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Time for a *Brady*-Type Disclosure Requirement for Federal Government in False Claims Act Litigation

by Stephen A. Wood

Discovery of the federal government has always been important in False Claims Act (FCA) litigation. The government, as the party allegedly injured in transactions with the defendant, is usually in possession of documentation relevant to the allegations that the defendant submitted false claims or otherwise caused them to be submitted. What's more, federal agency employees are frequently in a position to offer testimony relevant to liability and damages, including testimony potentially helpful to a defendant in these cases. Yet, discovery of the federal government is *never* a routine matter. Navigating the sea of agency *Touhy* regulations as well as department privilege claims, to say nothing of the government's disclaimer of a duty to preserve evidence in declined cases, can delay, even obstruct, a defendant's effort to obtain evidence relevant to its defense in *qui tam* litigation.

Given that the FCA imposes treble damages and statutory per-claim penalties that in some instances dwarf damages, as well as attorneys' fees and costs, and in light of the Supreme Court's holding that the FCA's remedial structure is predominately punitive, due process concerns loom large. It is past time for Congress, or the courts in the absence of Congressional action, to impose upon the government a requirement of automatic disclosure of evidence that is likely to be helpful to the defense in a fashion similar to the requirement applicable in criminal cases pursuant to the U.S. Supreme Court's decision in *Brady v. Maryland*. Such a requirement would help to ensure that defendants are not erroneously punished for violating the False Claims Act or pressured into an unwarranted settlement.

Liability under the False Claims Act—The Implications for Due Process

Prior to the 1986 FCA amendments, the FCA imposed double damages for violations and capped penalties at $2,000 per false claim. This measure of damages and penalties was seen as necessary to adequately compensate the government: "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." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943).[1] Forty-six years later, however, the Supreme Court acknowledged in its 1989 decision in *United States v. Halper* that a civil sanction is punitive when it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either a retributive or deterrent purpose." *United States v. Halper*, 490 U.S. 435, 448 (1989), *abrogated by United States v. Hudson*, 522 U.S. 93

[1] The Supreme Court acknowledged further that the imposition of penalties and double damages may indeed be seen as punitive: "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 wrongdoer is concerned,' but this is not enough to label it as 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 a specific sum was chosen to make sure that the government would be made completely whole. . . . . The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress." *Hess*, 317 U.S. at 551-52.

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(1997). The Supreme Court has also acknowledged that treble damages contain a punitive component. *See Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) ("To begin with it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.").

The notion that remedies under the FCA are purely compensatory or remedial is no longer tenable, if it ever was tenable in the post-double-damages era. Under the prevailing version of the statute, if liability is found, any damages proved are automatically trebled. 31 U.S.C. § 3729(a)(1). Even if double damages were needed to compensate the government, what compensatory effect is derived from awarding the government a third helping of the damages it or a relator has proved? Add a statutory right to recover attorneys' fees and costs, and the aggregate effect surely extends beyond compensation to deterrence and retribution. And this, of course, says nothing about the effect of statutory *per-claim* penalties of between $11,463 and $22,927.[2] In a given case, statutory penalties can easily dwarf any damages the government might claim.[3] Individuals and entities retain a property interest in the money they possess. *See, e.g., Mahers v. Halford*, 76 F.3d 951, 954 (8th Cir. 1996) (due process required before inmate-plaintiffs can be deprived of their money by administrative procedure aimed at forced restitution). Given that FCA claims affect a defendant's property interest and extend well beyond compensation to include punishment and deterrence, due process concerns are rightly implicated.[4]

The FCA raises additional due process concerns beyond property interests, however. The Supreme Court in *Santosky v. Kramer*, 455 U.S. 745, 754-55 (1982), also noted that due process mandates a clear and convincing proof standard where the "proceedings threaten the individual involved with 'a significant deprivation of liberty' or '*stigma*.'" *Id.* at 757 (emphasis added). Many courts have recognized that allegations of fraud, in general, and FCA claims, in particular, subject a defendant to the stigma of immorality and deceit. *See, e.g., United States ex rel. Keeler v. Eisai, Inc.*, 568 Fed. Appx. 783, 801, n. 23 (11th Cir. 2014) (FCA complaints can damage a defendant's goodwill and reputation); *United States ex rel. Clausen v. Laboratory Corp. of America,* 290 F.3d 1301, 1313, n. 24 (11th Cir. 2002). The mere act of filing a FCA complaint can stain a defendant's reputation sufficiently to impair the defendant's opportunities for business with the government. A verdict of liability can be devastating for defendants who may depend heavily on those opportunities. Beyond that, a verdict of liability can lead to other severe, even permanent, administrative sanctions such as exclusion or debarment. *See* 42 U.S.C. § 1320a–7 ("Exclusion of certain individuals and entities from participation in Medicare and State health care programs"); *United States ex rel. Harman v. Trinity Ind., Inc.*, 872 F.3d 645, 651 (5th Cir. 2017) (jury verdict in favor of *qui tam* relator prompted further agency investigation, further testing of defendant's product, and suspension of defendant's business with government). Thus, the fallout from a FCA prosecution can be severe, even affecting a defendant's livelihood.

Brady v. Maryland—Due Process Requires the Government to Produce Evidence Helpful to the Defense

In *Brady v. Maryland*, 373 U.S. 83 (1963), the petitioner and a companion were both convicted in separate trials of first-degree murder, having killed a man during a robbery. Prior to trial, the petitioner sought discovery of the companion's statements to authorities and was given access to all but one, a statement in which the companion admitted to having committed the killing. The petitioner was convicted, sentenced, and the conviction affirmed on appeal before the withheld evidence came to his attention. He sought a new trial based on the newly

[2] As part of the Bipartisan Budget Act of 2015, Congress directed the Justice Department to increase civil penalties to account for inflation and to make annual adjustments thereafter. The indicated penalty is applicable to claims adjudicated after February 1, 2019.

[3] Penalties in FCA cases have recently begun to reach unconstitutional proportions. In some cases, where the assessed penalties dramatically eclipse damages, courts have vacated or refused to impose penalties because they violate the Excessive Fines Clause of the Eighth Amendment. *See, e.g., United States ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, 764 F.3d 699, 702 (7th Cir. 2014). In *Absher*, the jury returned a verdict of $3 million in damages and $19 million in penalties. The trial court trebled the damages verdict, but vacated the entire penalty award as an excessive fine. *Id.* at 705.

[4] It is for these very reasons that punitive damages often require proof by clear and convincing evidence. That is the rule prevailing in at least half of the states. Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?*, 7 U. St. Thomas L. J. 1, 3 (2009).

revealed evidence. The Maryland Court of Appeals held that the prosecution's suppression of evidence denied the petitioner due process and remanded the matter to the trial court solely on the issue of punishment. He appealed this decision to the Supreme Court.

The Supreme Court ultimately affirmed the judgment of the Court of Appeals, remanding the case for re-trial on the issue of punishment only. But in arriving at that judgment, the High Court agreed that the petitioner was deprived of due process by the prosecution's withholding of evidence that would have been helpful to petitioner, announcing the following statement of the rule:

> Petitioner's papers . . . do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.

Id. at 86, *quoting Pyle v. Kansas*, 317 U.S. 213, 215 (1942). The Supreme Court further noted that other courts have held that due process is denied when the state, without more, withholds evidence helpful to the defendant. Clarifying the rule first articulated in *Pyle*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In a subsequent decision, the Supreme Court held that *Brady* material includes material that might be used to impeach key government witnesses: "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [the witness's] credibility falls within th[e] general rule [of *Brady*]." *Giglio v. United States*, 405 U.S. 150, 154 (1972).[5]

Over time courts continued to expand *Brady*'s application. The constitutional obligation to turn over *Brady* material falls upon not only prosecutors, but also investigators where the investigators are aware of exculpatory evidence that may not be known to prosecutors. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (due process requires disclosure of any *Brady* material known to any member of the prosecution team). If such evidence is withheld, the government will be held responsible by, for example, the court's suppression of evidence, reversal of a conviction, or referral of the prosecutor to disciplinary authorities, depending on the circumstances in a given case. The prosecution team includes, in appropriate circumstances, government employees in addition to law enforcement and prosecutors who were involved in the investigatory proceedings. *See, e.g., United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (in a prosecution where the defendant was convicted of obstructing a lawful function of the FDA, the court of appeals stated that "[U]nder *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute.")

Due Process Requires Application of *Brady to* Civil Claims Brought under the False Claims Act

In a broad sense, if a party faces deprivation of life, liberty, or property, due process is required. That is only the beginning of the inquiry, however. One must consider what procedures are fairly required to ensure due process. In *Mathews v. Eldridge*, 424 U.S. 319 (1976) the Supreme Court identified three determinants of procedural due process: (1) the importance of the interest to the individual (greater importance requires greater procedural protection); (2) whether additional procedures ensure greater accuracy in factfinding; and (3) the government's interest including the additional fiscal or administrative burdens resulting from additional

[5] In *Giglio*, the defendant was convicted of negotiating forged money orders. A bank teller was named as an unindicted coconspirator and testified at trial as a government witness. Neither defendant nor the prosecutor at trial knew until after the trial that a different prosecutor who had conducted the grand jury proceedings had given the teller full immunity in exchange for his testimony. The U.S. Supreme Court held that the government's failure to disclose the immunity agreement violated due process and threw out the defendant's conviction.

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procedures. *Id.* at 334.

As the False Claims Act evolves to become more punitive, as damages, penalties, and costs multiply, due process concerns intensify. Beyond this, the stigma associated with liability for committing fraud against the federal government combined with potentially draconian administrative sanctions reflect quasi-criminal consequences in the event of a violation of the Act. Insofar as these developments relate to the first *Mathews v. Eldridge* factor, protections greater than those afforded a typical civil litigant are necessary. A *Brady* requirement would surely help to ensure greater accuracy in factfinding, consistent with the second *Mathews* factor, particularly in cases in which the federal government has not intervened and is not subject to the Federal Rules of Civil Procedure. Even where the government is required to respond to discovery requests of some sort, a *Brady* requirement would impose an affirmative duty beyond the express requirements of a defendant's discovery to supply exculpatory evidence and thus help to foster fairer outcomes.

As for the third *Mathews* factor, the marginal burden imposed on the government by extending *Brady* beyond criminal cases to civil false-claims cases should be modest. In fiscal year 2017, for example, 67,619 criminal cases against individuals or organizations were pending in United States District Courts at some point during the year.[6] In contrast, between FY 2010 and 2018, 7,156 civil False Claims Act cases were brought either by the government or by *qui tam* relators. During that time, on average, less than 1,000 FCA cases per year were filed.[7] The volume of civil FCA litigation, certainly in respect of numbers of cases, is a small fraction of the Justice Department's criminal docket. While civil fraud cases may be more discovery- and document-intensive than many criminal cases, the numbers do not present a compelling argument against adopting a *Brady* requirement.

Conclusion

Due process is the touchstone that triggers the government's obligation under *Brady* to volunteer exculpatory evidence. That constitutional guarantee of fundamental fairness is eroded when the government pursues a criminal conviction while withholding information, either in the form of direct or impeachment evidence, that could be helpful to the defendant. The very integrity of the criminal justice process, in other words, is undermined when prosecutors and their agents are able to obtain a conviction that rests on a knowingly misleading set of facts.

Although the consequences of a FCA violation do not include deprivation of life or liberty, the sanctions and damages imposed under that law have increased to a degree that process afforded a non-FCA civil litigant is inadequate, and the failure of the government to produce evidence helpful to the defendant in advance of trial similarly threatens the fairness of the process. Defendants face the deprivation of property, well beyond anything necessary to compensate the government for its losses. Too, they confront the stigma and reputational harm resulting from a finding of having engaged in fraud against the federal government, the effects of which can last years if not decades. Administrative sanctions, to include the sanction of debarment, can utterly destroy some defendants who depend heavily on business with the government. Given these interests, that truthfinding will be enhanced, and that the burden on the government from additional procedures is likely modest and manageable, a *Brady* requirement should be adopted for use in all FCA cases, whether brought by the government or by a *qui tam* relator.

[6] *See* https://www.justice.gov/usao/page/file/1081801/download.

[7] https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

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