THE CIVIL FALSE CLAIMS ACT: THE NEED FOR A HEIGHTENED BURDEN OF PROOF AS A PREREQUISITE FOR FORFEITURE

I. INTRODUCTION

Since its inception, the False Claims Act of 1863 (FCA or the Act), also known as the "Abraham Lincoln Law," has been the federal government's chief weapon against fraud. Enacted in response to rampant fraud committed by public contractors upon the Union government, its applicability has been extended to the areas of health care fraud, welfare fraud, and defense procurement fraud. The False Claims Act is divided into separate civil and criminal provisions. For the most part, however, the civil portion of the Act is the primary means of Government action.


4. False Claims Amendments Act of 1986, S. REP. No. 345, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 5266, 5273 (hereinafter "S. REP."). The frauds committed during the Civil War generally consisted of selling products to the Army which were either defective, or not what they purported to be. For example, one Major McKinstry reportedly purchased 1,000 mules, at $119 a head, even though some of the mules were blind or diseased, and virtually all of the mules were useless. False Claims Act Amendments: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 2d Sess., 1 (1986) (statement of Rep. Glickman) [hereinafter "1986 FCA Hearing"]. Another example, as reported by Sen. Jacob Howard during the Senate debates of Feb. 14, 1863, was that shells which were sold to the army were not filled with gunpowder, but rather sawdust. False Claims Reform Act: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess., 1 (1985) (statement of Sen. Grassley, quoting Sen. Howard) [hereinafter "1985 FCA Hearing"].


8. See Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795, 1842 (1992). As the interest in health care reform has increased, there has been an attendant push for more criminal actions for health care fraud. Several reasons exist for a shift in emphasis to criminal prosecution:
Although the Act has always been the Government's primary tool in fighting fraud, it was perceived that the Act had become substantially weakened in the intervening years, and at a time when the war against fraud was at a critical stage.\(^9\) By 1986, it was suspected that the amount of public funds being lost to fraud was somewhere in the range of hundreds of millions of dollars to $50 billion per year.\(^10\) This number is substantially higher when health care fraud is included, which is believed to cost the United States between $30 million and $100 billion annually.\(^11\) This fraudulent conduct was

First, the magnitude of health care fraud is perceived to be huge and uncontrolable by civil sanctions. Second, there is a belief that because physicians and other health care providers hold privileged positions of trust in the health care system, violations should be corrected and punished vigorously. Third, the emphasis is part of the federal government's overarching priority of prosecuting white collar crime. Finally, the federal government is increasingly looking at criminal sanctions as a source of additional revenue.

Charles H. Roistacher & Catherine M. Cook, Battling Fraud and Abuse: Efforts to Control Health Costs Are Enlisting Law Enforcement Agencies to Pursue Fraud as a Federal Crime, Recorder Mar. 28, 1994, available in LEXIS, Nexis Library. Despite the increased attention on criminal prosecutions, the majority of the cases will be civil actions, due to the less stringent burden of proof and the greater likelihood of prevailing. Amy Boardman, Health Care Fraud Booms Arrives, Tex. Law., Nov. 7, 1994, available in LEXIS, Nexis Library.

\(^9\) Neil V. Getnick, Enacting and Enhancing False Claims Statutes, 208 N.Y. L.J., Nov. 26, 1990, at 20, 21. Michael Lawrence Kolis, Comment, Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act, 7 ADMIN. L.J. 409, 416 (1993). In 1943, the FCA's \textit{qui tam} provision was amended to restrict the availability of the \textit{qui tam} action, by barring a \textit{qui tam} action based on information which the government possesses. 31 U.S.C. § 3730(b)(4) (1982) (\textit{Qui tam} is derived from the latin phrase "\textit{qui tam pro domine rege quam pro sic ipso in hoc parte sequitur}," or "who as well for the king for himself sues in the matter.") The effect of this amendment was made clear in United States ex rel State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984), where Wisconsin was precluded from pursuing a \textit{qui tam} action based on the information which it was responsible for obtaining and giving to the federal government. There have also been amendments Pub. L. 97-258, 96 Stat. 978 (1982) (moved criminal part of the FCA to 18 U.S.C. § 287 and recodified the civil portion at 31 U.S.C. §§ 3729-31); Pub. L. No. 100-700, 102 Stat. 4638 (1988) (clarifying rights of the federal government in deciding whether to join a \textit{qui tam} action, and the effect of the decision); Pub. L. No. 101-280, § 10(a), 104 Stat. 162 (1990) (defining "senior executive branch official" in § 3730(e)(2)(B)). These amendments, however, have been simply clarifications or technical changes.

\(^10\) S. Rep., supra note 4, at 5267. These figures were taken from estimates made by the General Accounting Office, the Department of Justice, the Inspectors general, among others. \textit{Id.} It is important to note, however, that estimation is difficult because most fraud goes unreported. \textit{Id.} (citing GAO Report to Congress, Fraud in Government Programs: How Extensive is it? How Can it be Controlled?, 1981.

\(^11\) Roistacher & Cook, supra note 8, at 6. It is believed that health care fraud comprises approximately 3-10% of total health care costs, which are estimated to be near one trillion dollars. \textit{Id.} Typical examples of health care fraud include billing for services not rendered, misrepresenting services given, receiving kickbacks, and issuing self-referrals. Health Care Fraud and Abuse: Oversight Hearing Before the Senate Comm. on the Judiciary, FED. DOC. CLEARING HOUSE CONG. TEST., 5-7 (May 25, 1994) (statement of Michael Mangano, Principle Deputy Inspector General, Department of Health and Human Services), available in LEXIS,
believed to exist in all Government programs. Furthermore, it was believed that this massive fraud was significantly affecting the huge budget deficit, and that the recoupment of money lost to fraud was needed to help reduce the budget.

In response to this perceived crisis, Congress enacted dramatic amendments to the False Claims Act in 1986. The purposes of the new amendments was to strengthen the Act and to make it a better tool against government fraud. One legislator explained that the amendments sought to provide a deterrent against fraud by "forcefully discourag[ing] individuals and companies that do business with the United States from engaging in fraudulent practices." In order to give the FCA "more teeth", and to make it easier to
succeed in a False Claims Act suit, Congress eased the substantive and procedural burdens on plaintiffs, increased the amount of money recovered in a favorable judgment, and increased the incentive for qui tam relators to bring actions.

One of the more significant, though least discussed of the 1986 amendments, was the amendment that eased the burden of proof required to prove a false claim by adopting a preponderance of the evidence standard. This amendment was in response to a split among the circuits of the United States Courts of Appeals, where some circuits held plaintiffs to a clear and convincing evidence standard. In adopting the preponderance standard, the Senate Committee noted that:

19. 1986 FCA Hearing, supra note 4, at 241 (statement of Frank H. Menaker, Jr., of the Aerospace Industries Association of America, Inc.).

20. This was accomplished by affirmatively stating that there was no scienter requirement for a false claim, 31 U.S.C. § 3729(b) (1988); setting the burden of proof at preponderance of the evidence, 31 U.S.C. § 3731(c) (1988); loosening the statute of limitation by allowing suit to be brought within three years after the violation becomes known, 31 U.S.C. § 3731(b)(2) (1988); and improving the Government’s ability to gather information through Civil Investigative Demands, 31 U.S.C. § 3733 (1988).

21. The civil penalty was increased from double the amount of the damage sustained to triple the amount. The forfeiture amount was increased from $2,000 to not less than $5,000, and not more than $10,000. 31 U.S.C. § 3729(a) (1988).

22. S. REP., supra note 4, at 5288-89 (“The Committee’s overall intent in amending the qui tam section of the False Claims Act is to encourage more private enforcement suits.”). The two major aspects of this change are: raising the percentage of the judgment which the relator can recover to 15-25% where the Government takes over the suit, and 25-30% where the relator conducts the action, 31 U.S.C. § 3730(d) (1988) and allowing the plaintiff to proceed with the action even if the Government elects not to pursue the suit, 31 U.S.C. § 3730(c) (1988). By increasing the amount of money that a qui tam plaintiff can recover from a suit, the FCA provides a “marketplace incentive,” which “encourages people to protect the government and the public from waste, fraud and abuse.” Singer, supra note 18, at 16 (quoting Rep. Berman).

23. There is no commentary which specifically, and solely, discusses the burden of proof requirement of the FCA. For a limited discussion, see Oparil, supra note 15, at 553-54.


25. Sterling Millwrights, Inc. v. United States, 26 Cl. Ct. 49, 95 (1992); S. REP., supra note 4, at 5296.

Traditionally, the burden of proof in a civil action is by a preponderance of the evidence. However, this point is not expressly addressed in the current act, and the caselaw is fragmented and inconsistent. Inasmuch as the False Claims Act proceedings are civil and remedial in nature and are brought to recover compensatory damages, the Committee believes that the appropriate burden of proof devolving upon the United States in a civil False Claims Act suit is by a preponderance of the evidence.\textsuperscript{27}

The dilution of the burden of proof under the FCA has indisputably made it much easier for FCA plaintiffs to succeed.\textsuperscript{28} By all accounts, it appears that Congress was successful in making the FCA a more useful tool.\textsuperscript{29} Since the 1986 amendments were enacted, the number of \textit{qui tam} suits has risen dramatically, from 12 suits in fiscal year 1987 to 220 suits in fiscal year 1994.\textsuperscript{30} As a result of this rise in the number of suits brought the Government had recovered roughly $800 million through \textit{qui tam} and whistle-blower litigation by the end of fiscal year 1994.\textsuperscript{31} The Department of Justice reported that it recovered a total of $1.09 billion from civil fraud litigation in fiscal year 1994 alone.\textsuperscript{32} This dramatic rise in civil

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{27} S. Rep., supra note 4, at 5296.
\item \textsuperscript{28} McCormick, supra note 5, at 3. Professor Kenneth Mann explained:

Because the criminal standard of proof requires a high degree of certainty, prosecutors often decide not to seek criminal penalties even when convinced of their target’s guilt. Similarly, the “clear and convincing evidence” standard, which lies somewhere between the regular civil standard and the criminal standard, might stop a law enforcement official from seeking penalties. The amendment adopted the conventional civil standard, a preponderance of the evidence, thereby facilitating further the sanctioning process. Mann, supra note 8, at 1850.

\item \textsuperscript{29} The False Claims Amendments Act of 1993; Hearing Before the Subcomm. on Courts and Administrative Practice of the Sen. Comm. on the Judiciary, 103d Cong., 1st Sess., 3 (1993) (statement of Sen. Grassley) [hereinafter “1993 FCA Hearings”]. Although the statistics indicate that the amendments have been useful, critics have argued that the amendments have simply spawned numerous frivolous lawsuits. James Vicini, Supreme Court Rejects Challenge To Whistleblower Law, Reuters, Feb. 22, 1994, available in LEXIS, News Library, Current File. This was one of the arguments used by the Boeing Co. in challenging the constitutionality of the \textit{qui tam} provisions in the FCA. Boeing noted that, through 1992, there had been 600 \textit{qui tam} suits filed since 1986. The False Claims Act, Boeing Asks Supreme Court to Decide Constitutionality of \textit{Qui Tam} Provisions, 60 Fed. Cont. Rep. (BNA) at 23, available in LEXIS, News Library, Current File. Some critics have argued that the Act simply turns disgruntled employees into bounty hunters, which undermines the internal quality and ethics mechanisms within the corporations. Singer, supra note 18, at 16.

\item \textsuperscript{30} $800 Million Recovered By Government Through Whistleblower Litigation, 32 Gov’t Empl. Rel. Rep. (BNA) at 1408 (Nov. 21, 1994). In the first two months of Fiscal Year 1995, there had been 12 \textit{qui tam} actions filed. Id.

\item \textsuperscript{31} Id. The Department of Justice reported that in 1991, the recoveries from \textit{qui tam} lawsuits had increased 300 percent. Getnick, supra note 9, at 1.

\item \textsuperscript{32} $800 Million Recovered By Government Through Whistleblower Litigation, supra note 30, at 1408. In the health care fraud area, between Oct. 1, 1993 and March 31, 1994, the
\end{enumerate}
\end{footnotesize}
fraud recoveries has been largely the result of the increased damages amounts in the Act, as well as the lessened burden of proof needed to recover in a false claim case.\(^{33}\)

Perhaps the greatest impact of the 1986 Amendments will be felt in the health care area.\(^{34}\) As of January 9, 1995, some two hundred Pennsylvania hospitals were sent letters by the Justice Department informing them of potential liability under the civil False Claims Act.\(^{35}\) In addition to those hospitals, similar letters are to be sent to about 4,600 other hospitals nationwide,\(^{36}\) claiming that the hospitals have engaged in double billing for diagnostic tests.\(^{37}\) These 4,600 hospitals represent roughly 70% of all of the hospitals nationwide.\(^{38}\) The letters inform these hospitals that if they do not agree to a pre-filing settlement, a civil False Claims Act suit will be brought against them.\(^{39}\)

While the goals behind the civil FCA are certainly sound, this Comment argues that the means by which the goals are achieved have gone too far. The 1986 Amendments have improved the effectiveness of the FCA in combating fraud, but unfortunately have done so at the expense of the defendant’s due
process rights. The potential effect of this deprivation is obvious in light of the recent efforts by the Department of Justice. This Comment will focus on the burden of proof requirement in civil false claims cases, and argue that a "clear and convincing evidence" burden of proof should be utilized. Part II will layout the general provisions of the False Claims Act. Part III will delineate the progression of the burden of proof required in civil FCA cases since its enactment.

Part IV will argue that the forfeiture and civil penalty provisions in the FCA are punitive. Finally, Part V will contend that the Due Process Clause requires more than a preponderance of the evidence standard to support imposition of the civil forfeiture provision of the FCA.

II. THE FALSE CLAIMS ACT

The purposes of the False Claims Act are to root out fraud, punish and deter those who commit fraud upon the Government, and compensate the

40. Although this Comment will focus exclusively on the False Claims Act, it is important to note that the use of civil proceedings to exact essentially criminal penalties, without the attendant procedural protections, is rapidly expanding in many areas of law enforcement. Professor Mann explained:

While new criminal laws are appearing with great frequency and criminal sentences are growing more severe, punitive civil sanctions are rapidly expanding, affecting an increasingly large sector of society in cases brought by private parties as well as by the government. These sanctions are sometimes more severely punitive than the parallel criminal sanctions for the same conduct.

Mann, supra note 8, at 1798. These civil penalties, or punitive sanctions, have been enacted for the purpose of avoiding the procedural requirements of a criminal prosecution, and to make the penalty a more effective deterrent because of the ease with which it can be imposed. Jonathon I. Charney, The Need for Constitutional Protections for Defendants in Civil Penalty Cases, 59 CORNELL L. REV. 478, 482-83 (1974) ("Civil penalties have been enacted to deny defendants the protections normally afforded in criminal prosecutions."). Professor Charney further stated:

The protections granted to defendants in criminal actions impose burdens on the prosecutor which are not borne by the plaintiff in civil litigation. To escape these burdens, legislators and prosecutors have tried to devise various methods of circumventing the requirements of providing constitutional protections to criminal defendants. One increasingly popular technique to avoid this duty is to change the labels of the statutes under which individuals are prosecuted from criminal to civil.

Id. at 480. The False Claims Act, therefore, should not be viewed as an anomaly. It is one of many statutes which have sought to improve the government's position through the use of civil penalties. Many of the arguments made in the context of the FCA can also be made with respect to other statutes. See, e.g., Christopher M. Maine, Comment, The Standard of Proof in Civil RICO Actions for Treble Damages: Why the Clear and Convincing Standard Should Apply, 22 IND. L. REV. 881 (1989).

Government for that fraud.\textsuperscript{42} Generally, the FCA has been broadly construed to apply to any type of fraudulent claim.\textsuperscript{43} Under the False Claims Act, a person is liable for a false claim if he, among other things, knowingly presents, makes, uses, or causes to be presented, made or used, a false record or statement, which causes the federal government to pay money to that person.\textsuperscript{44} A False Claims Act suit can be brought in one of two ways. First, the Attorney General may file a lawsuit in a federal district court.\textsuperscript{45} Second, a private citizen may file a \textit{qui tam}\textsuperscript{46} lawsuit in a federal district court on behalf of the United States.\textsuperscript{47} If a private citizen initiates a False Claims Act suit, she is

\hspace{1cm}

\textsuperscript{42} United States v. Burton, 132 B.R. 968 (S.D. Ala. 1991) (\textit{In re Selma Apparel Corp.}).


\textsuperscript{44} 31 U.S.C. § 3729(a) (1988). Section 3729 of the FCA provides:

(a) Liability For Certain Acts – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of public property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.


\textsuperscript{46} \textit{Qui tam} is derived from the latin phrase "\textit{qui tam pro domine rege quam pro sic ipso in hoc parte sequitur}," or "who as well for the king for himself sues in the matter." In this situation, the person filing the suit is referred to as the "relator." The purpose of the \textit{qui tam} provision is to encourage private citizens to report fraud to the government. Mortgages, Inc. v. United States Dist. Ct. for the Dist. of Nev., 934 F.2d 209, 210 (9th Cir. 1991).

\textsuperscript{47} 31 U.S.C. § 3730(b) (1988). The \textit{qui tam} provisions of the FCA have been the most
entitled to receive a portion of the recovery.48

A wide range of misconduct is proscribed by the False Claims Act, such as the submission of fraudulent invoices for repayment under a federally funded program,49 and the submission of false information to the federal government in order to obtain a government loan.50 A “claim” under the FCA encompasses all demands or requests which lead to disbursement of federal

controversial. See supra note 29. In 1943, Congress became disgruntled with what they considered parasitic lawsuits, and barred private parties from bringing a qui tam action based on information which the Government possessed at the time the suit was brought. The 1943 Amendment was largely brought on by the Supreme Court case of United States ex re. Marcus v. Hess, 317 U.S. 537 (1943), which held that a qui tam suit could be brought by anyone, regardless of the origin of their information, if it advanced the purposes of the FCA. This prospect caused many to call for the elimination of qui tam suits entirely, however a compromise was forged which kept the action but severely limited it. Oparil, supra note 15 at 535. This jurisdictional bar severely limited the ability of private parties to use the qui tam mechanism, and substantially weakened the FCA. See F. Paul Bland, Why “Qui Tam” Is Necessary, NAT'L L.J., Nov. 4, 1991, at 13 (arguing that the False Claims Act had become “toothless” since the 1943 Amendments).

The 1986 Amendments cleared up the problems which plagued the qui tam provision in 1943 by barring suits based on information obtained from an ongoing civil suit by the Government, or information gained from criminal proceedings, public hearings, the media, etc. 31 U.S.C. § 3730(e) (1988). After the 1986 Amendments, there was some question as to whether a government employee could be a relator. Some courts have held that government employees did have standing to bring a False Claims Act suit. See U.S. ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 18 cert. denied 499 U.S. 921 (1991); United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158 (S.D. Fla. 1990); aff'd, 963 F.2d 384 (11th Cir. 1992). The rationale of these cases was that Congress explicitly delineated those persons who could not bring suit, and because government employees were not listed, they were eligible. Robert L. Vogel, Citizens' Lawsuits Based on the False Claims Act Have Multiplied; Private Suits Under False Claims Act on Rise, NAT'L L.J., Nov. 26, 1990, at 20, 21. There has been some action, however, to bar government employees from initiating False Claims Act suits. Assistant Attorney General Stuart Gerson explained:

We simply must preclude: inherent conflicts of interest among federal employees that the potential of large qui tam rewards would create; the incentive for Government employees assigned to investigations to understake the significance of the cases that they are working on in the hope that the Government will not follow up, leaving the way open for a qui tam case; morale problems in Government service among employees assigned to non-fraud investigations or smaller dollar value investigations; and the misallocation of Government resources through individual decisions by Government employees to spend official time on cases they hope could lead to potential personal recoveries rather than on assigned duties.


48. If the lawsuit is taken over by the Government, the relator will recover between 15% and 25% of the award. 31 U.S.C. § 3730(d)(1) (1988). If the Government declines to take the case, and the relator continues to pursue it, the relator will recover between 25% and 30% of the award. 31 U.S.C. § 3730(d)(2) (1988).


funds. Section 3729 of the Act was amended to clarify the term “claim” because some courts had held that once the federal government gives funds to a state or local actor, it relinquishes control of the funds and may not utilize the FCA. Essentially, Congress intended the FCA to reach “all types of fraud, without qualification, that might result in financial loss to the Government.”

A claim may be “false or fraudulent” in many situations. For example, a farmer may understate the yield of his crop in order to receive crop insurance indemnity payments, or a federal contractor may inflate subcontractors’ price quotes on a job in which there is no bidding. A false or fraudulent claim becomes grounds for a suit when it is made knowingly. A “knowingly” made false claim will exist when the person has actual knowledge of the falsity of the information, or acts in reckless disregard or deliberate ignorance of the truth or falsity of the information. If a violation of the False

51. 31 U.S.C. § 3729(c). A “claim” is defined as:

... any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

52. S. Rep., supra note 4, at 5286. See United States v. Azzarelli Construction Co., 647 F.2d 757 (7th Cir. 1981) (bid-rigging in highway construction); United States ex rel. Salzman v. Salant and Salant, Inc., 41 F. Supp. 196 (S.D.N.Y. 1938) (fraud against the Red Cross). The clarification was deemed necessary to ensure that frauds committed against State and local agencies, acting as intermediaries for the Federal Government, were prosecuted. S. Rep., supra note 4, at 5287. (States may not have sufficient remedies or investigative resources to adequately prosecute fraud). The Senate Committee believed that whenever Federal funds are used, regardless of who controls the outlay of the money, the Federal Government still retains the power to assure that the funds are being utilized appropriately. Id. In support of its position, the Committee pointed to the caselaw in the area of Medicare and Medicaid fraud. Under Medicare and Medicaid, the false claims are not made directly to the Federal Government. Rather, the claims are made to an insurance company or another intermediary, who is then reimbursed by the Federal Government. Courts have consistently held that this type of activity falls within the FCA. See, e.g., Peterson v. Weinberger, 508 F.2d 45 (5th Cir.) (Medicaid), cert. denied, 423 U.S. 830 (1975); United States ex rel. Davis, Long’s Drugs, Inc., 411 F. Supp. 1144 (S.D. Cal. 1976) (Medicaid).


57. 31 U.S.C. § 3729(b) (1988). The FCA provides:

(b) Knowing and Knowingly Defined — For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information —

(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the
Claims Act is proven, a civil penalty of three times the damage sustained by the Government is assessed, as well as a forfeiture of no less than $5,000, and no more than $10,000, per false claim.\(^{58}\)

The procedure by which a False Claims Act suit is brought depends upon who is bringing the suit. If the Attorney General is bringing the suit, the standard procedures are followed. However, if a relator is initiating the lawsuit, special procedures are employed. First, the complaint is filed under seal, and in camera, with the court, and must remain so for at least sixty days.\(^{59}\) Second, a copy of the complaint must be served on the Government,\(^{60}\) at which time the Government may choose to proceed with the action\(^{61}\) or decline to

---

truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

Subsection (b) was added to Section 3729 in response to conflicting interpretations of constructive knowledge under the Act. S. REP., supra note 4, at 5285. See, e.g., United States v. Cooperative Grain & Supply, 476 F.2d 47 (8th Cir. 1973); United States v. Bouchet, No. 85 Civ. 8530, 1987 U.S. Dist. LEXIS 4090 (S.D.N.Y. 1987). One of the main reasons for clarifying the liability standard was to assure that people could not insulate themselves from liability by intentional ignorance 132 CONG. REC. S 11243 (Aug. 11, 1986) (statement of Sen. Grassley). The clarified standard would make a person liable for recklessly acting in disregard of the truth or for deliberate ignorance of the truth or falsity of the claim. \(\text{Id.}\)

Beside the addition of subsection (a)(7), the pre-1986 FCA was identical with respect to the liability standard. 31 U.S.C. § 3729 (1982).

58. 31 U.S.C. § 3729(a) (1988). If there is more than one defendant, each one is joint and severally liable for the treble damages and forfeiture. Mortgages, Inc. v. United States Dist. Ct. for the Dist. of Nev., 934 F.2d 209, 212 (9th Cir. 1991). Congress retained the automatic forfeiture provision of the original Act (the $5,000 to $10,000 penalty), because it felt that “defrauding the Government is serious enough to warrant automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments.” S. REP., supra note 4, at 5282. The damages provisions of the FCA had remained unchanged since the original enactment of the FCA. \(\text{Id.}\) Under the original FCA, the Government was permitted to recover double the amount of the damages sustained, plus a $2,000 forfeiture per false claim. 31 U.S.C. § 3729 (1982). Proponents of the amendments believed that an increase in the penalty and forfeiture provisions of the Act would enhance the deterrent effect of the FCA, and also to signal that the Government is serious about stopping fraud. 1986 FCA Hearing, supra note 4, at 1 (statement of Sen. Grassley).

59. 31 U.S.C. § 3730(b)(2) (1988). The Government can extend the sixty days by a showing of “good cause”. 31 U.S.C. § 3730(b)(3) (1988). “Good cause” was not intended to cover situations were the Justice Department was simply overburdened and did not get to the complaint, but was intended to apply in situations such as when a criminal investigation is pending S. REP., supra note 4, at 5290. A pending criminal investigation, however, is not meant to act as a \text{per se} bar to a private suit. \(\text{Id.}\)

60. 31 U.S.C. § 3730(b)(2) (1988). The Justice Department has shown concern that the private initiation of FCA suits may interfere with ongoing criminal investigations by “tipping-off” the defendant. S. REP., supra note 4, at 5289. The sixty day provision, as well as the requirement that the complaint be filed under seal, were intended to allow the Government to evaluate the relator’s case, and determine if it conflicted with investigations already underway. \(\text{Id.}\)

If the Government chooses to proceed with the action, it retains primary responsibility for the lawsuit. If the Government declines to proceed with the lawsuit, the relator may continue to prosecute the case. Finally, the defendant is not served the complaint until the Government makes its determination, and the court orders service. At this point, the lawsuit will begin.

III. THE BURDEN OF PROOF IN FCA CASES PRIOR TO THE 1986 AMENDMENTS

The question of what burden of proof was appropriate under the False Claims Act was initially answered in United States v. Shapleigh. The suit in Shapleigh was based on 146 counts of receiving payment by vouchers for work which was not performed. The suit was brought on the grounds that the defendant’s conduct violated Section 3490 of the Revised Statutes of the United States (1878).

63. 31 U.S.C. § 3730(c)(1) (1988). If the Government takes over the suit, the relator may still participate. Id. However, the relator’s participation may be limited if the court finds that their participation would “interfere or unduly delay the Government’s prosecution of the case,” is for the purpose of harassment, or would cause the defendant “undue burden or expense.” 31 U.S.C. §§ 3730(c)(2)(C), (D) (1988). Further, the Government may dismiss or settle the suit over the objection of the relator, so long as the relator was given the opportunity to be heard. 31 U.S.C. §§ 3730(c)(2)(A), (B) (1988).
65. 31 U.S.C. § 3730(b)(2) (1988). The defendant has 20 days following service to respond to the complaint. Id. The Senate Committee believed that the filing of the qui tam suit should be treated as if the relator had simply asked the Government to review the case. S. Rep., supra note 4, at 5289.
66. 54 F. 126 (8th Cir. 1893).
67. Id. at 127.
68. Section 3490 provides:

Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty eight, title “Crimes,” shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act, together with the costs of suit; and such forfeitures and damages shall be sued for in the same suit.

Section 5438 of the Revised Statutes established the standard for liability, and provided:

Sec. 5438. Every person who makes or causes to be made, or who presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain
The court held that in a False Claims Act suit brought under sections 5438 and 3490, the Government was required to prove its civil case beyond a reasonable doubt. The court reasoned that because the Government sought damages in excess of the loss it sustained, and it relied on the commission of felonies to justify the action, the proceeding was criminal in nature and required the highest burden of proof. The court explained:

The United States might have maintained a civil suit for the single damages it sustained, if any, from the wrongful acts of the defendant charged in this complaint without establishing its case beyond a reasonable doubt. Such a suit would have been a civil suit in its nature and purpose as well as in its form. The action at bar is a civil suit in form; but when, under the form of a civil suit, the government sought to punish this defendant for felonies by recovering the penalty of double damages and $2,000 for each offense, it made this proceeding criminal in its nature and purpose, and invoked the application to it of the rules of evidence applicable to criminal trials.

The holding in Shapleigh has never been explicitly overruled, however, no court has applied this standard in a FCA action since Shapleigh.

In the years immediately preceding the 1986 Amendments, the courts were split regarding the burden of proof required under the False Claims Act. Several courts required plaintiffs to prove their case by clear and convincing evidence. These courts provided two rationales for this requirement. First,
some courts found that because the "gravamen" of the statute was fraud, the FCA plaintiff should be held to the burden of proof required in common law fraud suits. For example, the Sixth Circuit, quoting *Equitable Life Assurance Soc. of the United States v. Johnson*, stated:

Fraud is not to be presumed and the burden of establishing it was upon appellees. They were not required to establish it beyond a reasonable doubt, but something more is required than the mere weight, or preponderance, of the evidence. It is essential that the evidence should be clear, unequivocal, and convincing.

The second rationale provided was that the False Claims Act is penal in nature and therefore requires a heightened burden of proof. The clearest example of this rationale was forwarded by the court in *United States v. Klein*. The court cited the Supreme Court cases of *United States v. McNinch* and *United States v. Rainwater*, which pointed out that the civil portion of the FCA was grounded upon the criminal liability test, which showed that the Act had a penal quality to it. This penal quality evidenced that the action was based on fraud. Although the court acknowledged that the Supreme Court had expressly noted that the FCA was not penal, it still found that the action was based on fraud, and hence required clear and convincing evidence.

On the other hand, several courts have held that a False Claims Act plaintiff must prove his case by only a preponderance of the evidence. Unfortu-


75. *Ueber*, 299 F.2d at 315. The court stated it did not believe that "because this case involves a statutory cause of action under the False Claims Act, the government is relieved from meeting the burden applicable to any fraud action, statutory or common law." *Id.*

76. 81 F.2d 543 (6th Cir. 1936).


80. 356 U.S. 590, 592 (1958) ("In reaching our conclusion, we are aware that the civil portion of the Act incorporates, as a test of liability, the provisions of the criminal section as they were set out in § 5438 of the Revised Statute of 1878 . . . ").


82. *Id.* ("It is because of this background of the criminal or penal nature of the action that it has been held that a cause of action under the False Claims Act is grounded in fraud, and therefore, the standard of proof necessary to be applied to establish liability under the Act must be by clear, unequivocal, and convincing evidence.").

83. *Id.* at 432-33.

84. *See* Federal Crop Ins. Corp. v. Hester, 765 F.2d 723, 727 (8th Cir. 1985); United States
nately, many of the courts which have adopted this burden of proof have not given much explanation as to why this standard was chosen.\textsuperscript{85} The court in Federal Crop Ins. Corp. v. Hester, however, provided a rationale for the lesser burden of proof.\textsuperscript{86} The court explained:

Further, although we need not reach this point in view of our holding that the district court's instruction was not plain error, we think the preponderance of the evidence standard is appropriate under the Act. Courts that have chosen the clear and convincing standard have done so for one primary reason: that the "gravamen" of a False Claims Act suit is "intentional fraud and misrepresentation. This court has held, however, that the Act covers not only fraudulent claims based on intentional misrepresentations, but false claims based on negligent misrepresentations as well. Because fraud need not be an element of an action under the Act, the rationale of these courts, that fraud requires a higher standard of proof, is eroded.\textsuperscript{87} (citations omitted)

The court also rejected the argument that the FCA is penal in nature.\textsuperscript{88} This case became the primary support for Congress' amendment of the burden of proof requirement in 1986.\textsuperscript{89}

\textbf{IV. THE DAMAGES PROVISIONS OF THE FALSE CLAIMS ACT ARE PUNITIVE}

\textit{A. The Current View of the Nature of the False Claims Act}

Proponents of the False Claims Act have defended the damage provisions of the Act as being remedial in nature.\textsuperscript{90} During the House Hearings on

\begin{footnotesize}
\begin{itemize}
  \item See, e.g., Thomas, 709 F.2d at 971-72; JT Const. Co., 668 F. Supp. at 593; Thevenot, 620 F. Supp. at 394.
  \item Hester, 765 F.2d at 727-28.
  \item Id.
  \item Id. at 728. The court stated:
  \begin{quote}
  Nor are we persuaded by Hester's argument that a clear and convincing standard is required because the double damages and forfeiture provisions are punitive. The Supreme Court in United States ex rel Marcus v. Hess, [held] that an action under the Act retains its civil nature despite these provisions. Because the Act neither requires a showing of intent nor is punitive in nature, we find no justification for applying a burden of proof higher than a preponderance of evidence. (citation omitted)
  \end{quote}
  \item See S. Rep., supra note 4, at 5296.
  \item See 132 CONG. REC. H6480 (Sept. 9, 1986) (statement of Rep. Fish); 1986 FCA Hearing,
\end{itemize}
\end{footnotesize}
the 1986 Amendments, Rep. Fish began his statements by stressing that:

... we are dealing here with a civil — not a criminal — statute. The False Claims Act is remedial in nature. As it is now constituted, the False Claims Act does not contain any criminal sanctions and these legislative proposals do not contain any criminal provisions.91

Although the Act calls for treble damages, plus the forfeiture, proponents state that these additional damages are necessary to fully compensate the government for its loss.92

The position that the damage provisions of the False Claims Act are remedial and not punitive is supported by the Supreme Court’s 1943 decision in United States ex rel. Marcus v. Hess.93 In Hess, the defendants were indicted and convicted of collusive bidding, in violation of 18 U.S.C. § 88.94 Subsequent to that criminal proceeding, the Government brought a civil action under the False Claims Act.95 The defendants argued that this subsequent action was barred by the Double Jeopardy Clause of the Fifth Amendment.96 The Court held that this action was not barred because the civil proceeding was remedial in nature, and did not constitute punishment for double jeopardy purposes.97 The Court explained:

It is true that “Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,” but this is not enough to label it a criminal statute. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus

supra note 4, at 17 (statement of Jay. B. Stephens, Dep. Assoc. Attorney General) (“This is a civil remedy. As a civil remedy, it is designed to make the Government whole for the losses it has suffered. . . .”).

91. 1986 FCA Hearing, supra note 4, at 102. Interestingly, Rep. Fish’s statement, as well as all of the other House statement, assumed that the damage provision would require only double damages, not the treble damages ultimately passed.

92. 1986 FCA Hearing, supra note 4, at 147 (statement of Richard K. Willard, Assistant Attorney General, Civil Division) (“Because of the deceptive and concealed nature of fraud, the government will rarely be able to prove the entirety of its loss. Thus by establishing a form of ‘liquidated damages,’ this provision [double damages] insures that the government will be made whole.”). See United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 (1943) (“We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it.”).

93. 317 U.S. 537 (1943).

94. Id. at 548.

95. Id.

96. Id. The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

97. Id. at 549.
a specific sum was chosen to make sure that the government would be made completely whole.\(^9\)\(^8\) (citation omitted)

This case has been extensively utilized to support the remedial nature of the False Claims Act.

In 1989, however, the effect of Hess was substantially weakened by the Supreme Court's decision in United States v. Halper.\(^9\)\(^9\) In Halper, the defendant was convicted of 65 counts of submitting false Medicare claims for reimbursement, in violation of the criminal portion of the FCA.\(^1\)\(^0\)\(^0\) Once again, subsequent to the criminal conviction, the Government brought a civil suit based on the same 65 counts.\(^1\)\(^0\)\(^1\) The defendant was found liable for double the amount of the actual damages sustained, which equaled $585, the cost of investigating and prosecuting the case, and $130,000 in forfeiture.\(^1\)\(^0\)\(^2\) The district court found that the forfeiture bore "no rational relation" to the Government's actual loss, and held that it was punishment in violation of the Double Jeopardy Clause.\(^1\)\(^0\)\(^3\) Upon direct appeal, the Supreme Court affirmed the district court.\(^1\)\(^0\)\(^4\)

In finding that the particular award was punishment, the Court noted that civil penalties may rise to the level of punishment.\(^1\)\(^0\)\(^5\) In order to determine if a sanction is punitive in nature, the Court placed little importance on the civil label of the proceeding, and focused on the "purposes actually served by the sanction."\(^1\)\(^0\)\(^6\) Accordingly, the Court held that where a civil sanction is "so extreme and so divorced from the Government's damages and expenses,"\(^1\)\(^0\)\(^7\) such that the sanction can only be said to serve the purposes of retribution and deterrence, it is punishment.\(^1\)\(^0\)\(^8\)

---

98. Id. at 551-52.
100. Id.
101. Id. at 438.
102. Id. at 439.
103. Id. at 438-39 (1989).
104. Id. at 452.
105. Id. at 441-42.
106. Id. at 447. The Court stated that "in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." Id. at 447, n.7. See also Hicks v. Feiock, 485 U.S. 624, 631 (1988).
107. Halper, 490 U.S. at 442.
108. Id. at 448. The Court explained:

We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but
Although *Halper* stands for the proposition that the civil penalty and forfeiture provisions in the FCA can be punitive in nature, the Court’s holding was limited to the context of double jeopardy. First, the Court declined to deviate from the general notion that double damages plus a fixed penalty generally serve a remedial purpose. Rather, the Court simply held that in “rare cases” the sanction may exceed the remedial goal. Hence, the role of the court is to evaluate each case in order to determine whether the award is commensurate with the actual loss. Further, the Court stated that its decision did not preclude the Government from seeking the full civil penalty in a civil case, so long as there was no prior criminal proceeding. Therefore, while the rationale in *Halper* supports the proposition that the sanctions in the False Claims Act should be viewed as punitive, the effect of the decision is severely eroded by its express limitations.

### B. The False Claims Act Is Punitive

The current defense of the False Claims Act as remedial is consistent with the approach of viewing money sanctions as “rough compensation.”

The approach shown by the Supreme Court evidences a desire to utilize this rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term. (citations omitted)

109. *Id.* at 446 (“the Government is entitled to rough remedial justice, that is it may demand compensation according to somewhat imperfect formulas, such as reasonable liquidated damages or a fixed sum plus double damages . . .”).

110. *Id.* at 449 (“What we announce now is a rule for the rare case, the case such as the one before us, where a fixed penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.”).

111. *Id.* at 450. The remedy available to the district judge is to reduce the amount of the award, in order to bring in line with the damage suffered.

112. *Id.*. The Court also noted that the Government could seek both the civil remedy and the criminal penalty in a single proceeding without offending the double jeopardy clause. *Id.*

113. Mann, *supra* note 8, at 1842 (“Halper goes only part of the way toward accepting the punitive function of more-than-compensatory money sanctions.”).

114. *Id.* at 1823. Professor Mann notes:

The third approach, which I call the compensatory approach, views money sanctions as “rough compensation” rather than punishment. The money sanction is understood as a means to repay the government for the cost of enforcing the law. The idea that the sanction is technically more than compensatory does not prevent courts from finding an essentially compensatory arrangement. To explain how multiple damage sanctions often found in penal statutes can be considered compensatory, the courts have sometimes used the term “liquidated damages,” referring to the parallel contract remedy that retains the idea of compensation in a regime of more-than-simple damages.

*Id.*
type of rhetoric to sustain civil penalties which it deems appropriate, without
being required to provide procedural protection in light of their obvious pu-
nitive nature.\textsuperscript{115} The penalty provisions of the False Claims Act, however, are
clearly punitive, and go well beyond serving a remedial function.\textsuperscript{116}

The Supreme Court has clearly stated that deterrence and retribution are
not appropriate functions in a non-punitive setting.\textsuperscript{117} The forfeiture provision
in the Act, however, serves nothing but a deterrent and retributive function.
At no time during the hearings or debates on the 1986 Amendments was it
suggested that the current damage structure failed to fully compensate the
Government in suits which it brought. The apparent question was whether
the current structure provided a substantial enough deterrent.\textsuperscript{118} Although
proponents of the Act continually decry the penal nature of the Act, they are
quick to point out its deterrent and retributive qualities.\textsuperscript{119} According to one
Congressman, "the dual purpose of any such law should always be to deter as
well as punish fraudulent conduct."\textsuperscript{120}

\textsuperscript{115} Id. at 1820-30. Professor Mann stated further:

\textit{Mitchell} and \textit{Marcus} became part of a broader dynamic that transformed the term
"remedial" into a catch-all label for sanctions that courts did not want to define as
punitive in the criminal sense, but that were clearly not simple compensatory damages.
By referring to money sanctions as remedial, the Court could approve the use of
civil procedures to impose sanctions designed to punish wrongdoers and could send
a deterrent message to the community. By finding civil implications in a statute that
certainly had punitive meaning for legislators, administrators, and the public, the
Court made deft use of a legal fiction to facilitate and legitimize the increased use of
punitive sanctions.

\textit{Id.} at 1829-30.

\textsuperscript{116} See id. at 1798.

\textsuperscript{117} United States v. Halper, 490 U.S. 433, 448 (1989); Bell v. Wolfish, 441 U.S. 520,

\textsuperscript{118} 1986 FCA Hearing, supra note 4, at 104 (statement of Rep. Fish) ("I defer to the
expertise of the Members of this Subcommittee as to whether or not the double damage
remedy contained in the current law provides a sufficient deterrent."). The Department of
Justice was highly cautious about raising the damages to treble damages plus a $10,000 per
claim forfeiture. Assistant Attorney General Willard stated:

However, this crucial principle — that a civil False Claims Act prosecution is
remedial and not punitive — may be jeopardized by proposals to increase greatly
the penalties which may be recovered. We have found that where judges perceive
the penalties which may be assessed under the Act to be grossly disproportionate to
the wrongdoing, they will rule against the government outright or subtly engraft
criminal standards and procedural hurdles onto the civil portion of the Act.
Consequently, we are very concerned about the proposals contained in some bills,
notably H.R. 3317 and H.R. 3753, as well as S. 1562, to move to treble damages and
a $10,000 forfeiture.

\textit{Id.} at 128-29 (statement of Richard K. Willard).

\textsuperscript{119} See, e.g., 132 CONG. REC. at H6480 (statement of Rep. Fish).

\textsuperscript{120} Id.
Further, it is difficult to see how the treble damages provision, plus the provision for payment of investigative and litigation costs, is not sufficient to allow for full recovery. One commentator explained:

While the United States should recover fully for any damage it may suffer because of a false claim, the treble damages provision of the FCA are intended to ensure such recovery. The penalty provisions are intended to deter fraudulent conduct, especially when actual damages would be nominal. Where actual damages are not nominal, the trebling of those damages deters as well as compensates, with the result that the deterrence is multiplied without any consideration of the impact of such multiplied deterrence.

That the civil penalties and forfeitures substantially exceed the actual loss suffered by the Government is shown by the Department of Justice’s settlement strategy with the 4,600 hospitals recently notified of potential liability. The settlements proposed by the DOJ calculate out to approximately one times the amount overpaid by the Government. These settlement proposals, which are far below the potential award in a court action, indicate that the Government does not need treble damages, let alone a $5,000 to $10,000 forfeiture per false claim, to fully compensate it. In this light, it becomes apparent that the forfeiture provisions of the FCA serve little more than a deterrent or retributive function.

122. The Justice Department did not believe that treble damages plus the forfeiture were needed for compensation, and stated that “double damages plus a $5,000-per-claim penalty is more appropriate and consistent with the fundamental purpose of the statute.” 1986 FCA Hearing, supra note 4, at 129 (statement of Richard K. Willard, Assistant Attorney General, Civil Division).
125. Id. The average overpayments for each hospital total in the tens of thousands. The liability faced by each hospital typically is in the millions of dollars. Burda, supra note 36, at 3. For example, one hospital is being allowed to settle its case for $45,000, although its potential liability could be $3.4 million. Civil Prosecution for Medicare, supra note 124, at 25. The rationale presented by the Government for the low settlement figures is that it is “more interested in correcting future problems than penalizing past behavior.” Hospitals which settle will be required to establish self audit procedures. Burda, supra note 36, at 3. If this explanation is accurate, it clearly shows that the use of the forfeiture and treble damages provisions of the FCA are primarily used for “penalizing past behavior,” and would thus be punitive.
126. Burda, supra note 36, at 3 (due to the forfeiture provisions the potential liability greatly exceeds the amount of actual loss).
127. The discrepancy between the actual loss and the potential loss also serves to force defendants to settle, so that they can avoid a potentially devastating judgment. Id.
While the Supreme Court has upheld similar treble damages-plus-fixed-penalty provisions,\textsuperscript{128} these cases appear firmly rooted in the disarming rhetoric of "rough justice," and bear little relation to the actual effect and purpose of the sanction. The Court in \textit{Halper} clearly noted that when a civil sanction "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either a retributive or deterrent purposes," it is punitive.\textsuperscript{129} When the actual purpose and effect of the FCA is examined,\textsuperscript{130} the forfeiture provisions of the Act are clearly aimed solely at deterrence and retribution, and are not necessary to make the Government whole.

The situation faced in \textit{Halper}, which the Court considered punitive, is not as rare as the Court believes.\textsuperscript{131} One Assistant United States Attorney illustrated how the Act functions in the area of health care.\textsuperscript{132} He described a case in which a doctor submitted 3000 false claims, causing the Government $130,000 in actual damages.\textsuperscript{133} When the mandatory forfeiture was included, the doctor was held liable for $19 million, or roughly 150 times the amount of the actual damage.\textsuperscript{134} In response to this case, the Assistant U.S. Attorney stated, "It's a very draconian statute; we prosecutors love it."\textsuperscript{135} This type of result is not limited to health care, but also occurs in the case of contractors.\textsuperscript{136} As one example of the numerous "horror stories," Rand L. Allen, who represented the U.S. Chamber of Commerce, told of a construction contractor who violated Department of Labor regulations in running an employee training program.\textsuperscript{137} The contractor was held liable for a multimillion dollar judgment, even though the actual loss to the Government was only $14,000.\textsuperscript{138}

These types of situations occur because it is possible to be held liable for multiple false claims. The Supreme Court has held that liability can be placed


\textsuperscript{130} Id. at 447, n. 7.

\textsuperscript{131} Id. at 449.

\textsuperscript{132} McCormick, \textit{supra} note 5, at 3. The Assistant U.S. Attorney was James Sheehan, chief of the civil division for the U.S. Attorney's Office in Philadelphia, Pa.

\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} Id. Further examples of the potential for outrageously excessive awards in the health care area can be found in the DOJ's current efforts against hospitals. One hospital under investigation caused a loss of $45,000, but faced a total liability of $3.4 million. Another hospital would face a forfeiture on 898 individual claims. \textit{Civil Prosecution for Medicare}, \textit{supra} note 124, at 25.

\textsuperscript{136} 1993 \textit{FCA Hearing}, \textit{supra} note 29, at 58 (statement of Rand L. Allen, U.S. Chamber of Commerce).

\textsuperscript{137} Id.

\textsuperscript{138} Id.
on each act which leads to a false claim. As one commentator noted, "the government may use the FCA and obtain windfall damages, especially since its litigation costs are paid by the unsuccessful defendant." Because of the way "claims" are defined, the penalty assessed for each claim bears no relation to the loss caused by each claim, and hence bears no rational relation to the objective of compensation. The number of false claims can easily rise to levels where the forfeiture will overwhelmingly exceed the amount necessary to compensate the Government.

In this light it becomes quite apparent that the forfeiture provisions of the False Claims Act are punitive in nature, despite the contrary findings of the courts. The forfeitures are not necessary for compensatory purposes, and only serve as deterrence and retribution. This fact is clearly evidenced by the numerous cases where the forfeiture awards have been in extreme disproportion to the actual damages sustained.

V. DUE PROCESS REQUIRES A BURDEN OF PROOF OF CLEAR AND CONVINCING EVIDENCE

The Due Process Clause of the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law." The Due Process Clause has been held to have both a substantive

140. Oparil, supra note 15, at 557.
141. 1993 FCA Hearing, supra note 29, at 58 (statement of Rand L. Allen, U.S. Chamber of Commerce) ("For example, when the basis of an FCA suit is an error in an overhead account, each invoice submitted by a contractor under every open contract is can be classified as a 'false claim,' which the result is that potentially hundreds of contracts, thousands of claims and millions of dollars may be in issue even though actual damages are far less.").
142. See, e.g., United States ex rel. Dean v. Wisconsin, 729 F.2d 1100 (7th Cir. 1984) (900 false claims).
143. See supra notes 132-38 and accompanying text.
144. U.S. CONST. amend. V. The Fourteenth Amendment similarly provides that no State shall "deprive any person of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV, c.1.
145. See Albright v. Oliver, 114 S. Ct. 807, 812 (1994) ("[T]he words 'by the law of the land' from the Magna Carta were 'intended to secure the individual from the arbitrary exercise of the powers of government.'" (citation omitted)); Reno v. Flores, 113 S. Ct. 1439 (1993) (determining the constitutionality of an Immigration and Naturalization Service regulation which allows deportation of juvenile illegal aliens); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2804 (1992) ("[T]he guaranties of due process, though having their roots in Magna Carta's 'per legem terrae' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" (quoting Poe v. Ullman, 367 U.S. 497, 541 (1961)(Harlan J., dissenting)).
and a procedural component. Substantive due process precludes the govern-
ment from infringing upon certain "fundamental" liberties, regardless of
the process provided, unless there is a compelling state interest and the in-
fringement is narrowly tailored to serve that interest. Its purpose is to "pre-
vent governmental power from being 'used for purposes of oppression.'"

The interests protected by substantive due process have generally been lim-
ited to marriage, family, procreation and the right to bodily integrity. The
Court has been extremely reluctant to extend protection beyond these areas.

Procedural due process, the component of the Due process Clause impli-

(discussing procedural due process implications of clear and convincing evidence standard in
proceedings to remove someone from life support); Daniels v. Williams, 474 U.S. 327, 331
(1986) (determining whether an injury caused by a negligent act constitutes a deprivation);
(holding that procedural due process requires proof beyond a reasonable doubt in criminal
cases).

147. Flores, 113 S. Ct. at 1447 ("Respondents' 'substantive due process' claim relies upon
our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due
process of law' to include a substantive component, which forbids the government to infringe
certain 'fundamental' liberty interests at all, no matter what process is provided, unless the
infringement is narrowly tailored to serve a compelling state interest.").

148. Daniels, 474 U.S. at 331-2 (citing Murray's Lessee v. Hoboken Land & Improvement
Co., 18 How. 272, 277 (1856)).

149. Albright, 114 S. Ct. at 812. Freedom from bodily restraint is at the core of substantive
due process. Justice O'Connor explained in Flores:

"Freedom from bodily restraint" means more than freedom from handcuffs,
straitjackets, or detention cells. A person's core liberty interest is also implicated
when she is confined in a prison, a mental hospital, or some other form of custodial
institution, even if the conditions of confinement are liberal.

Flores, 113 S. Ct. at 1454 (O'Connor, J., concurring).

150. Albright, 114 S. Ct. at 812. The Court has been hesitant to expand protection beyond
these areas because "the guideposts for responsible decisionmaking in this uncharted area are
scarce and open-ended." Id. Justice Harlan, dissenting in Poe, commented:

Due process has not been reduced to any formula; its contents cannot be determined
by reference to any code. The best that can be said is that through the course of this
Court's decisions it has represented the balance which our Nation, built upon
postulates of respect for the liberty of the individual, has struck between that liberty
and the demands of organized society. If the supplying of content to this
Constitutional concept has of necessity been a rational process, it certainly has not
been one where judges have felt free to roam where unguided speculation might
take them. The balance of which I speak is the balance struck by this country,
having regard to what history teaches are the traditions from which it developed as
well as the traditions from which it broke. That tradition is a living thing. A decision
of this Court which radically departs from it could no long survive, while a decision
which builds on what has survived is likely to be sound. No formula could serve as
a substitute, in this area, for judgment and restraint.

cated by the False Claims Act, protects the individual from arbitrary governmental action.\(^{151}\) The purpose behind this aspect of due process is to promote fairness in decisions regarding interests in life, liberty, or property.\(^{152}\) Procedural due process differs substantially from substantive due process in that the actual deprivation does not constitute an abuse of governmental power.\(^{153}\) Justice Stevens, concurring in Daniels v. Williams, explained that “[i]n a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty without due process of law — without adequate procedures.”\(^{154}\) The essential requirement of procedural due process is the right to be heard “at a meaningful time and in a meaningful manner.”\(^{155}\)

Procedural due process analysis seeks to determine whether the government has provided sufficient procedural protections against erroneously or arbitrarily depriving a person of their life, liberty, or property.\(^{156}\) In order to sustain a procedural due process attack, it must be shown that a deprivation of a liberty interest existed, within the meaning of the Fifth Amendment, and that the procedures utilized in that deprivation were not adequate.\(^{157}\) Once a liberty or property interest is found, the test delineated in Mathews v. Eldridge is used to determine the adequacy of the procedures which were utilized.\(^{158}\) In Mathews, the Court held that the specific requirements of the Due Process Clause depend on three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including

\(^{151}\) Mathews, 424 U.S. at 332 (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendment.”); Thibodeaux v. Bordelon, 740 F.2d 329, 336 (5th Cir. 1984).

\(^{152}\) Daniels, 474 U.S. at 331.

\(^{153}\) Id. at 338 (“In such a case [procedural due process], the deprivation may be entirely legitimate — a State may have every right to discharge a teacher or punish a student — but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards.”)

\(^{154}\) Id. at 339.

\(^{155}\) Mathews, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

\(^{156}\) Thibodeaux, 740 F. 2d at 336.

\(^{157}\) See Mathews, 424 U.S. at 332. In order for there to be a valid procedural due process claim, the fundamental fairness of the government procedure must be challenged. Daniels, 474 U.S. at 341 (Stevens, J., concurring) (“Petitioner must show that they contain a defect so serious that we can characterize the procedures as fundamentally unfair, a defect so basic that we are forced to conclude that the deprivation occurred without due process.”).

\(^{158}\) Mathews, 424 U.S. at 335.
the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\footnote{159}

Based on a balancing of these three factors, a determination can be made regarding the procedural sufficiency of a particular practice.\footnote{160}

A. The Liberty or Property Interests Involved

In a civil False Claims Act suit, the defendants have a property interest in the money that may be taken from them, as well as a liberty interest in their continued ability to contract with the government. The Supreme Court has held that the scope of due process protection is meant to very broad.\footnote{161} In Board of Regents v. Roth, the Court explained:

“Liberty” and “property” are broad and majestic terms. They are among the “[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.” For that reason, the Court has fully and finally rejected the wooden distinction between “rights” and “privileges” that once seemed to govern the applicability of procedural due process rights.\footnote{162}

With respect to property interests, the scope of protection extends beyond merely actual ownership of real property, chattels, or money.\footnote{163} Similarly, procedural due process protection of liberty interests reaches beyond those interests protected by substantive due process.\footnote{164}

A defendant in a False Claims Act suit possesses a property interest in the money the government seeks through forfeiture. Courts have consistently held that people retain a property interest in the money they possess.\footnote{165} Fur-

\footnote{159. Id.}
\footnote{160. See id. at 347.}
\footnote{161. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).}
\footnote{162. Id. at 571 (citation omitted).}
\footnote{163. Id. at 571-72.}
\footnote{164. See Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972) ("While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." (sexism in original)).}
\footnote{165. See Roth, 408 U.S. at 572; Sell v. Parratt, 548 F.2d 753, 757 (8th Cir. 1977), cert. denied 434 U.S. 873 (1977) (prisoner has property interest in money confiscated by prison authorities); Contractors Against Unfair Taxation Instituted on New Yorkers, v. City of New York, 423 F.2d 1121 (2nd Cir. 1970), cert. denied, 400 U.S. 966 (1971).}
ther, when the government takes that money, it has effected a deprivation of the individual’s property interest.\(^\text{166}\)

According to one court, “[i]f the state does not have a legitimate claim to a person’s money, but nevertheless, under color of law, demands and receives payment, its conduct amounts to a constitutional deprivation.”\(^\text{167}\)

With respect to the forfeiture provisions of the FCA, the Government does not have a legitimate claim to the defendant’s money.\(^\text{168}\) The treble damages award, along with the payment of costs, compensates the Government for whatever loss it may have sustained.\(^\text{169}\) The imposition of the forfeiture provisions gives the Government an award above that which it is entitled.\(^\text{170}\) If the Government may take money through a statutory penalty that it has no claim to, without affording some procedural protection, the Due Process Clause will have lost much of its meaning. After all, the punitive sanction in this instance is not far removed from a criminal fine, which certainly requires a heightened burden of proof.\(^\text{171}\)

In a False Claims Act action, defendants are deprived of a liberty interest because they suffer an injury to their reputation, plus a potential loss of future employment opportunities due to the stigma of the fraud. At least one court has held that due process protections are demanded when a “person’s

---

\(^\text{166}\) Horn, 1986 WL 8450 at 11. There may be a liberty interest implicated here also. Generally speaking, there is no liberty interest in money. See, e.g., In re Sullivan, 161 B.R. 776, 779 (N.D. Tex. 1993) (“[T]his case . . . is ‘solely about money,’ and does not implicate any individual’s liberty or quasi-liberty interests.”). However, the individual may have a liberty interest in being free from the government demanding money from them. Horn, 1986 WL 8450 at 14 (“First, plaintiffs’ interest here is not only the amounts of money they paid to the government that they do not owe; rather, citizens also have a significant liberty interest in being free from government demands to pay monies they do not owe.”).

\(^\text{167}\) Horn, 1986 WL 8450 at 11.

\(^\text{168}\) The government’s only interest in the forfeited money is retribution and deterrence, and this is not a legitimate claim in the civil context. See supra notes 117-120 and accompanying text.

\(^\text{169}\) See supra notes 121-30 and accompanying text.

\(^\text{170}\) This situation is analogous to that of punitive damages in civil suits, where some courts have held that clear and convincing evidence is required. One court reasoned that because the defendant has already made the plaintiff whole, the system should err on the side of the defendant if additional damages are awarded. Travelers Indem. Co. v. Armstrong, 442 N.E. 2d 349, 362 (Ind. 1982). See supra notes 131-43 and accompanying text.

\(^\text{171}\) In the case of a fine, a person still holds a property interest in that money, which requires due process of law to effect the deprivation. See Contractors Against Unfair Taxation Instituted on New Yorkers, 1994 WL 455553 at 4.
good name, reputation, honor or integrity is at stake because of what the
government is doing to him."172 However, the Supreme Court has limited that
scope to exclude a loss of reputation alone, without a more tangible loss.173
When a cessation of Government dealings with a contractor have been based
on fraud, the courts have unanimously found that a liberty interest was in-
volved.174 The rationale behind these decisions is that once a charge of fraud
is made, a stigma attaches and severely limits that contractor's ability to re-
ceive subsequent government contracts.175

There is a significant possibility that a contractor or health care provider
will lose its ability to contract with the government if a False Claims Suit is

J., dissenting) ("We have repeatedly recognized that an individual suffers the loss of a protected
liberty interest 'where government action has operated to bestow a badge of disloyalty or
infamy, with an attendant foreclosure from other employment opportunity.'" (citation
omitted)).

Dist. Bd. of Ed., No. 94-7025, 1994 WL 694122 at 5 (2d Cir. Dec. 8, 1994); Hadley v. Moon,
No. 94-1212, 1994 WL 582907 at 1 (10th Cir. Oct. 21, 1994); LaSociete Generale Immobiliere
at 10 (8th Cir. May 11, 1994). The District of Columbia Circuit has held that a procedural
due process claim, when based upon a loss of reputation, must meet two requirements:

Paul and Mosrie require that a plaintiff demonstrate that the government's defamation
resulted in harm to some interest beyond reputation. Loss of present or future
government employment, however, satisfies that required additional interest. Roth
and other recent liberty interest cases in this circuit indicate a second inquiry. A
government discharge does not by itself constitute an injury to an employee's liberty
interest in reputation; a plaintiff must allege that the government has actually
stigmatized his or her reputation by, for example, charging the employee with
dishonesty, and that the stigma has hampered future employment prospects.

Department of Energy v. United States Dept. of Justice, 753 F.2d 1092, 1111 (D.C. Cir.
1985).

v. United States, 782 F.2d 1074 (1st Cir. 1986); Transco Sec., Inc. v. Freeman, 639 F.2d 318
(6th Cir.), cert. denied, 454 U.S. 820 (1981); Pro-Mark, Inc. v. Kemp, 781 F. Supp. 1172,
1175 (S.D. Miss. 1991), aff'd without op., 952 F.2d 401 (5th Cir. 1992). A person does not
have a property interest in continued participation in a government program or contract. 701
Pharmacy Corp. v. Perales, 930 F.2d 163, 170 (2d Cir. 1991), cert. denied, 502 U.S. 815
(1991). An interest only arises when discharge, or denial of a future contract, is the result of
an allegation of fraud or dishonesty. Transco Sec., Inc., 639 F.2d at 321.

175. See Corbitt v. Anderson, 778 F.2d 1471, 1475 (10th Cir 1985) ("Anderson not only
defamed Corbitt, but created a stigma that 'foreclosed his freedom to take advantage of other
employment opportunities.'); Old Dominion Dairy Prods. v. Secretary of Defense, 631 F.2d
953, 955-56 (D.C. Cir. 1980) (liberty interest of government contractor implicated by
government's refusal to award contract because government action virtually barred contractor
from all further government contracts and because government's reason for refusing to award
contract was based on dishonesty and lack of integrity); Pro-Mark, Inc., 781 F. Supp. at 1175
(Liberty interest implicated if suspension for fraud or dishonesty creates stigma which
forecloses ability to obtain other contracts).
Particularly in the health care field, the most substantial threat of any investigation is the possibility of exclusion — “the death penalty for health care providers.” This threat is increasingly apparent in light of the dramatic rise in the assessment of administrative civil penalties and exclusion in the health care area. Because the “gravamen” of the False

176. Boardman, supra note 8, at 1 (“The reasons [for civil actions] are a lower burden of proof and a higher-probability of success, because of the massive stick the [f]eds wield: exclusion from Medicare and Medicaid programs, essentially the death penalty four [SIC] health care providers.”). In the healthcare area, the loss of the right to participate in Medicare or Medicaid is called exclusion. In defense procurement, the term used is debarment.

177. Id. Exclusion may be either mandatory or permissive. Mandatory exclusion occurs when an individual or entity is convicted of “program-related crimes,” or for conviction of a crime related to abuse or neglect of a patient. 42 U.S.C. § 1320a-7(a) (1988 & Supp. 1994). Permissive exclusion can happen for many reasons, one being claims for excessive charges or unnecessary services. 42 U.S.C. § 1320a-7(b) (1988 & Supp. 1994). The statute provides, in relevant part:

(6) Claims for excessive charges or unnecessary services and failure of certain organizations to furnish medically necessary services. Any individual or entity that the Secretary determines —

(A) has submitted or caused to be submitted bills or requests for payment (where such bills or requests are based on charges or cost) under subchapter XVIII of this chapter or a State health care program containing charges (or, in applicable cases, requests for payment of costs) for items or services furnished substantially in excess of such individual’s or entity’s usual charges (or, in applicable cases, substantially in excess of such individual’s or entity’s costs) for such items or services, unless the Secretary finds there is good cause for such bills or requests containing such charges or costs;

(B) has furnished or caused to be furnished items or services to patients (whether or not eligible for benefits under subchapter XVIII of this chapter or under a State health care program) substantially in excess of the needs of such patients or of a quality which fails to meet professionally recognized standards of health care.

The statute is further clarified by the Department of Health and Human Services regulations concerning exclusion from Medicare and Medicaid. 45 C.F.R. § 101.105, through reference to 45 C.F.R. § 101.102(a)(1), provides that a person may be suspended from participation in Medicare or Medicaid if the Department determines that a person or entity has presented, or caused to be presented, a claim for an item or service “[t]hat the person knew or had reason to know was not provided as claimed.” For an example of similar regulations concerning defense procurement contracts, see Federal Acquisition Regulations System, 48 FED. REG. 42,103, 42,149 (Sept. 19, 1983) (“§ 9.406-2 Causes for debarment. The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following: (a) Conviction of or civil judgment for — (1) Commission of fraud or a criminal offense in connection with — (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract. . . .”).

178. Prepared Testimony of June Gibbs Brown, Inspector General Department of Health and Human Services, Oversight Hearing Before the Senate Appropriations Committee, Subcommittee on Labor, HHS, Education and Related Agencies on Oxygen Systems, FED. NEWS SERV. (Nov. 2, 1994), available in, LEXIS, News Library, Current file. The number of sanctions has risen from 230 in Fiscal Year 1983 to 1,265 in Fiscal Year 1994. The cases mostly investigated were false claims cases. Id. From October 1, 1993 to March 31, 1994, the Inspector General imposed 625 sanctions against health care providers. Report Outlines
Claims Act is fraud, any exclusion or debarment resulting from a False Claims Act suit would constitute a loss of government work based on a charge of fraud or dishonesty. Therefore, a liberty interest exists for FCA defendants.

B. The Process Due to Protect Liberty and Property

1. The Private Interests

The first facet of the Mathews test is to determine the private interests involved. The private interests involved on the defendants' side in a civil False Claims Act suit are twofold. The first interest is the avoidance of the stigma of dishonesty from a fraud allegation. Fraud allegations are taken very seriously by the courts. People are presumed to be honest until proven otherwise. Traditionally courts have required clear and convincing evidence to sustain a charge of fraud, because as one court said, "[f]raud is in the nature of a crime." The risk to reputation from a fraud charge is especially severe among professionals, such as doctors and contractors, whose good name is crucial in their business. In the case of a contractor or health care provider, the allegation of fraud could seriously damage its business opportunities. Thus, the interest in avoiding the stigma of dishonesty is very substantial.


187. The public perception of a company involved in a False Claims Act case can be very damaging — even if the company is found to have acted legally. According to Leroy J. Haugh, vice president for procurement and finance of the Aerospace Industries Association, the negative publicity of a suit "often overshadows efforts over the last seven or eight years
The second interest is protection of the property which may be taken. Property interests have long been considered of the utmost importance by our society.\(^{188}\) As one court explained:

> From its inception, the Constitution recognized the importance of private property as a concomitant to liberty. The Fifth Amendment embodies the Lockean belief that liberty and the right to possess property are an interwoven whole; neither life, liberty, nor property can be arbitrarily or capriciously denied us by government.\(^{189}\)

Property interests and liberty interests are interdependent, and a loss of property rights would substantially weaken many other rights.\(^{190}\) When the property at issue is money, that interdependence is even more evident,\(^{191}\) because “money is one of the greatest instruments of freedom ever invented,” and “opens an astounding range of choice.”\(^{192}\)

The private interests at stake in a FCA suit are substantial. Defendants risk their reputation, their money, and possibly their future in the business they have chosen.\(^{193}\) These interests have long been protected, and should not be obscured by the nature of the charge, or the penalty sought.\(^{194}\)

2. The Sufficiency of Existing Procedures

The next factor under Mathews is the sufficiency of the current procedures, and the availability of alternative or substitute procedures.\(^{195}\) The specific question here is what standard of proof is required to insure protec-

---


\(^{189}\) $12,390.00, 956 F.2d at 810.

\(^{190}\) See Lynch, 405 U.S. at 552 (“The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a ‘personal’ right, whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.”); Chicago, Burlington & Quincy R.R., 166 U.S. at 236 (“Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.”).


\(^{192}\) Id. (quoting F. Hayek, THE ROAD TO SERFDOM 89-90 (1976 ed.)).

\(^{193}\) See supra notes 176-78 and accompanying text.

\(^{194}\) See Hargleroad, supra note 191, at 130.

tion of an FCA defendant. The standard of proof is intended to reflect society's view of the importance of a particular adjudication, and the tolerable level of error in that adjudication. The Supreme Court in Addington v. Texas explained:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

In a case involving individual rights, the standard of proof reflects the value that society places on the particular liberty or property interest. The minimum standard of proof permissible is generally a question which must be decided by the courts.

Standards of proof exist on a continuum from "preponderance of the evidence" to "beyond a reasonable doubt." The most stringent standard, "beyond a reasonable doubt," has been reserved almost exclusively for criminal trials and quasi-criminal proceedings. This standard is utilized to protect the defendant from the immense stigma and deprivation of liberty

196. Santosky v. Kramer, 455 U.S. 745, 755 (1982) ("[T]he minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants."); Addington v. Texas, 441 U.S. 418, 423 (1979); United States v. Schell, 692 F.2d 672, 676 (10th Cir. 1982).

197. Addington, 441 U.S. at 423 (citation omitted).

198. Id. at 425.

199. Santosky, 455 U.S. at 755-56 ("Moreover, the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left with the judiciary to resolve'" (citation omitted)). Typically, the courts will defer to the legislature when it has set the standard of proof. Steadman v. SEC, 450 U.S. 91, 95 (1981). However, the power of Congress to set the standard of proof is limited by the Constitution. Id. See also Vance v. Terrazas, 444 U.S. 252, 266 (1980).


201. The level of probability required by this standard, if put into numerical terms, is roughly 95% probability. Fatico, 458 F. Supp. at 406.

associated with a criminal conviction, as well as to protect the justice system from a loss of credibility.\textsuperscript{203}

The least stringent standard of proof is “preponderance of the evidence”. This burden of proof is the typical burden in civil cases.\textsuperscript{204} The preponderance-of-the-evidence standard is used in civil proceedings, particularly private suits for money, because society has little interest in the outcome, and the litigants share equally the risk of an erroneous decision.\textsuperscript{205} Justice Blackmun, writing for the Court in \textit{Santosky v. Kramer}, noted:

Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a “fair preponderance of the evidence” standard indicates both society’s “minimal concern with the outcome,” and a conclusion that the litigants should “share the risk of error in roughly equal fashion.”\textsuperscript{206}

Under this standard of proof, the plaintiff must prove that a given fact is “more probable than its nonexistence.”\textsuperscript{207} Currently, a plaintiff in a False Claims Act

\begin{footnotes}
\item[203] Justice Brennan, writing for the Court in \textit{In re Winship}, provided the rationale for demanding this burden of proof in criminal cases:

The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in \textit{Speiser v. Randall}: “There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden of ... persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the factfinder of his guilt.” To this end, the reasonable-doubt standard is indispensable, for it “impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue. Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. (citations omitted)

\textit{Winship}, 397 U.S. at 363-64. \textit{See also Santosky}, 455 U.S. at 755; \textit{Fatico}, 458 F. Supp. at 405-06.


\textit{205. Addington}, 441 U.S. at 423; \textit{Winship}, 397 U.S. at 371 (1970) (Harlan, J., concurring) (“In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor.”).

\textit{206. 455 U.S. at 755.}

\textit{207. Winship}, 397 U.S. at 371 (Harlan, J., concurring); \textit{Fatico}, 458 F. Supp. at 403
\end{footnotes}
case need only prove his case by a preponderance of the evidence.\textsuperscript{208}

The intermediate standard of proof is "clear and convincing evidence," which is stricter than preponderance of the evidence.\textsuperscript{209} Clear and convincing evidence can be defined as evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."\textsuperscript{210} Courts have tended to go beyond mere "preponderance of the evidence" where there has been a serious risk of a deprivation of liberty or of an attachment of a stigma.\textsuperscript{211} In particular, the clear and convincing standard of proof has been utilized in common law fraud cases, as a protection against damaging the defendant's reputation.\textsuperscript{212} Extremely severe civil sanctions, however, have generally not given rise to requiring clear and convincing evidence.\textsuperscript{213}

In a civil False Claims Act suit, the preponderance of the evidence standard is not sufficient to protect the defendant's private interest. First, by characterizing the sanctions imposed by the False Claims Act as punitive, it becomes necessary to develop procedural protections to safeguard the rights of the defendants.\textsuperscript{214} As Professor Mann explained:

\textsuperscript{208} 31 U.S.C. § 3731(c) (1988).
\textsuperscript{209} Santosky, 455 U.S. at 756; Fatico, 458 F. Supp. at 404-05.
\textsuperscript{210} Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 286 n. 11 (1990).
\textsuperscript{211} Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983); Santosky v. Kramer, 455 U.S. at 756 ("[T]he Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'"); Woodby v. Immigration Service, 385 U.S. 276, 283-86 (1966) (denaturalization, expatriation and deportation).
\textsuperscript{213} Herman & MacLean, 459 U.S. at 389-90 (referring to United States v. Regan, 232 U.S. 37, 48-49 (1914)). It appears, however, that the Court only chose between preponderance of the evidence and beyond a reasonable doubt, but did not consider clear and convincing evidence. Heartland Fed. S & L v. Briscoe Enter., 994 F.2d 1160, 1164-65 (5th Cir. 1993), cert. denied, 114 S. Ct. 550 (1993). Further, clear and convincing evidence has been required by some courts in the case of punitive damages, which is very similar to the forfeiture provision of the FCA. See, e. g., Travelers Indem Co. v. Armstrong, 442 N.E.2d 349, 362-63 (Ind. 1982).
\textsuperscript{214} Mann, Punitive Civil Sanctions, supra note 8, at 1839-40. Professor Mann commented:
This proposition is based on two core norms of American constitutional due process: law: (1) the more severe the sanction, the more the procedure must protect against the sanctioning of the innocent, and (2) the more it must protect the accused's dignity and privacy. The logical and normative implications of these ideas are that the criminal sanction should be contingent on the use of the most stringent procedural rules and that punitive civil sanctions do not demand equally strict procedures. As a corollary, procedural rules for punitive civil sanctions should be more stringent than procedural rules for nonpunitive sanctions.\footnote{215}

As the penalties have risen under the FCA, it has become increasingly important to raise the burden of proof required to more than a mere preponderance of the evidence.\footnote{216} Second, the standard was chosen for the purpose of making it easier to bring suits against government contractors, and to actually encourage these suits.\footnote{217} If society is to presume the honesty of individuals, it seems incongruous that the courts should sanction a procedure intended to invite private citizens to question the integrity of contractors and health care providers in open court.\footnote{218}

Further, the forfeiture that FCA defendants are required to make is quasi-criminal in nature, and clearly requires a greater degree of certainty in imposing such a sanction.\footnote{219} One Supreme Court Justice explained, in applying the Fourth and Fifth Amendments to these proceedings, that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offense committed by him, though they may be civil in form, are in their nature criminal."\footnote{220} When the proceeding becomes essentially criminal in

\begin{itemize}
  \item But labeling more-than-compensatory money sanctions punitive rather than deterrent would require the increased use of procedural protections. By calling the sanctions deterrent, compensatory, or simply debt collection devices, the Court has avoided developing procedural protections for settings in which punitive sanctions were imposed. \ldots Abandoning the conventional paradigms would require the development of middleground procedure, specifically designed to respond to the punitiveness of middleground sanctions.

\footnote{215} Id. at 1870.

\footnote{216} 1986 FCA Hearing, supra note 4, at 251 (statement of Frank H. Menaker, Jr., Aerospace Industries Association of America).

\footnote{217} See supra notes 19-23 and accompanying text.

\footnote{218} One justification for the clear and convincing evidence standard has been to use it in actions which should be disfavored on policy grounds. Pinizzotto v. Parsons Brinkerhoff Quade & Douglas, 697 F. Supp. 886, 887 (E.D. Pa. 1988).

\footnote{219} Mann, Punitive Civil Sanctions, supra note 8, at 1871 ("As the availability of civil monetary sanction increases, so does the possibility that the application of such a sanction will deeply affect the life of a person or corporation. American constitutional law's vision of due process strongly suggests the need for an independent mix of procedural rules for middleground jurisprudence.").

\footnote{220} Justice Bradley, cited in United States v. Shapleigh, 54 F. 126, 132 (8th Cir. 1893).
nature, a standard of proof closer to the criminal standard is demanded. 221

Finally, the risk of error is high in a FCA suit. The defendants stand to lose a tremendous amount of money, disproportionate to the actual harm they caused and potentially their ability to participate in government programs. 222 This is particularly true in the health care field, where the nature of the business creates several claims for small amounts. 223 Also, both parties involved are not private, but rather the Government is prosecuting the case. When the Government is a party to an action, there is an increased risk of error due to the disparity in resources and options available to the Government vis a vis the defendant. 224

The alternative procedure would be to require clear and convincing evidence in order to impose the forfeiture provisions of the FCA. This standard of proof better protects the liberty and property interests of the FCA defendant. First, clear and convincing evidence will reduce the probability of an erroneous decision. 225 Second, the standard will place the risk appropriately on the Government. The preponderance of the evidence standard assumes that both parties share equally in the risk. 226 However, when the Government seeks forfeiture under the FCA, the risk is disproportionately put on the defendant. 227 The Government has already been compensated for its loss through the treble damages provision; 228 the defendant, on the other hand, stands to lose far more than she allegedly took. 229 A heightened standard of proof will lessen the risk that an erroneous decision will be made against the defendant. 230

Finally, the standard would still allow the Government to advance its objectives of retribution and deterrence. Those who commit fraud against the government are deserving of severe sanctions; and the intermediate burden of

---

221. See id. at 134.
222. See supra notes 131-43 and 176-78 and accompanying text.
225. *Id.* at 764-65 ("'Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate' terminations will be ordered.").
226. See supra note 205 and accompanying text.
227. See supra notes 121-27 and accompanying text.
228. *Id.*
229. See supra notes 131-43 and accompanying text.
230. The effect of increasing the burden of proof is to comparatively reduce risk to one party. As the burden of proof increases, the risk of an erroneous decision for the plaintiff will decrease. *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring).
proof simply assures that the certainty of liability matches the severity of the sanction. 231

3. The Government's Interests

The final factor to be considered under Mathews is the Government's interest in the current procedures. 232 The Government, as well as the public, has an interest in stopping fraudulent practices committed by government contractors. 233 Further, the Government has an interest in recouping its losses. 234 Furthermore, cases would need to be investigated in greater depth, and therefore at greater expense, in order to meet the heightened burden of proof.

These interests, however, would not be compromised by raising the burden of proof with respect to the forfeiture provisions only. The treble damages provision would permit the Government to recoup its losses, and thus fulfill the compensatory objectives of the Act. 235 The increase in investigatory costs is irrelevant because losing defendants are required to pay such cost under the terms of the statute. 236 Finally, the FCA will still serve as a deterrent, because the forfeiture provision will still be used. Therefore, the interests of the Government and the public in the lower standard of proof would not be compromised by requiring FCA cases to be proven by clear and convincing evidence before forfeiture is ordered.

VI. CONCLUSION

Fraud against the United States government has been a target of public outcry ever since the media found out about the $300 toilet seat. 237 The False Claims Act has been the tool used by the government to fight such fraud. 238 In

233. See supra note 4.
235. See supra notes 111-114 and accompanying text.
237. See supra notes 7-10 and accompanying text.
order to make the Act a more useful tool, Congress amended the Act in 1986 to, among other things, raise the amount that the Government could recover and make it easier for the Government to win in court. In strengthening the False Claims Act, Congress appears to have made a conscious choice to put individual liberty behind fraud prevention. While stopping fraud is an indisputably worthwhile goal, it is not so worthwhile as to permit the enactment of an overly severe punishment without sufficient procedural safeguards.

In order to strike a balance between the defendant’s rights and the Government’s interests, the burden of proof should be raised to clear and convincing evidence. The sanctions involved under the FCA are not simply compensatory, but have a clear punitive aspect. In the case of this type of punitive civil sanction, the Due Process Clause demands a greater degree of protection than that provided by setting the burden of proof at merely a preponderance of the evidence. Although the Supreme Court has found preponderance of the evidence sufficient in other fraud contexts, the particular circumstances demanded greater protection here.

FRANK LA SALLE

239. See supra notes 15-26 and accompanying text.