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Keeping Out of Treble: What the Seventh Circuit's Adoption of Net Trebling Means for FCA Damages

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On March 21, the Seventh Circuit in *United States v. Anchor Mortg. Corp.* adopted the "net trebling" approach to calculating damages under the False Claims Act (FCA), holding that damages should be trebled after applying any reduction to the Government's loss, and not before. *See* No. 10-3122 (7th Cir. Mar. 21, 2013). This decision, which continues a trend toward net trebling in other circuits, carries weighty implications for contractors facing or assessing potential FCA liability, as net trebling can mean substantially lower damages in cases where the Government received some value in connection with false claims.

At trial, Anchor Mortgage and its CEO were found liable for false statements to the Department of Housing and Urban Development in connection with applications for home mortgage loans to be insured by the Federal Housing Administration. The district court calculated damages by trebling the amount the Government paid lenders under the mortgage guarantees, and then subtracting the amount it recovered by selling the collateral properties, finding that FCA "damages are trebled before any deduction is made for payments previously received from any source in mitigation of those damages."

On appeal, the defendants challenged both the liability finding, arguing that they lacked the requisite knowledge that the statements were false, and the damages calculation, arguing that damages should have been 1) doubled rather than trebled because the CEO self-reported some of Anchor Mortgage's false claims, and 2) multiplied based on the Government's actual loss, including what it recovered from selling the properties, rather than every dollar it paid

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After affirming the liability finding and concluding that double damages were not warranted because the CEO did not (as the FCA requires) furnish all information about any of the false claims, the court turned to the question of how to treble damages. Starting with the statute, the court noted that the FCA does not clearly support either net or "gross trebling"—*i.e.,* trebling before applying reductions to the Government's loss. Finding no support in the statute for gross trebling, the court noted that damages under the Clayton Act have long been calculated based on net trebling, and that damages in civil litigation are generally based on net loss.

The court next observed that the Government's argument for gross trebling relied solely on the case *United States v. Bornstein*, 423 U.S. 303 (1976), where the Supreme Court held that under the FCA, "the Government's actual damages are to be [multiplied] before any subtractions are made for compensatory payments previously received by the Government from any source." In distinguishing *Bornstein*, the court noted that the question there was whether damages against a subcontractor should be multiplied before or after deducting settlement payments to the Government from the prime contractor. The court concluded that *Bornstein* does not broadly support gross trebling, but rather holds that a party liable under the FCA should not benefit damages-wise from third-party payments to the Government. The court reasoned that any doubt about *Bornstein's* import on this question was resolved by a footnote in the opinion stating that the Government's actual damages are based on the difference between the value of what it received and the value of what it paid for. Concluding that *Bornstein* supports a net trebling method, and that this method comports with the usual way of calculating damages in civil litigation, the court remanded the case for the district court to recalculate damages based on net trebling.

As the court observed, its adoption of the net trebling approach continues a trend in which the Second, Sixth, District of Columbia and Federal Circuits have endorsed net trebling. Though none of the cases cited by the court directly involved the question of net versus gross trebling, in each of them, the court stated that the Government must show loss—that it received less than what it paid for—in order to recover damages. This rule implies net trebling, as the Government will essentially always have damages if the amount it paid is trebled before any value it received is subtracted. Despite this trend, as the court noted, the Ninth Circuit in *United States v. Eghbal*, 548 F.3d 1281 (9th Cir. 2008) directly adopted gross trebling of FCA damages. Thus, *Anchor Mortgage* marks a general trend, but not a consensus, toward net trebling.

The Seventh Circuit's decision, and the broader trend toward net trebling, carries substantial implications for companies facing potential FCA liability. Companies assessing their FCA liability should account for any value to the Government in connection with potential false claims. This could come from a variety of sources, including the value of products and services provided to the Government, the Government's sale of any property related to the claims, credits to the Government in connection with self-reported overpayments, and restitution to the Government from related proceedings. A broader adoption of net trebling will impact negotiations toward settlement of FCA claims, where the Government and FCA relators have long used the specter of gross trebling as leverage to force parties to pay (and pay more) rather than litigate. Net trebling can substantially limit the scope of potential damages in cases where the Government received some value, and allows contractors to argue that the Government is due no damages because, notwithstanding any false claims, it suffered no loss. Despite this, companies should bear in mind that the FCA provides for penalties between $5,500 and $11,000 for each false claim even if the Government shows no loss.