Whistleblower Defense Alert: Sixth Circuit Reaffirms Fair Market Value As Proper Measure of Damages, Vacates FCA Award of $657 Million to the Government

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Last month, the Sixth Circuit reaffirmed the fair market value (FMV) standard as the primary measure of damages in False Claims Act (FCA) cases—and demonstrated the teeth of that requirement when evidence (including expert testimony) is not presented to support an FMV determination. *United States v. United Technologies Corp.*, 2015 U.S. App. LEXIS 5476 (6th Cir. April 6, 2015), represented the culmination of a decades-long dispute between the government and United Technologies' Pratt & Whitney unit over pricing for engines supplied to the Air Force for use in its F-15 and F-16 aircraft.

In the early 1980s, the Air Force sought to encourage competition in the jet engine field, and invited GE Aircraft to enter into the competition to supply engines for the F-15 and F-16 (for which Pratt & Whitney had been the longtime supplier). In response to this competition, Pratt & Whitney misstated the projected costs in its 1983 bid—a misstatement that was eventually uncovered by the Air Force. (*Id*. at **4-5.) After splitting the contract award between GE Aircraft and Pratt & Whitney, the Air Force went back to both suppliers in subsequent years seeking improved prices in exchange for the hope of selling more engines. (*Id*. at *5.) As a result of this annual competition, the Air Force certified that both Pratt & Whitney's and GE Aircraft's prices were "fair and reasonable" as the result of a market test between competitors. (*Id*.)

But the Air Force eventually returned to Pratt & Whitney's initial projected costs, and in 1998, the government filed an administrative action before the Armed Services Board of Contract Appeals under the Truth in Negotiations Act. There, the board rejected the government's arguments, finding that the Air Force had not been damaged by the misstatement, as it relied on the competitive process in making awards and exercising contract options. (*Id*. at **7-8.)

The government also brought suit under the FCA, and the Southern District of Ohio found that the Act had, in fact, been violated. The court awarded the government $7 million in statutory penalties. (*Id*. at *8.) The government also sought damages under the FCA, offering the testimony of the Department of Justice auditor who uncovered the fraud. (*Id*. at * 9.) The district court rejected the government's claims for additional damages, reasoning that the false statements had not caused any damages to the government. (*Id*.)

On appeal, the Sixth Circuit affirmed the finding of FCA liability, but vacated the district court's finding of no damages. (*Id*. at *12.) In so doing, the appellate court questioned whether the Board of Contract Appeals' determination that the prices were found fair and reasonable by the Air Force through competition precluded additional damages in the FCA case. (*Id*. at **12-13.) The Sixth Circuit sent the matter back to the district court, focusing on three potential issues—including the concern that instead of using fair market value as the benchmark in its damages analysis, the district court had used original contract prices. (*Id*. at *12.) Instead, the Sixth Circuit "asked the district court on remand to recalculate damages based on what the government paid above 'what it should have paid for what it received' in terms of 'fair market value.'" (*Id*.)

On remand, the district court awarded the government $657 million in damages—a number that the Sixth Circuit vacated in its latest decision. The district court relied on the government's auditor for price estimates as to the value of Pratt & Whitney's engines—but the auditor (not trained as a pricing expert) refused to consider the role that the competition between Pratt & Whitney and GE Aircraft played in determining whether the prices were fair and reasonable. (*Id*. at **26-27.) Indeed, the government's expert did not consider whether the competition and resulting prices resulted in no damages to the government. (*Id*.) In short, the government's expert was not offering a fair market value damages analysis.

On the second appeal, the Sixth Circuit noted that its previous opinion simply reaffirmed basic principles of FCA damages jurisprudence by asking the district court to consider the fair market value of the Pratt & Whitney engines. (*Id*. at **27-28.) Relying on *United States v. Bornstein*, the Sixth Circuit wrote that ***when "the government gets what it paid for despite a contractor's misstatements, it has suffered no 'actual damages.'*** That is not just the law of the False Claims Act; it is also the black-letter law of fraud and restitution (putting aside disgorgement of profits, which the government does not seek here). The only benchmark consistent with this benefit-of-the-bargain theory of damages is 'fair market value,' by which we meant (and still mean) 'what a willing buyer would pay in cash to a willing seller at the time.'" (*Id*. at **29-30 (emphasis added) (citations omitted).)

The Sixth Circuit went on to note that the traditional and preferred method of proving fair market value has been comparable sales analysis—relied upon by the government to prove damages in FCA cases—which led the Sixth Circuit to conclude that the price for the competitive GE Aircraft engines would be a good place to look for evidence as to whether the government received fair market value for its purchase of Pratt & Whitney engines. (Id. at **30-31.) With this in mind, the Sixth Circuit rejected the government's efforts to defend the district court's damages award, which was based on the government auditor's analysis—even though on remand the "government had every opportunity to put on an expert to show whether competition affected its damages. It not only refused to do so, but it also successfully objected to Pratt's own efforts to put on a pricing expert." (Id. at *42.) The matter was remanded to allow the district court to determine if the government should be able to present evidence that it suffered damages, in spite of the competitive process surrounding the purchase of the engines.

The Sixth Circuit's decision underscores a key—but sometimes underemphasized—aspect of defending an FCA suit: the importance of forcing the *qui tam* relator or government to prove that any alleged misrepresentation has actually caused harm to the government. While questions of materiality or scienter often take center stage in FCA litigation, the *United Technologies* decision illustrates that establishing damages can often be an insurmountable hurdle for the FCA plaintiff—and a powerful defense for the contractor or health care provider. As the Sixth Circuit's ringing endorsement of *Bornstein* makes clear, an FCA plaintiff can only recover damages under the Act by establishing that the government did not get what it paid for, and that requires demonstrating what the fair market value of the goods or services provided by the defendant actually was. Moreover, the Sixth Circuit's decision clearly requires that such an analysis be undertaken by a competent expert employing a sound methodology—and these requirements may be difficult for the *qui tam* relator to meet. In short, as the Sixth Circuit has found, damages are not a given under the FCA—they must be proven, and the difficulty of proving them provides significant opportunities for companies defending FCA claims.