2014 Roundtable Series

False Claims

When the U.S. government is at war, which arguably has been the case since 2002, the Wartime Suspension of Limitations Act kicks in. It was first passed in 1942 and allows the statute of limitations to be tolled until the fog of war has ostensibly cleared. Just how the law applies to the False Claims Act is up for review by the Supreme Court. Our panel of experts discusses these issues as well as how penalties should be counted in false claims cases, implied certification, and voluntary disclosure to the government.

They are Maria Ellinikos of Akin Gump Strauss Hauer & Feld; Ryan G. Hassanein of Morrison & Foerster; Robert J. Nelson of Lieff, Cabraser, Heimann & Bernstein; and Steven J. Saltiel of the U.S. Attorney's Office for the Northern District of California. The roundtable was moderated by *California Lawyer* and reported by Cherree P. Peterson of Barkley Court Reporters.

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EXECUTIVE SUMMARY

MODERATOR: What are the implications of recent decisions applying the Wartime Suspension of Limitations Act to False Claims Act cases, and the Supreme Court's decision to review *Carter v. Halliburton*?

MARIA ELLINIKOS: There is a recent line of decisions applying the Wartime Suspension of Limitations Act (WSLA, 18 U.S.C. § 3287) to False Claims Act (FCA, 31 U.S.C. § 3729-3733) cases, and the Fourth Circuit's opinion in *Carter v. Halliburton* has received significant attention. The Supreme Court recently granted certiorari. Almost every court that has considered the issue has held that the WSLA applies to suspend the statute of limitations in FCA cases, eliminating the statute of limitations defense in many cases. Application of the WSLA exposes defendants to FCA liability for conduct that occurred outside the limitations period because courts have interpreted the military engagements in Iraq and Afghanistan as the equivalent of being at war. This particular case was brought against a defense contractor but courts have not limited application of the WSLA to cases involving defense contractors. (See *U.S. ex rel. Carter v. Halliburton Co.,* 710 F. 3d 171 (4th Cir. 2013), cert. granted, 2014 WL 1931840.)

RYAN HASSANEIN: The statute of limitations applicable to the FCA is six years from the date of the violation. In addition, there's an outer ten-year limit, which is better viewed as a statute of repose as opposed to a statute of limitation. Since statutes of repose are historically not subject to equitable tolling, I would argue that under no circumstances could the ten-year limit be tolled by virtue of the WSLA, even if it were deemed to apply to the six-year limitations period.

Separately, it is unclear precisely what issues the Supreme Court will address in *Carter*. The case involves a defense contractor providing services in Iraq, so it isn't necessary for the Court to address whether the WSLA applies to FCA claims that have nothing to do with wartime activities. On the other hand, the Court will likely decide, assuming the WSLA applies to the FCA at all, whether it only applies to claims initiated by the government as opposed to those initiated by a private whistleblower. There are policy reasons for limiting the application of the WSLA to cases initiated by the government. *Carter*, however, was filed by a private whistleblower. Some district courts have held that, because the WSLA makes no mention of private parties, it does not apply to an FCA case initiated by a whistleblower. (See, e.g., *U.S. ex rel. Emanuele v. Medicor Assoc.*, 2013 WL 3893323 (W.D. Pa.).)

STEVEN SALTIEL: I should make it clear that I'm speaking in my personal capacity and not on behalf of the government. The Solicitor General will probably take a position on a number of these issues. The Supreme Court should clarify a number of issues regarding the WSLA and civil FCA cases. It will probably also address whether the statute applies to qui tams where the government has decided not to intervene. There's controversy over that issue in this statute.

ROBERT NELSON: The issue Steve [Saltiel] raised is of particular interest to me as someone who represents relators. It's interesting that when the WSLA was amended in 2008, Congress did not see the need to limit the statute only to cases in which the government had intervened. Obviously, Congress was aware of FCA cases involving fraud against the U.S. being brought by relators, but Congress chose not to treat FCA cases differently from any other case involving fraud against the U.S.

The Fourth Circuit in *Carter* was quite explicit about simply interpreting the plain language of the WSLA statute, which is very straightforward, and the statute does not say anything about its application being dependent upon whether or not the government has initiated or intervened in a qui tam action. Judge Agee in his dissent suggested that the suspension should not apply to a case in which the government did not intervene given that the ostensible purpose of the statute is to aid the government in examining fraud cases when it is not clouded by the "fog of war."

Maria [Ellinikos], I would dispute that there is no longer a statute of limitations given the WSLA. The WSLA obviously has the potential to extend the limitations period, but not forever, and certainly not for periods prior to the initiation of hostilities in Iraq and Afghanistan in 2002.

To address Ryan's [Hassanein] point about whether or not the WSLA should apply outside the context of defense contracting, it was curious to me that the Supreme Court granted certiorari on a case that involved defense contracting. If the Court were going to make a ruling about the kinds of cases to which the WSLA does or does not apply, one would have thought that the Court would have taken a WSLA case that did not involve a defense contractor.

SALTIEL: Within the statute there is a subdivision that lays out three categories of offenses to which tolling applies. The third addresses that very kind of case where it's committed in connection with negotiation, procurement, award, performance, payment for, etcetera, of any contract, subcontract which is connected with or related to the prosecution of a war. So that is addressed separately from an offense involving fraud against the U.S. and might be a quick issue.

ELLINIKOS: To clarify, my comments about the statute of limitations were prospective. There has been no presidential proclamation or congressional resolution terminating the hostilities and one does not appear on the horizon.

NELSON: The Supreme Court in *Carter* also granted certiorari on the application of the first to file rule. Broadly speaking, the first to file rule under the FCA limits the ability of a relator to go forward with his or her case unless the case is the first case on file. In *Carter*, the relator dismissed his case no less than three times, and at various times there were one or two other FCA actions also pending that raised the same or similar misconduct. The question arose as to whether the relator in *Carter* should have been able to file a fourth complaint when other related cases were no longer pending. The Fourth Circuit ruled that the relator could, because there never had been a determination on the merits in connection with any of the cases. Halliburton argued the relator in *Carter* should still not be allowed to proceed with his case—otherwise it could be sued in seriatum in perpetuity. It was an interesting and utterly complex factual scenario likely not to be repeated anytime soon, but ultimately the Fourth Circuit ruled in favor of the relator because no court had ever heard the merits and there were no pending cases when the relator would re-file, so the relator's case was not barred by the first to file rule.

HASSANEIN: Some justices may be concerned that the Fourth Circuit's broad application of the WSLA to FCA cases and its very narrow reading of the first to file bar potentially erode what are otherwise clear temporal and jurisdictional boundaries set forth in the FCA itself and which have not been expressly repealed, amended, or modified by any later act of legislation.

As a practical matter, Congress can and

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–MARIA ELLINIKOS

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> "Congress presumably will continuously engage our armed services in combat. If that is deemed enough to continuously toll the FCA's statute of limitation, the WSLA amounts to an implicit repeal."
> –RYAN HASSANEIN

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presumably will continuously engage our armed services in combat. If that is deemed enough to continuously toll the FCA's statute of limitation, the WSLA amounts to an implicit repeal. But under basic principles of statutory construction, you arguably need a very clear and express intent by Congress to effectively do away with the FCA's limitations period. The WSLA doesn't provide any such intention let alone a clear and express intent by Congress to do just that. The Supreme Court may have granted certiorari because it views the Fourth Circuit's decision as troubling as I do.

NELSON: But in 2008 Congress amended the WSLA and essentially extended the limitations period even longer and made clear that a public declaration of war wasn't needed, ensuring that the WSLA would apply even if there were no formal declaration of war. Ryan [Hassanein], it's not clear to me if you were suggesting that the history of the statute is such that the Supreme Court would be hard pressed to do anything but to affirm the Fourth Circuit's ruling because the plain language of the statute doesn't provide any way to limit its applicability.

HASSANEIN: There's no bridge between the WSLA and the FCA. Neither of them refers to the other. The WSLA doesn't expressly say that it is undoing, modifying, amending, or otherwise repealing the FCA's statute of limitations. In the absence of crystal clear congressional intention to modify that statute of limitations, the Supreme Court under basic statutory interpretation principles can read the WSLA narrowly if it so chooses.

SALTIEL: Just to clarify, the question presented by the petition for certiorari was whether the WSLA applied to civil fraud claims brought by a private relator under the FCA. There are a lot of sub-issues, but the essence of the issue will be does this apply in civil cases and does this apply to non-intervened qui tams.

MODERATOR: What are the constitutional limits on penalties and how should we count false claims for purposes of penalties given the Fourth Circuit's decision in *Bunk v. Gosselin*?

NELSON: Over the years the Supreme Court has indicated an interest in due process limitations as they might apply to the imposition of punitive damages, and there's a possibility that the Court may again want to step in and provide guidance on the potential constitutional limitations on the use of penalties in FCA cases. In *Bunk*, the trial court determined that there were arguably $50 million in penalties, a result that the trial deemed impermissible under the excessive fines clause of the Eighth Amendment. The Fourth Circuit ultimately determined that the trial court, through remittitur, could essentially make an otherwise unconstitutional penalty under the excessive fines clause of the Constitution, constitutional and within any limitation set by the excessive fines clause. The relator agreed to limit the award to $24 million and the court of appeals indicated that that seemed reasonable. (See *U.S. ex rel. Bunk v. Gosselin World Wide Moving*, N.V., 741 F.3d 390 (4th Cir. 2013).)

Where the opinion is lacking is that the court of appeals never explained why $24 million was an appropriate number under the Eighth Amendment. There was very little analysis other than to say that a fine has to be proportional. But there is a way to justify what the court of appeals did because the court indicated that there was upwards of $2 million in damages. Applying the due process analysis that the Supreme Court has outlined in the context of punitive damages, where the Court has sought to limit punitive damages to a multiple of less than 10 times compensatory damages absent extraordinary circumstances, one could get to the $24 million result. But I'm concerned that the opinion is vulnerable, and the defendants have sought certiorari to the Supreme Court because the Fourth Circuit never really did a serious analysis.

SALTIEL: The court in the *Gosselin* case cited and relied on a Ninth Circuit decision that was prosecuted by my office (*United States v. Mackby*, 339 F. 3d 1013 (9th Cir. 2003)), in which damages were similarly somewhat limited but the number of claims was voluminous so that penalties were potentially excessive. In *Mackby*, the civil prosecutor suggested to the court, and the court agreed, to assess penalties on a subset of the claims in order to avoid the excessive penalties issue. I agree there's a lack of analysis with respect to the constitutionality of the $24 million penalty award in the *Gosselin* case, but the court is telling the district courts that the parties should be allowed to figure this stuff out. It's not an all-or-nothing proposition.

Also potentially significant in the case—particularly if it goes up on appeal—is the court's discussion of the inevitable problems with assessing penalties on specific invoices, which are often numerous. It's almost as if the court is suggesting that other courts revisit the issue.

NELSON: I hope you're wrong about that.

HASSANEIN: This is an important issue in FCA cases because many of these cases involve thousands, if not millions, of claims for reimbursement, particularly in the health care arena. The Fourth Circuit had an opportunity to set forth an analysis that clearly explained the application of the Excessive Fine provision to penalty awards under the FCA. Indeed, there was an expectation among practitioners, including myself, that we might get some clear direction coming out of this decision. But we didn't, and it was disappointing. Now, defendants are left guessing where the constitutional limit should be drawn.

On a related topic, due to a lack of direction in the federal FCA as to how penalties should be calculated, courts sometimes exercise discretion and get creative when computing penalties in hopes of keeping them constitutional. This lack of direction, by the way, does not exist in all FCA statutes. The California FCA specifies that a civil penalty should be imposed for "violation." By contrast, in qui tam cases pursued under the California Insurance Code, penalties are assessed for each "fraudulent claim" and not for each "violation." The California legislature clearly knows how to specify how penalties should be calculated in the FCA context. The statutory language used in the federal Civil Monetary Penalties Law suggests that the U.S. Congress also knows how to specify how penalties should be calculated.

ELLINIKOS: It was a missed opportunity for the Fourth Circuit to lay a clear framework for how to calculate penalties in FCA cases involving thousands of invoices and to provide guidance on when a penalty is unconstitutionally excessive.

The case involved a government contract pursuant to which more than 9,000 invoices were submitted to the government, and the invoices did not contain any express misstatements. Liability was premised on a certification of independent pricing (CIPD) that the defendants had submitted with their bids affirming that they arrived at their pricing independently. The alleged false CIPD rendered each claim submitted pursuant to the contract false and fraudulent under the statute as interpreted by the district court and the Fourth Circuit.

There is little explanation as to how the relator arrived at the $24 million penalty request, and the Fourth Circuit noted that the relator chose a number that would ease the appellate path and avoid the unconstitutional result. It was disappointing that the Fourth Circuit did not articulate why the $24 million penalty was not unconstitutionally excessive. While the Fourth Circuit argued the government suffered $2 million in damages, the district court had disagreed when it held that a $50 million penalty would be grossly excessive. The Fourth Circuit's opinion incentivizes relators to pursue cases where there are limited, if any, damages because it sanctioned an approach for obtaining significant penalties in such cases.

SALTIEL: Or conversely, a contrary result would incentivize the contractor to put in their claims piecemeal in order to increase the number of claims to increase the chances that any civil penalties award will be excessive and therefore reversible.

NELSON: The court of appeals was obviously frustrated with the trial court's unduly rigid approach and basically said, "Get real. Let's try to figure out a fair resolution." But the four of us are left a bit unsatisfied. There is really no guideline as to how to be fair per the Eighth Amendment, so it's a lost opportunity. But it was the right result and a really creative move by the relator to agree to a remittitur thinking long term.

"The court of appeals was obviously frustrated with the trial court's unduly rigid approach and basically said, 'Get real. Figure out a fair resolution.' And yet, there is still no guideline as to how to be fair per the Eighth Amendment."

–ROBERT J. NELSON

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"Companies do disclose, but the government has an obligation to not take it at face value. Not to discourage them or to doubt the disclosure, but to look at it closely to verify the amount and see how it happened."

–STEVEN J. SALTIEL

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ELLINIKOS: Ryan [Hassanein] mentioned earlier that the California statutes are more clearly drafted, but a case pending under the Insurance Frauds Prevention Act (IFPA) may present the same issue. In a case pending in the Los Angeles Superior Court, the relators alleged that Bristol-Myers Squibb (BMS) paid kickbacks to physicians so they would prescribe its drugs to their patients. Recently the trial court ruled on a summary adjudication motion brought pursuant to California Code of Civil Procedure 437c(s), which allows the parties to stipulate to the resolution of issues that will not resolve an entire claim. One of the questions posed to the court was whether—assuming Bristol-Myers Squibb paid a physician a kickback and the physician then prescribed a BMS drug—that conduct violated the IFPA. The trial court held "no" absent a showing that the physician would not have prescribed the drug but for the kickback. (See *State of California ex rel. Wilson v. Bristol Myers Squibb Co.*, No. BC367873 (Los Angeles Super. Ct. summary judgment ruling Sept. 23, 2013.))

The court of appeals recently reversed and held that to employ a doctor to procure prescriptions automatically violates the statute, so the trial court did not even need to consider the causation requirement. It went on to say that courts should apply the "substantial factor" test rather than the "but for" test to determine whether the causation requirement has been met. (See *State of California ex rel. Wilson v. Superior Court,* 2014 WL 2918872 (Cal. Ct. App.).) If Bristol-Myers Squibb is found liable for violating the IFPA by paying kickbacks to physicians, the court could calculate the penalty based on the number of prescriptions for BMS drugs written by each physician who received a kickback for prescribing BMS drugs. Millions of prescriptions must be involved in that case. It will be interesting to see whether the California courts would consider such penalty excessive.

MODERATOR: What are the implications of the California appellate court's recent decision in *SF Unified School District ex rel. Contreras v. First Student, Inc.*, 224 Cal. App. 4th 627 (2014)?

HASSANEIN: When the four of us last met for a roundtable, we discussed the appellate court decision in this case that reversed the trial court's order granting the defendant's demurrer, or motion to dismiss. (See *SF Unified School District ex rel. Contreras v. Laidlaw Transit, Inc.*, 182 Cal. App. 4th 438 (2010).) There, the appellate court held that the act of submitting invoices to the government pursuant to a contract includes an implicit or implied certification of compliance with the contract's various requirements.

Two other things happened in 2010. San Francisco Unified School District (SFUSD) renewed the contract, and they also continued to pay the invoices submitted by the defendants to the school district. In addition, after this case was initiated, the SFUSD declined to intervene in it. It also never brought a breach of contract case. In sum, the SFUSD never took any action signaling that it viewed the defendant's alleged violation of certain contractual requirements as material to its decision to pay any invoices.

Based on this evidence, the defendants moved for summary judgment, arguing that their alleged violations of certain contractual requirements were immaterial. The trial court granted the motion. Earlier this year, the appellate court reversed. It distinguished between the SFUSD having knowledge of the defendant's actual wrongdoing as opposed to having knowledge of only "allegations" of wrongdoing. The appellate court also emphasized that materiality should be judged at the time the claim was presented to the SFUSD rather than at a later point in time.

Of interest is that typically in FCA cases, particularly in the federal case law, government knowledge is defense that defendants assert to undermine the fraudulent intent or falsity elements. In the *Contreras* decision, government knowledge was used not to attack the fraudulent intent or falsity components, but rather the materiality element.

The court theorized that, I quote: "The District's decision to continue to make payments could reflect acceptance of defendant's representations of compliance, the expense and difficulty of investigating the allegations of wrongdoing, fear of litigation with defendant, or concerns about the possibility of disrupting services." Therefore, the fact that the school district continued to pay invoices alone was not enough to prove dispositive on the materiality element and the Court left it up to a jury to decide the issue.

NELSON: I was most intrigued by the facts of this case, which ultimately drove the result in favor of the relator. *Contreras* involved the safety of school buses with allegations about a lack of routine inspections, inadequately serviced brake linings, and improperly cared for tread of the buses' tires. This was all in violation of SFUSD's contract with the bus company, and constituted a very scary set of facts that SFUSD would not allow to go unchecked.

Justice Simons agreed that you can't read anything into the fact that the government continued to pay because there could be many reasons why SFUSD decided to do so, and you certainly couldn't infer that the SFUSD accepted the status quo as being somehow satisfactory.

This case—when it was first decided by the court of appeals way back when—was one of the first to implement the implied certification theory under the CFCA. At the time I recall defense counsel decrying the result and that the case would open the floodgates to implied certification cases in California. Well, we do see them. I bring them. But, not unlike this *Contreras* case, it has to be in cases where there are important facts at issue and materiality is clear.

ELLINIKOS: When the appellate court held in 2010 that a vendor's implied certification with contractual requirements may expose the vendor to CFCA liability, it stressed the need to meet this materiality requirement and show that the implied certification with the breached provisions of the contract was material to the district's decision to pay the claim, as well as the need to show whether the defendant had the requisite knowledge of the alleged false implied certification.

There was an expectation that the court would enforce the materiality requirement, and what we have instead are the facts that the district clearly knew about the breach, but continued to pay the claims. If it believed there was a material breach, it could have either terminated the contract or refused payment. And it did neither.

The court of appeals' two decisions can be read to hold that a vendor impliedly certifies compliance with contractual requirements when it bills a public entity for the services and the mere submission of an invoice pursuant to that contract will expose the vendor to an FCA claim. What would normally be an ordinary breach of contract claim exposing the vendor to compensatory damages becomes an FCA claim that exposes the vendor to civil penalties and treble damages. That is the real concern with the combined decisions. Given that the opinion was issued in April of 2014, sufficient time has not passed to see the full impact of the two decisions on the application of the CFCA.

NELSON: The court of appeals ruled that the materiality determination turns on whether the alleged false statement or certification was such that it had a natural tendency to influence or was capable of influencing government action. That's what materiality requires, and that certainly was met here given the critically important safety considerations at issue. So even though the school district continued to pay, and even though SFUSD declined to intervene, SFUSD did make new demands upon the defendant, ordering them to do many different things in response to the allegations and reports describing failures and problems.

ELLINIKOS: The conduct of the district and First Student does not necessarily show that the district took action. The opinion notes that in November 2011 the district received a report indicating the defendant had operated a certain number of vehicles out of compliance. It wrote a letter to the defendant requesting that it immediately remove those buses. That was an opportunity for SFUSD to terminate the contract or withhold payment, and it didn't do so. It just continued with the contract.

NELSON: But is the only way to show materiality by canceling the contract or stopping payment upon learning of the false claims? It seems to me the court addressed that issue. SFUSD needs the buses to transport its students.

SALTIEL: It's striking that the court is saying it really doesn't matter what the district did or didn't do in response to this. It's an objective standard identical to the federal standard. Given this alleged false statement or misrepresentation, is it the type of information that would have a tendency to lead the government to pay or not pay.

The court is also saying it is inherently a question of fact whether or not this is material. This is a state court decision under the state FCA not likely to be cited in federal court much. But we don't see a lot of federal decisions under the FCA dealing with materiality, and I agree with Ryan [Hassanein] that that's the interesting part of this decision. Discussing government knowledge within the context of materiality is very interesting from our perspective. There are a lot of nuggets in this decision for plaintiffs.

HASSANEIN: But the court doesn't go so far as to say that the school district's actual reaction to the allegations of wrongdoing is irrelevant to the materiality element. It just says it's not legally dispositive.

"If an organization already has compliance mechanisms in place, penalizing it for self-reporting overpayment essentially discourages businesses from continuing those policies." –RYAN HASSANEIN

MODERATOR: How should the government respond when a company voluntarily discloses an overpayment?

SALTIEL: There are various ways that FCA cases come to the government, and one avenue that isn't talked about much is through voluntary disclosures. Agencies have different voluntary disclosure protocols and there is also a general provision under the Federal Acquisition Regulation that addresses voluntary disclosure. Sometimes the agency will refer the disclosure to the U.S. Attorneys office or the Department of Justice to further investigate and potentially resolve or even prosecute.

From the government's perspective, the contractor has disclosed either an overpayment or fraud. One task is to verify that the amount disclosed by the contractor is correct and inclusive—I would say often it is not. Secondly, the government will want to dig a little deeper because usually in these disclosures the contractor does not say, "we've discovered fraud." It is more likely, "our audit discovered an overpayment." It's the government's obligation to determine whether there was a knowing submission of false statement or false claim and whether the elements of the FCA have been met. How does the defense counsel handle those cases and what are their expectations when they're brought to the government?

HASSANEIN: Under the Affordable Care Act (ACA), certain types of healthcare companies get 60 days to return an overpayment to the government once it's identified. Last month, the DOJ intervened for the first time in an FCA case alleging violation of the ACA's 60-day rule. In that case, the government reportedly became frustrated with the defendant's handling of the situation. There was an internal audit that identified overpayments, but rather than returning the overpayments to the government immediately, it did so only in response to outside pressure from the DOJ over the course of two years. (See *United States, ex rel. Kane v. Healthfirst, Inc.* No. 11-CV-02325 (S.D.N.Y. complaint in intervention filed June 27, 2014).).

I always advocate to my clients that cooperation is critically important and we endeavor to be as forthcoming as possible. When disclosing an overpayment, a company should be as transparent to the government as possible without waiving privileges. There is no middle ground—cooperate and disclose.

I have not personally come across a situation where, through an internal auditing process, a company has identified an overpayment and also concluded that it resulted from its actual knowledge, deliberate ignorance, or reckless disregard for the truth or falsity of the original claim submitted to the government. What is far more likely is that the claim was innocently submitted in the first instance, but upon learning that there's an overpayment the question becomes: What do we do now? We thus examine the potential liability for retaining the overpayment once it has been identified. That is typically the focus of our analysis.

SALTIEL: How should the government handle that in a way that would continue to encourage disclosures? What are the expectations of companies and defense counsel as a policy matter to encourage that kind of disclosure? It happens a lot in the health care world.

ELLINIKOS: The complaint filed in the Southern District of New York alleged that a number of hospitals improperly billed Medicaid based on a software glitch. According to the complaint, the company learned about the glitch, assigned an employee to determine the number of overpayments, and when he allegedly found that there were 900 overpayments, totaling a million dollars and reported his findings to his superior, he was fired. When a company assigns an employee to determine whether there are overpayments and then discovers overpayments, as defense counsel, I would advise the company to voluntarily disclose its discovery to the government and cooperate. And in a situation where, for example, a software glitch was to blame, the government could tailor its response to the specific circumstances of that case. The government should incentivize companies to report overpayments as soon as they discover them.

HASSANEIN: To make sure it doesn't happen again, the corporate entity should have in place the requisite internal controls, procedures, and compliance programs designed to not only detect overpayments, but to report them. But if the organization already has those mechanisms in place, penalizing it for coming forward and reporting essentially discourages businesses from continuing to do that. That's the wrong policy for self-reporting. It's important for the government to respond to self-reporting in such a way that encourages an increasing number of companies to voluntarily disclose overpayments.

ELLINIKOS: It's important for companies to engage counsel early in the process. For example, when there is a whistleblower, the company needs to navigate how to treat the whistleblower because there are so many legal issues presented by whistleblowers. The sooner a company involves counsel, the less likely it will find itself in a qui tam action brought by a former employee alleging that it hid a $1 million overpayment for two years.

SALTIEL: So companies do disclose, but on the other side of that the government has an obligation to not take it at face value. Not to discourage them or to doubt the disclosure, but to look at it closely to verify the amount and see how it happened or whether there was a knowingly made false claim or misrepresentation. OIG will also look at the systems that are in place.

NELSON: Similarly, I counsel relators that if they're aware of an ongoing fraud the sooner they bring it to the government's attention, the better. As a prosecutor, Steve [Saltiel], would you take into account how quickly the relator comes forward in thinking about, for example, the relator's share of the recovery. Does that play a role in your analysis?

SALTIEL: As everyone knows, there are lots of factors that we consider. Certainly a factor is whether the fraud was promptly reported, whether it was promptly brought to the attention of the government, and whether the relator was involved in the fraudulent activity. All are relevant with respect to the relator's share of the recovery. ■