 F.2d 169, 172 (5th Cir. 1952) (using gross trebling to determine damages).

112. 31 U.S.C. § 3729(a)(1) (2012).

113. *Anchor Mortgage Corp.*, 711 F.3d at 749 ("Section 3729(a) calls for trebling 'the amount of damages which the Government sustains.' That's an unfortunate expression, because 'damages' usually represents the amount a court awards as compensation.").

114. *Id.*

115. *See* Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 117 (2008) (arguing that disparity in punitive damages "violates two principles of legality").

A. THE TREBLING AMBIGUITY RESULTS IN DAMAGE DISPARITIES THAT UNDERMINE THE FAIRNESS OF THE JUSTICE SYSTEM

Perhaps the most significant problem with the current split between gross and net trebling is that it can create huge disparities in the damages awarded for the same bad acts. Scholars and courts alike have found disparate outcomes for the same behavior unfavorable.[116] For example, scholars have criticized disparate punitive damage awards by juries and highlighted the disparity as a reason to legislate permissible damage awards.[117]

The issue of damage disparity can be well understood in the context of a recent court decision, wherein gross trebling was rejected. In *United States ex rel. Wall v. Circle C Construction, LLC*, the government sued Circle C, which violated the FCA.[118] As part of its agreement with the government, Circle C was required to pay its employees and subcontractors at an above-market wage.[119] Additionally, Circle C was required to submit compliance statements that essentially stated that Circle C complied with the wage requirement.[120] Circle C violated the FCA when it falsely certified that it complied with the wage requirement, even though one of its subcontractors paid its employees $9,900 less than required over a period of seven years.[121] The government sought gross trebling damages for the value of the entire contract, totaling over $750,000.[122] The court rejected the government's argument for gross damages, stating "[t]he damages the government seeks to recover here are fairyland rather than actual"[123] and remanded for the lower court to enter an award of $14,748.[124]

The decision in *Wall* perfectly illustrates the potential disparities that can arise from the lack of a definitive method of damage calculation. Under gross trebling, the contractor would have been liable for over $750,000 in

116. *See, e.g.*, 28 U.S.C. § 991(b) (2012) ("The purposes of the United States Sentencing Commission are to . . . provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."); Dorsey v. United States, 567 U.S. 260, 276–77 (2012) (finding that applying an old criminal statute's mandatory minimum sentence would create an unfair sentencing disparity); Romero, *supra* note 115, at 117 (arguing that damage disparities "violates two principles of legality").

117. Romero, *supra* note 115, at 117.

118. United States *ex rel.* Wall v. Circle C Constr., LLC, 813 F.3d 616, 617 (6th Cir. 2016).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 618.

124. *Id.* The award was initially recalculated at $29,748, but $15,000 was subtracted as the result of a prior settlement payment. *Id.* To add insult to injury, the court later required the government to pay for Circle C's legal fees associated with the suit. United States *ex rel.* Wall v. Circle C Constr., LLC, 868 F.3d 466, 472 (6th Cir. 2017).

damages.[125] Under net trebling, the contractor was liable for only $14,748 —less than two percent of the gross trebling amount.[126] Circle C's fortune was the result of being lucky enough to appear in a court willing to adopt net trebling. Had it been unluckily situated in the Ninth Circuit, Circle C would have been liable for a much larger damage award.[127] Such a large sway in the damage award should not be determined by being fortuitous enough to be on the correct side of a boundary line.[128] Lack of uniformity in an area with such a wide range of penalties undermines the legal system by making verdicts the product of fortune and not justice.[129]

The facts that create the disparity in *Wall* are not uncommon. In fact, some FCA violations incur no monetary damage to the government.[130] FCA violations can occur through false certification of compliance with other laws, such as the Anti-Kickback Statute ("AKS").[131] The AKS is a healthcare statute that prohibits the payment of remuneration in exchange for a patient referral.[132] Violations of the AKS are per se violations of the FCA.[133] The implications for this type of FCA violation are best explained through example.

Suppose a physician sees a patient for a routine checkup.[134] During that visit, he informs his patient that if the patient refers others to his practice, he

125. *Wall*, 813 F.3d at 617.

126. *Id.* at 618.

127. *See* United States v. Eghbal, 548 F.3d 1281, 1285 (9th Cir. 2008) (calculating FCA damages using gross trebling).

128. In other areas, the Supreme Court has found fortuitous circumstances to be a poor method to decide the outcome of a case. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (failing to find jurisdiction based on "the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while in Oklahoma"); United States v. Chadwick, 433 U.S. 1, 22 (1977) (Blackmun, J., dissenting) ("The approach taken by the Court has the perverse result of allowing fortuitous circumstances to control the outcome of the present case.").

129. *See generally* BRIAN J. OSTROM ET AL., NAT'L CTR. FOR STATE COURTS, ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES (2008) (reviewing the sentencing schemes of three states and evaluating them in terms of predictability, proportionality, and non-discrimination and finding that systems with sentencing guidelines were less prone to discrimination).

130. *See* United States v. Rogan, 517 F.3d 449, 453 (7th Cir. 2008) (explaining that there may be cases where contractors provide the full benefit promised, but still falsely certify claims and are thus liable for trebling of the full value of the government contract).

131. Henning et al., *supra* note 64, at 3.

132. 42 U.S.C. § 1320a-7b(b)(1) (2012) ("Whoever knowingly and willfully solicits or receives any remuneration . . . in return for referring an individual to a person for the furnishing . . . of any item or service for which payment may be made in whole or in part under a Federal health care program . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both."). Offering a kickback is also a violation of the AKS. *Id.*

133. *Id.* § 1320a-7b(g).

134. While claims like the example above do occur, a far more common violation of the AKS occurs when laboratories, pharmacies, or other medical providers offer or receive remuneration

will offer the patient a discount for future services. The doctor completes the routine checkup and sends the patient on his/her way. The physician then bills a Federal health care program for the services. In this scenario, the physician has violated the AKS by offering a kickback in exchange for patient referrals.[135] As a result, he has also violated the FCA.[136] However, the patient received all the benefits of the services the physician promised. Under gross trebling, the physician would be liable for damages equal to triple the amount billed to the Federal health care program, less the value of the services provided. Under net trebling, the government suffered no economic loss, and therefore there is nothing to multiply.[137] The damage disparity could not be more extreme. Under gross trebling, the government recovers a large award; under net trebling, it recovers only the statutory penalty.[138]

B. Relators, Defendants, and Prosecutors Are All Negatively Affected by the Ambiguity

Another major issue with the split between gross and net trebling is that it creates uncertainty for the parties involved in the litigation. Specifically, the split may impact a relator's decision to investigate fraud, the government's decision to prosecute, and the defendant's decision to settle or go to trial.

1. Qui Tam Relators May Choose to Not Investigate Fraud Because the Expected Award Is Uncertain Without a Definite Trebling Method

As previously discussed, an important part of the FCA is that it permits private plaintiffs to bring suits on behalf of the government.[139] Uncertainty in qui tam suits could deter relators from bringing FCA claims. Like all plaintiffs, qui tam relators must consider a variety of factors when considering when to file suit. One of the factors a relator will inevitably weigh is the expected award they receive once the suit reaches its conclusion. Uncertainty in the type of

in the form of payments, discounts, or free services in exchange for patient referrals. *See, e.g.*, United States v. Greber, 760 F.2d 68, 70–71 (3d Cir. 1985) (affirming the trial court's ruling that a doctor's payment of "interpretation fees" to other physicians were payments for patient referrals).

135. 42 U.S.C. § 1320a-7b(b).

136. *Id.* § 1320a-7b(g).

137. *See* United States *ex rel.* Davis v. District of Columbia, 679 F.3d 832, 839–40 (D.C. Cir. 2012) (finding that where the government received the benefit it paid for, there were no damages even though the defendant violated the FCA). Interestingly, courts have approached healthcare violations of the FCA differently than other FCA violations. Rather than look at the government's economic loss, some courts have ruled that the government's loss is the entire amount paid. This is the case even in jurisdictions where courts have adopted net trebling. *Compare* United States v. Rogan, 517 F.3d 449, 453 (7th Cir. 2008) (finding the government's loss was the entire value of the contract, even where some benefit may have been conferred), *with* United States v. Anchor Mortgage Corp., 711 F.3d 745, 751 (7th Cir. 2013) (adopting net trebling).

138. The court in *Davis* similarly found that if the plaintiff could prove an FCA violation, he could recover his portion of statutory penalties, but that there were no damages to be trebled because the government suffered no actual loss. *Davis*, 679 F.3d at 840.

139. *See supra* Section II.A.2.

damage theory a court will use makes this analysis more difficult, as the realtor will have to consider the expected award under each theory, as well as the likelihood that a court will use a given theory. This uncertainty deters qui tam suits in at least two ways. First, relators who are contemplating suing may choose to not sue because the damage award they expected from the suit may be much less because a court uses net trebling over gross trebling. Second, a relator may have to incur additional costs to litigate which damage theory is more appropriate in each case. This additional cost may make the suit no longer profitable for the relator.

The importance of qui tam suits and the impact of deterring them cannot be easily underestimated.[140] One commentator has gone so far to say that past amendments making it more difficult to bring qui tam suits caused the FCA to fall into disuse.[141] Claims where the case is not as strong are especially at risk in the current damages split. While the government only intervenes in roughly 25% of qui tam actions, claims where the government chooses to intervene are responsible for the largest qui tam settlements.[142] This suggests that the government intervenes in cases that produce larger damage awards or are more likely to be successful.[143] If qui tam relators no longer investigate and file claims for less viable fraud cases, it seems unlikely that the government would intervene in these cases.[144] Apart from losing out on the damage awards gained by prosecuting fraudsters, the government loses out on a deterring activity that is borderline fraudulent. Moreover, if the government is unable to prosecute smaller crimes (through qui tam relators) more small frauds may be committed based on the belief that the government will not take the trouble to bring suit on smaller claims.

2. Damage Uncertainty May Lead to the Government Prosecuting Fewer FCA Violations

The uncertainty surrounding gross and net trebling also negatively impacts government prosecutors. A fundamental purpose of the FCA is to enable the government to recover damages when it has been defrauded by others.[145] Uncertainty surrounding the type of damage calculation to be used

140. *See supra* notes 38–41 and accompanying text.

141. *History of the False Claims Act*, *supra* note 42 ("As a result of the 1943 amendments, the False Claims Act fell into almost complete disuse.").

142. Kristi Morgan Aronica, *The Effect of the Government's Decision to Intervene in False Claims Act Cases*, WEITZ MORGAN PLLC (Apr. 27, 2017), https://www.weitzmorgan.com/2017/04/27/intervene-false-claims-act.

143. *See id.*

144. *See* Eric Topor, *Intervention in False Claims Act Lawsuits: Is It Make or Break?*, BLOOMBERG L. (Apr. 24, 2017), https://www.bna.com/intervention-false-claims-n73014460786 (explaining that a lack of resources may prevent the government from investigating "every worthy FCA action brought to its attention").

145. *See* United States v. Bornstein 423 U.S. 303, 314 (1976) ("We think the chief purpose of the (Act's civil penalties) was to provide for restitution to the government of money taken from

may influence the government to pursue some claims over others. Rather than pursuing cases on their merits, the government may be persuaded to only pursue cases that will result in large damage awards. It is easy to imagine a policy change wherein the government only pursues high damage claims in response to public sentiment that expending government resources on less lucrative claims is wasteful.[146] Moreover, records surrounding the 1986 amendments to the FCA reveal that a primary focus of increasing qui tam incentives was to aid prosecutors burdened by an overwhelming case load.[147] Even if the government responds to fewer qui tam suits by pursuing more FCA claims on its own, it will never be able to prosecute to the same efficacy of having thousands of others performing investigative work.[148]

3. Uncertainty May Result in Defendants Making the Wrong Decision When It Comes to Choosing Whether to Settle or Litigate

Uncertainty over which damage method is used is also detrimental to defendants. The majority of FCA claims are settled.[149] In order to make informed decisions about settling, defendants need to know the consequences of going to trial.[150] Defendants will not have reliable

---

it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 551–52 (1943))).

146. The government has already been reprimanded in at least one court that adopted net trebling. In *Wall*, the court awarded attorney's fees to the defendant because it found the government's requested damages to be grossly disproportionate to the actual harm. United States *ex rel.* Wall v. Circle C Constr., LLC, 868 F.3d 466, 472 (6th Cir. 2017). When the government argued that this would negatively impact the government's zealous enforcement of FCA violations, the court stated, "One should hope so." *Id.* The court's response to the government's efforts to combat fraud that incurred little actual harm to the government is illustrative of a potential shift where courts and the public disapprove of government resources being used to investigate low damage claims.

147. 132 CONG. REC. 29,322 (1986) ("Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid given the demanding tasks and frequently overwhelming case loads they maintain.").

148. *See id.* ("If the government can pass a law that will increase the resources available to confront fraud against the government without paying for it with taxpayers' money, we are all better off. This is precisely what this law is intended to do: deputize ready and able people who have knowledge of fraud against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government.").

149. A Westlaw search for all FCA cases filed in a United States District Court between January 2010 and December 2014 resulted in 2,536 cases. By comparison, the United States Department of Justice reported 3,941 new FCA claims during the same period. U.S. DEP'T OF JUSTICE, *supra* note 42, at 1–2. While the numbers above suggest that roughly 40 percent of FCA claims are settled, other empirics have estimated the settlement rate of civil cases within the U.S. District Courts to be somewhere between 65 and 95 percent. *See* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 141 (2009).

150. *See* John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1134 (2009) ("But when a judgment makes clear what behavior is and is not lawful, that clarity can increase efficiency by directing would-be defendants how to act."); *see also* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry Into the Selection of Settlement and Litigation Under*

information if the ultimate damage award is uncertain. This may cause defendants to be more over or under optimistic about the outcome of litigation than they should be. For example, if a defendant believes that net trebling will be used at trial, he or she will be less likely to accept a settlement offer that is based on gross trebling. Conversely, a defendant will be more likely to accept a settlement offer that is based on net trebling if he or she believes gross trebling is the norm. If the defendant is wrong about what method will be used, he or she may enter into a settlement that is not optimal.[151]

C. Uncertainty Regarding Damages Results in Parties Unnecessarily Expending Time and Money Litigating Which Trebling Method Should Be Used

One of the biggest problems with the current split is the resulting increased litigation costs.[152] A definitive rule regarding damage calculations under the FCA would eliminate the need to litigate which damage method should be used. As is, even courts that have adopted one method over the other are inconsistent.[153] For example, the Seventh Circuit has utilized both gross and net trebling in calculating damages. In *Rogan*, the court refrained from subtracting any benefit conferred prior to trebling damages.[154] Just five years later, the court in *Anchor Mortgage Corp.* reprimanded the government for not asking for an award that included subtracting the value of homes before trebling damages.[155] The contrast between *Rogan* and *Anchor Mortgage Corp.* has been cited by commentators as an example that even when a given circuit seems to rule one way, it may change its tune a few years later.[156]

The costs in terms of time and resources to determine which method to use can be extremely high. The *Wall* case is illustrative of this issue. The plaintiff in *Wall* originally filed suit in 2007.[157] The case was first heard in

---

Uncertainty, 56 EMORY L.J. 619, 635 (2006) ("Thus, uncertainty of outcome promotes trial."); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63–64 (1982) (explaining that efficient settlements may not occur where one party is more optimistic about the outcome of a trial).

151. Shavell, *supra* note 150, at 63–64.

152. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 196–97 (2006).

153. *Compare* United States v. Rogan, 517 F.3d 449, 453 (7th Cir. 2008) (finding the government's loss was the entire value of the contract, even where some benefit may have been conferred), *with* United States v. Anchor Mortg. Corp., 711 F.3d 745, 751 (7th Cir. 2013) (adopting net trebling).

154. *Rogan*, 517 F.3d at 453.

155. *Anchor Mortg. Corp.*, 711 F.3d at 751.

156. *See* Henning et al., *supra* note 64, at 4 ("The Seventh Circuit's *Anchor Mortgage* opinion is difficult to square with the same Court's holding in *Rogan* . . . .").

157. United States *ex rel.* Wall v. Circle C Constr., LLC, 43 F. Supp. 3d 853, 855 (M.D. Tenn. 2014), *rev'd and remanded*, 813 F.3d 616 (6th Cir. 2016).

2010.[158] During those proceedings, the district court ruled that Circle C was liable under gross trebling.[159] Circle C's first appeal was heard in 2012, wherein the court affirmed the judgment and remanded the case back to the district court for additional damage calculations.[160] The district court heard the case again in 2014, and again calculated the damages under a gross trebling theory.[161] Circle C appealed the calculation again, and the Sixth Circuit decided the case in 2016.[162] The court reversed the damage calculation, and instructed the district court to calculate the damages under a net trebling method.[163] On remand, Circle C filed a motion for attorney's fees under 28 U.S.C. § 2412(d)(1)(D).[164] The district court denied the motion and Circle C appealed once more.[165] The Sixth Circuit reversed the district court's denial and remanded to the district court once again to award attorney's fees to Circle C.[166] Ten years have passed since Wall first brought

158. United States *ex rel.* Wall v. Circle C Constr., LLC, 700 F. Supp. 2d 926, 926 (M.D. Tenn. 2010), *aff'd in part, rev'd in part sub nom.* U.S. *ex rel.* Wall v. Circle C Const., L.L.C., 697 F.3d 345 (6th Cir. 2012).

159. *Wall*, 700 F. Supp. 2d at 940.

160. *Wall*, 697 F.3d at 360.

161. *Wall*, 43 F. Supp. 3d at 855.

162. *Wall*, 813 F.3d at 616.

163. *Id.* at 618.

164. United States *ex rel.* Wall v. Circle C Constr., LLC, No. 3:07-cv-00091, 2016 WL 3362066, at *1 (M.D. Tenn. 2016). Section 2412(d)(1)(D) states in relevant part:

> If, in a civil action brought by the United States . . . the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(D) (2012); *Wall*, 2016 WL 3362066, at *2. The District Court's reasoning for denying the motion is especially relevant in the context of this Note, as it further demonstrates that the conflict between gross and net trebling has not been fully resolved:

> Here, the ultimate judgment secured by the Government was substantially smaller than the Government's initial demand. Still, the Court does not find that the discrepancy between the demand and judgment renders the demand unreasonable in light of the facts and circumstances. The Government's damages theory was validated by two separate district courts, including this one. While those decisions no longer stand, they indicate that the Government behaved reasonably in pursuing its demand. Indeed, the Government could hardly be expected to abandon a damages theory that had twice been accepted by courts.

Wall, 2016 WL 3362066, at *2.

165. *Wall*, 2016 WL 3362066, at *2.

166. United States *ex rel.* Wall v. Circle C Constr., LLC, 868 F.3d 466, 472 (6th Cir. 2017). The court's finding that the government's fee request was unjustified is interesting considering two other courts found gross trebling to be appropriate. A dissenting justice would have upheld the denial of defendant's motion for attorney's fees based on this and the fact that other courts employed gross trebling. *Id.* at 472–73 (Rogers, J., dissenting).

suit, yet the case has still not been entirely decided. A definitive rule would help eliminate long litigation.[167]

In addition to taking a long time, litigation to determine which method to use can be expensive. While the attorney's fees have not yet been awarded in *Wall*, there can be little doubt that ten years of litigation came at a high price. The court estimated nearly a half-million dollars to defend the suit.[168] If there had been a definitive ruling, Circle C may have been more easily persuaded to forego various appeals, and thereby eliminate much of the litigation cost it incurred. While there is no similar calculation for the expenses incurred by the government, it can be certain that ten years of litigation took an overwhelming amount of time and money for the government to pursue what it believed to be a just claim.

IV. WHETHER BY CONGRESSIONAL INTERVENTION OR SUPREME COURT INTERPRETATION, GROSS TREBLING SHOULD BE ADOPTED

This Part advocates for gross trebling. Section A argues that gross trebling best protects the interests of relators and the government and best comports to the FCA's purpose of combatting fraud. In addition, it addresses some of the criticism toward gross trebling. Section B advocates for Congressional intervention by modifying the language of the FCA in a way that clarifies the way courts should calculate damages. Finally, Section C argues that in the absence of Congressional action, the Supreme Court can and should adopt gross trebling.

A. GROSS TREBLING PROTECTS QUI TAM RELATORS AND GOVERNMENT INTERESTS AND BEST COMPORTS TO THE INTENT OF THE STATUTE

Qui tam relators stand to lose the most if gross trebling is not adopted. Gross trebling protects the interests of relators by providing the best chance for a large damage award. Relators pursue FCA claims to receive some form of compensation. It is worthwhile to note that relators deserve substantial compensation for their work. Qui tam relators provide an invaluable service by investigating and suing companies that have defrauded the government. If qui tam suits were not permitted, either the government would have to dedicate more resources to combating fraud, or more fraud would go undetected. Additionally, qui tam suits are desirable because they expend fewer government resources. A qui tam suit where the government chooses to not intervene only results in the government spending money on running the judicial system. All awards, and in some cases even attorney's fees are paid by the guilty party. A system where the government expends little yet gains a lot in terms of recovering fraudulent funds and deterring further fraud should

167. Bronsteen, *supra* note 150, at 1134 ("But when a judgment makes clear what behavior is and is not lawful, that clarity can increase efficiency by directing would-be defendants how to act.").

168. *Wall*, 868 F.3d at 472.

be protected. Gross trebling protects the qui tam system by providing the best environment for relators to recover, thereby incentivizing them to bring qui tam suits.

Gross trebling best protects the government's interest by deterring future fraudulent acts. Under net trebling, this deterrent is not as strong and in certain cases, nonexistent. Consider again the example of the doctor who violates the FCA via an illegal kickback scheme. As long as the doctor provides all of the services he bills to the government, net damages are zero. In this case, net trebling offers no deterrent above the statutory penalties. On the other hand, gross trebling offers a deterrent of three times the amount billed to the government. Thus, gross trebling protects the government's interest in combating fraud in a way that net trebling cannot.

Additionally, gross trebling does a more adequate job at making the government whole after it pays a false claim. Trebling was written into the FCA to ensure that the government was made whole after paying a false claim.[169] Reimbursement for a fraudulent claim is generally inadequate because the government must spend additional resources to rectify a false claim.[170] For example, the government will have to sell unusable goods, pay for prosecutors to sue fraudulent parties, and pay for goods that were not delivered as certified.[171] Trebling damages ensures that the government is not left in a worse position than before by imposing a cost on the defrauding party to offset the additional expenses the government incurs as a result of the fraudulent behavior.[172] Gross trebling more adequately compensates the government for these expenses.[173] Thus, because gross trebling better protects the government's interests, it should be adopted.

Gross trebling also best embodies the purpose of the statute. While the FCA has no legislative history that clearly demands gross trebling, courts that have employed gross trebling have assumed certain intentions of the lawmakers who enacted the statue.[174] The Court in *Bornstein* explained "[w]e

169. United States v. Bornstein, 423 U.S. 303, 314 (1976).

170. *See generally* BMY–Combat Sys. Div. of Harsco Corp. v. United States, 44 Fed. Cl. 141 (1998) (listing different expenses the government incurred as a result of the false claim).

171. It may be useful to consider the expenses above in the original context of the FCA. Consider a contractor providing mules instead of horses under a government contract. Suppose the mules are worth $50 and a horse costs $100. If the government only recovers $50 per mule, it will still be in a worse position. This is because the government will incur various expenses to obtain the $50 it was defrauded. It will have to pay investigators to gather proof of fraud, attorneys to sue the defrauding party, and court staff to hear the case. In addition, it will have to spend money to take care of the mules while it attempts to sell or repurpose them. Finally, it will have to pay someone to broker a new deal with a new provider of horses. Thus, government damages go far beyond just the difference in price between what was contracted for and what was delivered.

172. *See* United States v. Rogan, 517 F.3d 449, 453–54 (7th Cir. 2008).

173. *See id.*

174. *Bornstein*, 423 U.S. at 314 ("Although there is nothing in the legislative history that specifically bears on the question of how to calculate double damages, past decisions of this Court

think the chief purpose of the (Act's civil penalties) was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole."[175] Congressional debates surrounding the 1986 amendments to the FCA indicate that legislators were concerned about fighting fraud and providing incentives for qui tam relators to bring FCA suits.[176] In all areas, gross trebling better embodies the purpose of the statute than net trebling.

While gross trebling is the best choice for calculating damages, it is not without its critics. The large awards from gross trebling have certainly drawn a critical eye.[177] Indeed, to some, it may seem like penalties under gross trebling border on the edge of cruel and unusual punishment.[178] However, critics of gross trebling often fail to recognize one critical point: defendants liable for FCA damages are culpable; they have been found to have *knowingly defrauded* the government by a trier of fact.[179] Any sense of unfairness does not carry much sympathy because the defendants have consciously engaged in

---

have reflected a clear understanding that Congress intended the double-damages provision to play an important role in compensating the United States in cases where it has been defrauded.").

175. *Id.* (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 551–52 (1943)).

176. Records from Senate debates wherein Senator Grassley introduced what eventually become the 1986 amendments are particularly illuminating when it comes to the sentiment surrounding the then current state of government fraud:

> Why the Government bureaucracy is, for whatever reason, unwilling to guard against or agressively [sic] punish fraud, is puzzling. But while we in Congress may not be able to legislate aggression on the part of investigators and prosecutors, we do have a very important responsibility to pursue a vigilant oversight of their activities.
>
> What we can and should legislate is statutory assistance for those charged with protecting against fraud. This bill is intended to provide that assistance in three ways; by expanding enforcement tools, by strengthening deterrence, and by encouraging disclosure of fraud by private individuals.
>
> . . . .
>
> Current law puts the Government at a critical disadvantage in fraud cases. Contractors have us over a barrel. Our choice is inexorably clear. If we like being over a barrel, I would suggest we leave the law the way it is and instead grin and bear continued rapes and pillages of the Treasury. The alternative is true reform that shifts the advantage back to the Government where it belongs, and deals with fraud as those who elect us would expect.

131 CONG. REC. 22,322–23 (1985).

177. Henning et al., *supra* note 64, at 6 ("Those penalties could be so exorbitant that they could run afoul of the Eighth Amendment's prohibition against excessive fines . . . .").

178. *See* United States v. Eghbal, 548 F.3d 1281, 1285 (9th Cir. 2008).

179. 31 U.S.C. § 3729(b)(1)(A)(i)–(iii) (2012) ("[T]he terms 'knowing' and 'knowingly' —(A) mean that a person, with respect to information—(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information . . . .").

fraudulent behavior.[180] Often, during settlement negotiations, defendants have had the opportunity to settle for far less than the amount under gross trebling, but choose to go to trial.[181] Gross trebling is sensible in these circumstances, because the defendant has imposed additional costs on the public by going to trial.[182] When defendants are subsequently found liable for their conduct, it makes sense that they should pay the additional cost the government incurred to bring them to justice. Moreover, as previously mentioned, the government bares more than just the immediate loss caused by the wrongdoer's fraud.[183] In addition to not receiving the goods or services it bargained for, the government must incur the expense of procuring a new contract with an honest party. In addition, where the contract involved goods, the government may have to pay to store the goods until they can be liquidated, which also incurs a cost in terms of finding a buyer. In short, parties who defraud the government cannot seriously contend that damages are unfair where they acted knowingly and without regard for the expenses the government bares to clean up the mess.

B. CONGRESS SHOULD INTERVENE AND AMEND THE FCA TO ADOPT GROSS TREBLING

Whether gross or net trebling should be used is a question that Congress could easily resolve. Congress has amended the FCA on various occasions.[184] The more recent amendments have been spurred by the way courts have narrowed the ability of qui tam relators to bring suit.[185] All amendments since 1983 have expanded qui tam relators' abilities to bring suit.[186] A new

180. Knowingly or knowledge is commonly associated as the second most culpable mens rea. Karen Rosenfield, Note, *Redefining the Question: Applying a Hierarchical Structure to the Mens Rea Requirement for Section 875(c)*, 29 CARDOZO L. REV. 1837, 1841 & n.31 (2008) ("The different levels in this hierarchy are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence." (quoting United States v. Bailey, 444 U.S. 394, 403–04 (1980))).

181. *See Keeping Out of Treble: What the Seventh Circuit's Adoption of Net Trebling Means for FCA Damages*, WILEY REIN LLP (Mar. 27, 2013), https://www.wileyrein.com/newsroom-articles-2653.html (suggesting that one of the strategies of government prosecutors is to threaten gross trebling damages should defendants choose to go to trial).

182. *See id.*

183. *See supra* notes 170–72 and accompanying text.

184. Harry Litman & Joseph Zwicker, *A New Practitioner's Guide to the Federal False Claims Act: Brave New World Recent Developments in Federal and State False Claims Act Litigation*, at 1–5, A.B.A (2012), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/25-1_fca_101_presentation.authcheckdam.pdf (explaining the act's passage in 1863, and amendments in 1943, 1986, 2009 and 2010).

185. *Id.* at 4 ("2009 Amendments passed as part of the Fraud Enforcement and Recovery Act ('FERA') in order to correct judicial misinterpretations of the intended reach of the 1986 Amendments, to otherwise clarify key provisions of the FCA, and to modernize the FCA in light of changes since 1986 in how the Government conducts its business.").

186. *Id.* at 3 (explaining that the 1986 amendment reinvigorated qui tam provisions by eliminating certain requirements and introducing a minimum award for relators); *id.* at 4

amendment that addresses gross and net trebling would therefore be at home in a legislative setting. Moreover, it makes more sense for Congress to intervene, than say the judiciary, because the issue at hand is a policy question.[187] In addressing the issue, Congress need only make a small change to the language of the statue. The proposed change would read as follows:

> [A]ny person who–knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . ; is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount **expended by Government or billed to the Government** because of the act of that person.

The proposed change takes away the ambiguity that existed in the original statute. Damages are defined as amounts expended by the government. The statute would still permit deductions for the value of benefits conferred to the government. These deductions would be calculated as payments toward the final damage award. The calculation would be identical to calculations done under gross trebling. Additionally, the modification preserves the current view that the Government need not actually pay a claim in order for an FCA violation to occur.[188] This is desirable because it allows the Government to be prevent fraud, rather than just address the damage it causes. Unfortunately, it is unlikely that Congress will resolve the issue anytime soon. As of today, there is no pending legislation that would modify the FCA.

C. IN THE ABSENCE OF CONGRESSIONAL ACTION, THE SUPREME COURT COULD ADOPT GROSS TREBLING

Alternatively, the Supreme Court could grant certiorari and hear a case that addresses this question. However, it may be less likely for the Supreme Court to adopt gross trebling. The recent trend in appellate courts has been to reject gross trebling for net trebling.[189] Even if the Supreme Court chooses

---

(explaining the 2009 amendments were meant to correct judicial decisions that curbed qui tam suits); *id.* at 5 (explaining that 2010 amendments were meant to make it easier to sue on the government's behalf).

187. Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 47 (1976) ("But while policy-making is shared, and the constitutional phrases 'legislative powers' and 'executive power' may have somewhat overlapping connotations, the framers of the Constitution seem clearly to have intended Congress, through exercise of article I's enumerated and incidental 'legislative powers,' to be the main policy-maker.").

188. *See* United States *ex rel.* Sheldon v. Kettering Health Network, 816 F.3d 399, 411–12 (6th Cir. 2016).

189. United States *ex rel.* Feldman v. van Gorp, 697 F.3d 78, 87–88 (2d Cir. 2012) ("In most FCA cases, damages are measured as they would be in a run-of-the-[mill] breach-of-contract case—using a 'benefit-of-the-bargain' calculation in which a determination is made of the difference between the value that the government received and the amount that it paid."); United

to adopt net trebling, a definitive ruling has immense benefits in terms of eliminating problems caused by uncertainty.[190] The Supreme Court's hypothetical decision would likely rest heavily on how it interprets the *Bornstein* court's decision. If the Supreme Court reads *Bornstein* narrowly as holding third-party payments are not subtracted before trebling, it is likely that it will accept the *Anchor Mortgage* approach and adopt net trebling.

It is possible, however, that the Supreme Court would look to the underlying logic behind *Bornstein* and still adopt gross trebling. The *Bornstein* court cited three reasons for disallowing third-party payments to be subtracted prior to multiplying the government's loss. First, it found that multiplying damages before subtracting was the best way to make the government whole.[191] This is still a compelling reason to adopt gross trebling. As discussed above, gross trebling gives the greatest chance for the government to recover the expenses it incurs as the result of being subject to fraud.[192] Second, the *Bornstein* court found gross trebling made penalties less vulnerable to the fortuitous acts of others.[193] Finally, it found that gross trebling prevented the fraudulent party from simply paying a non-multiplied amount before judgment to escape multiplied damages.[194] This last reason is particularly persuasive. If net trebling is used, a defendant may be able to escape treble damages by paying the difference owed before a judgment is entered. This tactic would not work in gross trebling, because any payment would be subtracted after the amount is trebled. Should the right case come before it, the Supreme Court should adopt gross trebling in order to faithfully uphold the purpose of the FCA and prevent defendants from escaping liability.

V. CONCLUSION

The False Claims Act is an important tool in combating fraud against the government. The FCA provides strong deterrence against fraud by requiring damages to be trebled. Because the language of the FCA is ambiguous, a split has occurred wherein courts are divided as to whether gross or net trebling

States v. United Techs. Corp., 626 F.3d 313, 321–22 (6th Cir. 2010) (amended Jan. 24, 2011) ("The district court should calculate the difference between what the government paid each year—FEC III, IV and V—and what it should have paid each year."); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1279 (D.C. Cir. 2010) ("Under this benefit-of-the-bargain framework, the government will sometimes be able to recover the full value of payments made to the defendant, but only where the government proves that it received no value from the product delivered."); Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1372 (Fed. Cir. 1998) ("We agree with CCI that the normal measure of damages is the difference in value between what the government was supposed to get and what it actually got from the contractor.").

190. Bronsteen, *supra* note 150, at 1134 ("But when a judgment makes clear what behavior is and is not lawful, that clarity can increase efficiency by directing would-be defendants how to act.").

191. United States v. Bornstein, 423 U.S. 303, 315 (1976).

192. *See supra* Section IV.A.

193. *Bornstein*, 423 U.S. at 315.

194. *Id.* at 316.

should be used. This split negatively impacts relators by making damage awards less certain, government prosecutors by making it more difficult to decide which cases are best to pursue, and defendants by making the decision to settle more nebulous. Whether by an act of Congress or by ruling of the Supreme Court, gross trebling should be adopted. Gross trebling is appropriate because it best protects the government and private plaintiffs. Additionally, it best embodies the purpose of the FCA, which is to deter fraud and to make the government whole after being victimized by fraud. Although there is no pending legislation or appeals to the Supreme Court that deal with the current split, the issue is an important one that should be resolved.