

## Insights

### False Claims Act Jury Verdict Halved as Unconstitutionally Excessive

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How much is *too much* when it comes to damages awards for False Claims Act violations? A district court judge in Minnesota weighed in recently in *United States of America ex rel. Fesenmaier v. Cameron-Ehlen Group, Inc. et al.*, No. 13-cv-3003 (D. Minn.), holding that the jury's \$487 million verdict violated the protections afforded by the Constitution's Excessive Fines Clause. The court reduced the jury's award by more than half to \$217 million. The court's reasoning could influence similar reductions in False Claims Act cases in other jurisdictions.

Following a two-month trial, the jury in *Fesenmaier* concluded that Defendant Precision Lens and its owner, Paul Ehlen, violated the Federal Anti-Kickback Statute by offering trips, meals, and other inducements to ophthalmologists, who would then purchase medical supplies from Precision Lens and bill Medicare for reimbursement. The jury determined Defendants caused the submission of 64,575 false claims, resulting in more than \$43 million in actual damages to the Medicare program. By statute, this amount was trebled to \$131 million. Mandatory statutory penalties were then applied for each of the 64,575 false claims, totaling approximately \$358 million. All told, the jury award amounted to \$487 million.

The Defendants challenged both the merits of the verdict and the calculation of the damages award. As to damages, the Defendants argued, among other things, that the statutory penalties of approximately \$358 million violated the Constitution's Excessive Fines Clause. The court agreed with the Defendants' contention that the Excessive Fines Clause "precludes such a massive imposition of penalties." *Id.* at 34. In evaluating the excessiveness of the award, the court made clear that its role was not to determine the appropriate punishment for the Defendants, but rather to ascertain the permissible punishment under the Excessive Fines Clause. *Id.* at 35. The court analyzed factors developed by the 8th Circuit Court of Appeals: (1) the reprehensibility of the Defendants' conduct; (2) the harm to the victim; (3) the ratio of punitive damages to compensatory damages; (4) legislative intent; (5) the Defendants' ability to pay; and (6) sanctions assessed in other cases involving comparable misconduct.

Ultimately, the court found the jury's damages award violated the Excessive Fines Clause, warranting a substantial reduction to a constitutionally permissible level. Beginning with the actual damages amount of \$43 million, the

court added treble damages of \$86 million, plus another \$86 million in mandatory statutory penalties, for a total award of just over \$217 million. On a per-claim basis, the court's reduced imposition of statutory penalties amounts to approximately \$1,332 for each of the false claims submitted. The court observed that its reduced award correlates to five times the actual damages incurred by the United States as a result of the Defendants' conduct, while noting that anything more "threatens to become grossly disproportional to the gravity of the offense." *Id.* at 48.

As reduced by the court in *Fesenmaier*, the \$1,332 per-claim penalty is significantly less than the minimum civil monetary penalty for False Claims Violations set forth in the Department of Justice's regulations, which the DOJ recently amended. On February 12, 2024, only a few days after the court's decision in *Fesenmaier*, the DOJ published inflationary adjustments to the minimum and maximum civil monetary penalties for False Claims Act violations. Civil Monetary Penalties Inflation Adjustments for 2024, 89 Fed. Reg. 9764 (Feb. 12, 2024) (to be codified at 28 CFR 85). For penalties assessed after February 12, 2024 with respect to violations occurring after November 2, 2015, the statutory minimum penalty has been increased from \$13,508 per claim to \$13,946. The statutory maximum penalty has been increased from \$27,018 per claim to \$27,894. By comparison, the reduced *Fesenmaier* per-claim penalty is approximately ten percent of the new statutory minimum.

Our attorneys will continue to monitor judicial developments impacting False Claims Act, Anti-Kickback, and qui tam litigation. If you have questions about this area or how it may impact your organization, please contact Marc T. Quigley, Matthew C. Branich, or another member of our Litigation and Dispute Resolution or Health Care Practices.

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