It would be easy to tuck into a large piece of **Schadenfreude pie** and bask in the misfortune of the Department of Justice. Depending on your point of view, two recent cases have highlighted either (a) problems with the underlying statutes that DOJ and the courts are trying to enforce, or (b) problems with DOJ's overreaching and ill-advised attempts to catch wrong-doers and bring them to justice. One case addressed penalties under the False Claims Act (FCA) and the other concerned the Foreign Corrupt Practices Act (FCPA).

Both statutes have been discussed on this blog before. **This article** provided an overview of the FCPA, and this **other article** discussed how Congress was "adding teeth" to the statute. Further, we typed "False Claims" into the site search engine and 48 articles were listed involving some aspect of the FCA. Most of the articles have concerned settlements, fines, and other penalties associated with FCA violations, but not all—in **one article**, we reported that the U.S. Court of Appeals (D.C. Circuit) vacated and remanded a D.C. District Court judgment against SAIC, after finding the Government's theories of corporate "collective knowledge" to be unpersuasive, and rejecting several of the government's aggressive theories of damage quantification. The point is, if you have read this blog before, you should have a good layperson's understanding of both statutes and how the government attempts to enforce them.

So you should have a good appreciation for the two cases we want to discuss today. In the first case, **Bloomberg Businessweek** reported that the DOJ moved to dismiss its indictments against 22 individuals accused of violating the FCPA, after failing to convict ten of them. The

case was reportedly the largest prosecutions of individuals accused of FCPA violations as well as the first time the government used a sting operation “involving undercover techniques” to catch alleged FCPA violators.

According to the Bloomberg article—

‘I for one hope that this very long and very expensive ordeal will be a true learning experience for the department and the FBI as they regroup to investigate and prosecute FCPA cases against individuals’ U.S. District Judge Richard Leon said while granting the government’s request. He had earlier told prosecutors of his concerns about their ‘aggressive conspiracy theory’ of the case, he said.

The Bloomberg article also reported that—

The dismissal adds to courtroom setbacks for the government in FCPA cases. Last month, a federal judge in Texas acquitted a former manager at a Texas unit of Zurich-based ABB Ltd. who was accused of bribing Mexican officials. A related case was dismissed last year by a judge who said the jury verdict convicting two men at an electricity tower company of bribing Mexican officials was tainted by prosecutor misconduct in ‘a sloppy, incomplete and notably over-zealous investigation.’

According to the Bloomberg article—

The case stemmed from a three-year investigation involving an informant who had pleaded guilty in an earlier bribery case. Investigators recorded telephone calls and videotaped meetings with Federal Bureau of Investigation agents posing as representatives of Gabon, sub-Saharan Africa’s fifth-biggest oil producer.

The government said the defendants agreed to pay a $3 million commission for the business, half of which they were told would be paid to the country’s defense minister. …

The government’s case was put together through Richard Bistrong, a former executive from Armor Holdings Inc. He pleaded guilty in 2010 to bribing officials of the United Nations and the Netherlands to obtain contracts for body armor and pepper spray, according to court papers. He has yet to be sentenced.

Bistrong identified possible targets for the government, according to court papers. Working

with the FBI, he recorded telephone and in-person meetings with the defendants. He also introduced them to Pascal Latour, an FBI agent posing as a representative for Gabon's defense minister.

Bistrong, in testimony given during the second trial, admitted to having a cocaine addiction and to filing false tax returns and other crimes. Defense lawyers said the lead FBI agent shared cigars, gifts and meals with Bistrong, compromising the government's investigation. The relationship was documented in text messages and e-mails shown to the jury.

In the second case, FCA penalties were found by a District Court Federal Judge to violate the U.S. Constitution's prohibition on excessive penalties. Here's **an article** that summarizes the case and the ruling. As the article reported—

[The defendant] submitted 9,136 invoices for payment under the fraudulently received contract, according to the court opinion. Pursuant to the False Claims Act's penalty provision, the whistleblowers sought $5,500 to $11,000 in penalties for each of the invoices.

So the defendant was looking at paying somewhere in the neighborhood of $50 million to $100 million on conviction. The article noted—

[The Judge] compared the extent of the harm caused by [the defendant's] conduct to the fine requested, finding that the economic harm felt by the government because of the price fixing was uncertain, and possibly insignificant. [The Judge] took care to base his decision on the fact that the government would not necessarily have received a better price for services but for [the defendant's] price fixing conduct.

The same decision **was discussed** in more detail by the attorneys at Wiley Rein. They wrote—

… the Eastern District of Virginia denied any civil penalties under the False Claims Act (FCA), holding that even the minimum mandatory civil penalty was unconstitutionally excessive, in violation of the Eighth Amendment. … a jury found the defendants liable under the FCA for conspiring to fix prices of subcontracts and then falsely certifying that the pricing in their bids had been independently calculated. … the parties stipulated that the defendants filed 9,136 invoices under the contract at issue; thus, there were 9,136 potential false "claims." In theory, the FCA would require civil penalties amounting to between $50,248,000 and $100,496,000 for 9,136 false claims.

In the face of such a large penalty, Judge Anthony Trenga, who wrote the opinion, awarded no civil penalties because even the minimum penalty of $50 million would be unconstitutionally excessive. The court found no evidence that the defendants' actions caused the government any economic harm. Nothing supported the relator's contention that the government paid more for services or received deficient services because of the subcontract pricing conspiracy. In

fact, the government had extended the contract twice. Additionally, the court found the defendants received only a limited benefit from their misconduct. The defendants only realized a $150,000 profit on $3.3 million worth of services. Among other key findings, the court determined that there was nothing in the language of the FCA suggesting an intent to impose a $50 million penalty in these circumstances. Thus, the court ruled that imposition of the minimum required fine under the FCA would result in disproportionally excessive fine in violation of the Eighth Amendment.

The Wiley Rein attorneys concluded—

Coming from a court in which government contract issues are frequently litigated, this decision may limit the government's ability to recover penalties that are disproportional to the harm caused by the defendants. For government contractors facing FCA allegations, especially in situations where the government received the full value of the contract, this decision could be quite important.

Compliance professionals often lose sleep worrying about compliance with FCA and FCPA. Although these two cases can be seen as victories for the defendants and losses for the prosecutors, we would not advise reducing risk assessments associated with these two statutes. As with all Federal prosecutions, the cost of winning is excessive, whether measured in terms of distractions to the executive team, in diversion of internal resources, or in payments to very expensive external attorneys.

Sure, these were two victories—but we think you'll agree that they were pyrrhic victories.