In the

Supreme Court of the United States

United States Of America,

Petitioner

V.

Philip L. Bornstein, et al.,

Respondents.

No. 74-712

Washington, D. C.
October 8, 1975

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner v. PHILIP L. BORNSTEIN, et al., Respondents.	No. 74-712

Washington, D. C.

Wednesday, October 8, 1975

The above-entitled matter came on for argument at 2:10 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KEITH A. JONES, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

WILLIAM ROSSMOORE, ESQ., 218 Bedford Street, Stamford, Connecticut 06901, for Respondent Gerald Page.

JACK BALLAN, ESQ., 14-25 Plaza Road, Fair Lawn, New Jersey 07410, for Respondent Philip L. Bornstein.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 74-712, the United States against Bornstein.

Mr. Jones, you may proceed whenever you are ready.

ORAL ARGUMENT OF KEITH A. JONES ON BEHALF OF PETITIONER

MR. JONES: Mr. Chief Justice, and may it please the Court: This case under the False Claims Act arises out of respondents' fraudulent supply of nonconforming electron tubes for use in Army radio communications kits. The facts are as follows:

In 1962 the Signal Supply Agency, acting on behalf of the Department of the Army, entered into a contract with a private company, Model Engineering and Manufacturing Corporation, for the supply of radio kit sets. Each set was to contain a transmitter, a receiver, power supply, transformer, and radio accessory kit.

The radio accessory kits operated with 4X150G electron tubes. The contract required that these tubes be JAN branded. JAN, J-A-N, is an acronym standing for Joint Army-Navy. The manufacturer is authorized to use the JAN designation only after its manufacturing processes pass certain Government tests for quality control and the tubes themselves pass certain Government inspection tests. Thus, by calling for JAN tubes in the contract, the contract in

effect required the furnishing of tubes that were certified as having met certain Government standards as to both manufacture and performance. The call for JAN tubes in the contract can therefore be seen to be more than a mere technical formality. Although the record is silent on this point, it may reasonably be inferred that the radio sets which, as I have indicated included both receiver and transmitter, would be used for the Army for field communications and that a tube failure can impair the military operations that might be dependent upon such communications.

The rigid quality control and performance standards represented by JAN branding therefore serves to minimize the risk of such a tube failure. This consideration, I believe, indicates the practical importance of the contractual requirement that the tubes to be supplied would be JAN tubes. And it also underlines the seriousness of the respondents' fraud which I will now describe.

Respondents were the owners and operators of a corporation, United National Labs, that entered into a contract with the prime contractor, Model Engineering, for the supply of the JAN tubes called for by the contract. It is undisputed in this case that the respondents caused and were responsible for all the acts of their corporation, United National Labs, and therefore it is appropriate in further describing the facts in this case to raise the corporate veil and talk solely in

terms of the respondents' individual acts attributing the acts of the corporation to the respondents as well.

The respondents were dealers in electron tubes, and they entered into the subcontract with Model Engineering knowing that the tubes to be furnished thereunder were to be used in a military procurement contract.

At the time they entered into this subcontract, the prevailing market price for JAN tubes of the type specified in the contract was approximately $40 per tube. Instead of buying and supplying these kinds of tubes, respondents instead bought cheaper tubes at prices ranging from $15 to $18, and they falsely stamped each tube with the JAN designation. Thus we have here a case of fraud, pure and simple, committed solely for the purpose of making a dishonest profit.

Respondents made three shipments of a total of 397 falsely branded tubes. The tubes were packaged in 21 separate boxes, and each box was accompanied by a packing list to which the respondents affixed a false Government inspection stamp. Respondents billed Model Engineering, the prime contractor, for the tubes on three separate invoices.

In turn, Model Engineering incorporated these tubes into the radio kit sets that it supplied to the Army, and it billed the Army for the tubes on 35 separate invoices or claims for payment. Each of these claims for payment represented falsely, because of the respondents' fraud, that the electron

tubes furnished in the radio kit sets were Government inspected JAN tubes. The Government paid the 35 claims for payment.

When respondents' fraud was subsequently discovered, after some negotiation, Model Engineering, the prime contractor, paid the Government a total of a little bit more than $16,000 for the breach of contract that had been occasioned by the respondents' fraud.

QUESTION: Did Model pay it, or was it withheld from Government payment to Model?

MR. JONES: I think that the Government owed Model moneys in connection with some other contract and that the $16,000-odd here was withheld from that other payment.

QUESTION: In this connection, are the respondents responsible, liable to Model? And if so, has Model ever instituted suit against them?

MR. JONES: Now, that raises two questions, one of contract law that I cannot answer because these respondents are individuals and I do not know whether they would be liable in contract to Model Engineering. It was their corporation, United National Labs,that actually was in the privity of contract relation with Model.

The second question is a factual one, and I simply don't know the answer to it, and I don't think it's in the record.

QUESTION: Well, certainly, there is incipient

liability, isn't there, the possibility of liability.

MR. JONES: Yes, there is, and that is the basis for the Government's concession that it would be appropriate in determining double damages to allow a certain credit for the payment that Model Engineering made, and I will get to that aspect of the case in a moment.

QUESTION: If they defrauded the Government, they defrauded Model, too.

MR. JONES: That's correct.

QUESTION: It wouldn't have to be based on contract liability.

MR. JONES: The respondents as individuals themselves might be liable in tort. Perhaps that's so, Mr. Justice Rehnquist.

At any rate, under the theory that they will be liable in one form or another, we have not pressed the full double damages liability but rather have indicated that some kind of allowance may be appropriate on account of Model's payment to the Government.

QUESTION: Like in the full amount.

MR. JONES: Like in the full amount, but only as against the double damages.

QUESTION: Yes, but nevertheless you don't expect to collect that amount again.

MR. JONES: No, we don't expect --

QUESTION: Especially double.

MR. JONES: Well, I will get to the double damages aspect of the case. I would first like to lay out the rest of the facts.

QUESTION: If there is liability there, then I suppose your suggestion -- I think there was one in the brief -- of the respondents' profiting by their fraud may well evaporate.

MR. JONES: Well, I certainly hope so.

At trial of the case, the district court determined that the Government's actual injury from the breach of contract was approximately the same that Model had paid to the Government but $39.70 more. The district court further determined that respondents' acts in supplying the falsely stamped tubes thereby causing the submission of false claims to the Government violated the False Claims Act,and the respondents have not contested that determination either in the court of appeals or in this Court.

The issues in this case pertain to the consequences that flow from the district court's finding of a violation of the False Claims Act. There are two issues:

One concerns the question of whether there are multiple forfeitures that may be imposed against respondents for their violation.

The Government takes the position that the respondents

here are subject to a total of 35 $2,000 forfeitures under the Act, one for each of the 35 false claims for payment that were made as a result of their fraud.

Respondents assert that they are subject to only one forfeiture payment because they say their fraud affected only one subcontract and that is how they would measure the number of forfeitures under the Act. And the court of appeals sustained the respondents' position.

QUESTION: Is it Government practice on the accounting side to require a separate voucher for each shipment?

MR. JONES: In this case there were actually eight Government vouchers of payment. Model submitted 35 invoices for payment.

QUESTION: They accumulate them and pay in groups, apparently.

MR. JONES: Yes, that's apparently what took place in this case. And I don't know over what course of time the various claims and payments were made.

The other issue in the case we have already talked about a little bit is the question of the proper measurement of double damages. Both courts below sustained the respondents' contention that the Government's single damages under the Act for purposes of computing double damages is limited to the amount of the Government's injury less its recoveries from the prime contractor. Accordingly the courts below determined

single damages of $39.70 and double damages of $79.40. Our position on this issue is that for determining single damages you look to the Government's actual injury at the time of the discovery of the fraud, to get double damages you double that amount. The Government's injury was $16,000-odd, to double that you get $32,000. But we have further submitted the respondents should be allowed credit against that $32,000 double damages liability in the amount of the recoveries from the prime contractor.

Now, before turning to an analysis of these two separate issues, I would like to point out to the Court the combined effect of the court of appeals' decisions on these issues taken as a whole, and that effect, we feel, is to eviscerate the False Claims Act as a deterrent to subcontractor fraud.

The court imposed upon the respondents in this case a paltry penalty of only $2,079.40, and that penalty, the penalty imposed by the court of appeals, permits the respondents to retain over three-quarters of the illegal gain that they made by supplying the Government with cheap tubes rather than the JAN tubes required by the contract. And we submit that the puny threat of such disproportionately small penalty is unlikely to deter any subcontractor from attempting to defraud the Government. If the fraud goes undetected, the subcontractor reaps a dishonest profit and pays no penalty

whatsoever. If, on the other hand, as in this case, the fraud is discovered, the subcontractor nevertheless pays back to the Government only a small fraction of the dishonest profit or the illegal gain.

QUESTION: But isn't he subject to criminal prosecution and isn't there a deterrence on the criminal side?

MR. JONES: There is some deterrence on the criminal side. It wasn't terribly effective in this case.

QUESTION: Well, you just said that if the fraud isn't discovered, there is no deterrence. That's true of crime also, isn't it?

MR. JONES: Yes, but what we are now talking about is placing at least a substantial deterrence once there is a discovery.

I would further point out that although these respondents were prosecuted and convicted of conspiracy, apparently there is no criminal statute which by its terms would prohibit the substantive act of causing a false claim to be made. If you look at 18 U.S.C. 287, it punishes the making of false claims, but what we are concerned with in this case with regard to contractors is causing a third party to make false claims.

QUESTION: Not even an aider and abettor?

MR. JONES: Well, I don't know if you can be an aider and abettor if there is no substantive crime by another

person and there would be no substantive crime by the prime contractor because he unknowingly made the submission of false claims. I'm not saying there is no possible criminal punishment other than under a conspiracy clause. I am just pointing out that the criminal and civil statutes are not coterminus and it's by no means positive that you can always punish criminally the kinds of acts that we are now trying to impose a civil penalty on.

QUESTION: I didn't follow that.

MR. JONES: To summarize the court of appeals decision, the court of appeals has in our view converted the False Claims Act into little more than an inexpensive license to defraud the Government, license, moreover, as I have just indicated, that must be paid for only if the fraud is discovered. We believe Congress could not and did not intend that result. Indeed, as I now hope to show, Congress intended a very different result indeed.

Again for purposes of convenience of exposition with the question of double damages, I have one important thought to add to what we said in our brief on that issue, and I would like to address that at the outset.

Respondents' contention here is that the prime contractor's payment to the Government of single contract damages in effect absolves the respondents from any liability under the False Claims Act double damages provision. And this

contention can fairly be tested, I think, by asking what would the consequences have been if the single contract damages payment had been made not by the prime contractor but by the respondents themselves? Could respondents have insulated themselves from any liability for double damages by coming forward after the discovery of fraud merely with the payment of single damages?

QUESTION: What if before the discovery of fraud, the day after they sent the stuff, they simply had a change of heart and before the Government ever discovered the fraud they sent single damages?

MR. JONES: Well, I would think that from a purely dry, logical reading of the Act, that double damages would have in fact been -- the liability for double damages would in fact have been incurred as of the date of the fraud. But there might be a question whether had there been a payment the next day there had actually been an injury to the Government.

QUESTION: Would you say, I believe the double damages become fixed when they cause to be submitted to the Government the false --

MR. JONES: Well, that is -- well, the violation of the Act has become complete at that point.

QUESTION: Otherwise, I suppose any time a prime contractor or anybody else defrauds the Government -- seems to have defrauded the Government, he could reduce his liability

to single damages by paying.

MR. JONES: Well, that's exactly our point. Respondents seem to think that they or the prime contractor can come in after fraud has been discovered and after the injury has already been sustained and reduce their liability under the double damages provision of the Act from double damages to single damages merely by coming forward voluntarily with the payment.

But that's clearly not the case. Respondents could not have escaped their own liability for double damages simply by offering single damages.

QUESTION: Yet if Model had discovered the fraud and refused to submit the invoices to the Government, then although the respondents' fraud was complete, they never would have become liable to the Government.

MR. JONES: In that case, there might not have even been a violation of the False Claims Act.

QUESTION: They would not have caused --

MR. JONES: They would not have caused the submission of a false claim and there would have been no injury to the Government for the purposes of the double damages provision either.

Well, we believe that this analysis that I have just gone through, which I am sorry to say was not set forward with any clarity in our brief, is dispositive of respondents'

double damages claim in this case.

I would recommend to the Court the reading of our brief for further arguments on this point. But I would like to turn for the remainder of my argument to the question of multiple forfeitures.

The first clause of the False Claims Act which is the relevant clause in this case provides, and I quote with some deletions, none of which, I hope, change the substance: "Any person who shall make or cause to be made any claim upon the United States or any department or officer thereof, knowing such claim to be false, shall forfeit and pay to the United States the sum of $2,000."

It is well established that as to prime contractors this language imposes a separate $2,000 forfeiture for each false claim for payment. Since the Act imposes a forfeiture on any false claim, the statutory violation is complete upon the presentation of the first false claim and a forfeiture arises on account of that violation. Each additional false claim constitutes a separate and complete violation of the Act that gives rise to an additional forfeiture. Thus a prime contractor who, for example, knowingly submitted 35 false claims for payment to the Government unquestionably would be liable for 35 separate forfeitures.

We believe that the same reading of the Act per force applies to subcontractor fraud. In the first place, it was

established by this Court's opinion in United States ex rel. Marcus v. Hess that a subcontractor violates the Act when its fraud causes the prime contractor to submit a false claim for payment to the Government. The subcontractor's violation is complete when the prime contractor submits its first false claim and a forfeiture arises at that time. Every additional submission of a false claim is a separate and complete violation of the Act that gives rise to an additional forfeiture. In short, the plain language of the Act requires the number of forfeitures to be determined in the same fashion whether the fraud originates with the prime contractor or as in this case the subcontractor.

Now, this, we believe, to be a sensible and natural result, because, after all, the Government's injury is the same whether the fraud originates with the contractor or subcontractor. The need for deterrence is the same whether the fraud originates with the contractor or the subcontractor. And there is no reason to distinguish between these two cases.

The respondents' argument moreover, which is that you measure the subcontractor's forfeiture by the number of subcontracts, has utterly no basis in the statutory text. There is just nothing in the language of the Act that produces that result.

Not only is our result supported by the statutory text, it serves the twin purposes of deterrence and restitution

that underlie the Act. As we point out in the brief, and I won't repeat those arguments here, it would be a mockery of the legislative intent to lump, as respondents would have this Court do, all the subcontractors' fraudulent practices and derelictions into a single statutory violation.

Now, this more or less furnishes the Court with our affirmative presentation on this issue. Now, we will address what seem to me to be the two threads of argument that the respondents present here. One appears to be that the False Claims Act should be narrowly construed in the matter of criminal statute. I'm not sure what kind of narrow construction they would intend since there is no apparent basis in the language of the Act for their result anyway. But I would point out that the Court has already rejected the principle of construction upon which they rely.

In United States ex rel. Marcus v. Hess the Court held that the forfeiture provisions of the Act imposes civil not a criminal sanction, and perhaps more to the point, in United States v.Neifert-White Co. the Court stated, and I quote: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil." The statute no longer imposes any criminal sanctions; it's a wholly civil statute that should

be liberally construed in a manner that will effectuate its underlying purposes of deterrence and restitution.

Respondents' argument appears to be that although 35 false claims for payment were presented to the Government in this case, they nevertheless have committed only a single causative act, a single act of causation deserving a penalty.

It's difficult to know what basis the respondents have for making that suggestion. In the first place, it is clear that they committed many separate fraudulent acts. They falsely stamped each of 397 electron tubes. They falsely affixed false Government inspection stamps to each of 21 packing lists. They submitted three false invoices to the prime contractor, and they made false oral representations to the contractor as well.

QUESTION: Does the Government take the position that there are 190, in effect, false claims -- 199 false claims effected by respondents?

MR. JONES: Well, I think the suggestion is that the Government could take the position that there were 397 violations of the Act as a consequence of the false stamping of each of the 397 tubes. The court of appeals seems to assume that the stamping of the tubes would constitute a violation of the Act and of the second clause of the Act. I think that it's arguable whether the Government would be able to prevail because the categories of documents with respect

to which false entries are punished under the second clause of the Act would not appear to include the tubes.

QUESTION: You have all kinds of numbers. You have 199 --

MR. JONES: Well, the 199 is a number the respondents drew out of a hat. I think they arrived at it because there were 397 false tubes and they said well, each radio kit set contains two tubes and therefore 198 kit sets would include false tubes. No one on the Government side has ever suggested the figure 199.

The only figures -- I can run through them -- are 35 false claims under the first clause of the Act; 397 falsely stamped tubes under the second clause of the Act, but I question whether you could find a violation with regard to that; 21 falsely stamped package lists, and that probably is a violation, causing the Government to issue --

QUESTION: Under 2.

MR. JONES: Under 2.

QUESTION: Which is not involved.

MR. JONES: Which is not involved.

None of these other numbers are involved.

Eight false vouchers issued by the Government also under the second clause, and one conspiracy, and three false invoices issued to the prime contractor.

We are just taking the position here that the false

claims submitted in violation of the first clause without regard to any of the other clauses of the Act constitute a basis for the forfeitures.

We would say that the respondents' course of fraudulent conduct, whether it's consisting of one act or many, nevertheless caused the submission of the 35 false claims and it is the number of false claims that is determinative of the number of forfeitures under the Act.

QUESTION: You take that position even though there is no indication, as I understand it, that the subcontractor had any control over the number of invoices.

MR. JONES: That is correct, Mr. Justice.

QUESTION: Thirty-five or 500, would your position be the same?

MR. JONES: Well, we might not have seeked to impose 500 penalties, but as a reading of the Act --

QUESTION: As a matter of principle under your theory, you would take that position.

MR. JONES: That's correct. We take the position that respondents could reasonably have anticipated that the prime contractor might submit more than one false claim for payment as a result of their fraud. More generally our position is that when a subcontractor seeks to defraud the Government, he does so at his peril and at the anticipatable risk that the prime contractor will submit multiple false claims

as a result of the fraud. There were 35 such false claims filed here. We think 35 forfeitures should be imposed.

I would like to reserve --

QUESTION: The reason for submitting frequent claims is to get the money back into the capital of the performing contractor, is that not so?

MR. JONES: Yes, sir.

QUESTION: Because they don't want to wait a year or a year and a half.

MR. JONES: That's right, when you have a contract that extends over a long period of time, you have payments during that time.

I would like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Rossmoore.

ORAL ARGUMENT OF WILLIAM ROSSMOORE ON BEHALF OF RESPONDENT GERALD PAGE

MR. ROSSMOORE: Yes, sir, Mr. Chief Justice, and may it please the Court: I represent the Respondent Gerald Page in this matter.

I don't think there is any dispute as to the fact with one exception. That is, Mr. Jones' statement that the repayment by Model to the Government was made in the form of a deduction from other contracts between Model and the Government. I think the documents which were included in the Government's

appendix make it quite clear that the deduction was from payments due under this very same contract. I pointed out the numbers involved in my brief on pages 17 and 18 and I think if you will look at that, you will see it's perfectly clear that it comes under this same contract.

Addressing myself first to the question of the number of forfeitures, Mr. Jones here dealt with the different numbers that might be used. And as a matter of fact, the Government's position from the beginning of this litigation has not been at all consistent. As Judge Gibbons pointed out in the decision in the court of appeals, originally the Government based its claim for forfeitures not at all on vouchers submitted by Model to the Government, but on its claim that the respondents submitted 30 invoices to Model and it asserted 30 forfeitures on that basis. The shift came when I think it found out that there were only three invoices and then this theory came in that the respondents were now liable for one forfeiture for each of 35 invoices submitted by Model to the Government plus one forfeiture each for the joint act of misbranding the tubes, one forfeiture for the combined acts of submitting 21 packing lists, and one forfeiture for the combined acts of submitted 21 certificates, a total of 38. I take it that at this point they are now asking only for 35.

I think that what this demonstrates is that in fact

the Act as the Government reads it is not at all clear. I submit, however, that if properly read the Act is clear and I note that Mr. Jones in reading the Act to this Court persisted in reading from the codification in 31 U.S. Section 231. As I pointed out in my brief that is not the correct wording of the Act. This Court has so recognized that in the U.S. ex rel. Marcus v. Hess case, the Neifert-White case, the Rainwater case, and other cases.

If you read the Act as it is actually written, I think that you will find --

QUESTION: Where in your brief is that?

MR. ROSSMOORE: That is on pages 4 and 5 of my brief, sir.

The Act does not say that anyone who submits a false claim or causes --

QUESTION: What pages?

MR. ROSSMOORE: Pages 4 and 5, Mr. Justice.

Anyone who -- it does not say that anyone who causes the submission of a false claim shall forfeit $2,000. It says that anyone who commits any of the acts prohibited by the prior criminal section -- that was section 5438 -- shall forfeit $2,000. Now, one of the acts prohibited by section 5438 is the causing to be made of a false claim. But the forfeiture is imposed by the statute on the act committed by the respondent, or the defendant, in the trial court. It is

not imposed on the submission of one or more false claims. As long as the respondent caused the submission of a false claim, he then becomes for that act liable for one $2,000 forfeiture. And I think that whether or not this is now solely a civil statute, the criminal statute having been absorbed elsewhere, it was written as a criminal statute originally and the language was quite clear that forfeitures were only to be imposed for acts committed by the person charged with the forfeiture. And I think it's for that reason that I have stressed the correct reading of the statute, the correct language as it actually exists on the statute books.

QUESTION: Well, as applied to this case, do you think that operates as much of a deterrence for this kind of corrupt conduct on the part of contractors?

MR. ROSSMOORE: Well, the deterrent effect as it works out in this case certainly is not as great as if you impose 35 forfeitures. The deterrent effect comes from the criminal statute, and I think the record here shows that both of these respondents were charged criminally, did plead guilty, and were sentenced. Now, the fact that they weren't deterred previously, that's true of both any deterrent statute and any criminal statute, they could have gone to jail for a long period of time, they could have been fined, I think it's $10,000. This being a first offense, those penalties were not visited upon them, but I think the threat of the criminal

process, the threat of the jail term would certainly be a much greater deterrent than the possibility of the fortuitous imposition of fines.

QUESTION: There is nothing uncommon about having the civil penalties in a situation like this be vastly more than the criminal in terms of dollars.

MR. ROSSMOORE: Nothing at all. In many cases it so works out, and I guess even in the Hess case the criminal (sic.) penalties actually imposed were greater than would have been imposed had the defendant there been prosecuted criminally.

But the purpose of the statute, and I think this Court has recognized it in the Hess case, is to provide restitution for the Government.

QUESTION: Is that all? Just restitution?

MR. ROSSMOORE: I believe that's all. And I think that the language of the Court in the Hess case so states. "We think that the chief purpose of the statute here was to provide 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 the Government would be made completely whole."

Now, it may also incidentally have a deterrent effect and somebody who is starting out to commit a fraud might examine -- sit down and say, Well, gee, if I do this it's going to cost me $70,000 or $100,000, I don't give a damn about the criminal

penalty, but I'm not going to subject myself to that.

I don't think that's the way people get into this kind of situation. I think as the record shows here, these respondents actually backed into it. They entered into a contract which they couldn't fulfill and then they found out that the way they could fulfill it was committing the fraud, and they were involved not in considering the penalties at all, and they certainly weren't considering the number of forfeitures. They certainly committed illegal acts, they certainly were subject to the criminal penalties, and they were subject to the civil penalties that this statute provides.

QUESTION: They certainly caused to be presented a claim to the Government under the R.S. 5438 that you set forth at pages 4 and 5 of your brief, didn't they?

MR. ROSSMOORE: Yes. There is no question about that. But the question is are they to be charged with a $2,000 forfeiture for each act then committed by somebody else over which they had no control?

QUESTION: But would the language cause to be presented --

MR. ROSSMOORE: What the statute says is anyone who commits an act shall be fined $2,000. The act is causing to be presented a claim or claims.

QUESTION: I don't read 5438 -- if you look at the top of page 5, perhaps I've missed something, but if you look

at the top of page 5 of your brief, "any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent." Now, that just says "claim," it doesn't say --

MR. ROSSMOORE: That's right, Mr. Justice, but the section 3490 says that the forfeiture should be visited upon the act committed by the respondent, not upon the claim submitted. The act causes the claim, yes, but the punishment or the penalty or the forfeiture goes against the act committed.

QUESTION: But the act prohibited is causing to be submitted the claim.

MR. ROSSMOORE: That's right, sir. One act can cause the submission of one claim or 100 claims or 400 or 397 claims, in this particular case. And perhaps it can be made clearer, the Government's argument is that somehow the subcontractor gets off easier than the contractor in this case because if the contractor himself were committing the fraud, he submitted 35 claims. Well, that is true, but the contractor had the power each time that he submitted the claim, and let's assume he knew he was submitting a false claim, to say, "Gee, I talked to my lawyer and I realize I'm going to be in trouble, I'm not going to submit any more of these. I may be stuck with what I've submitted, but I'm not going to submit any more."

The subcontractor doesn't have that option. He committed his fraud, he submitted the false goods, and then he is subjected to the multiplication of claims by acts over which he has neither knowledge nor control, and that's why I say that the impact of section 3490 is on the act committed by the respondents, not on the subsequent acts committed by the contractor, even though one of those subsequent acts is a necessary chain, it's the claim submitted.

QUESTION: You say the act, then, is the causing to be -- and that the subcontract only caused one.

MR. ROSSMOORE: The act that respondent here committed was causing a claim to be submitted. It wasn't submitting one or 35 or 397 claims.

I suppose the problem with the statute and the problem that this Court and many of the lower courts have wrestled with is that it does find its impact in such a great variety of situations and there has been no broad statement as to what the rule is. It's been applied on a case-by-case basis and the courts of appeals have come to different conclusions, although most of them, I think, except for the Court in the Usber case agree with the position we take in this case. And at the risk of being presumptuous, I would like to state what I think might be a formulation of a rule for consideration by this Court which would operate fairly and which would be in accordance with the language of the statute. And that is that

a forfeiture should be imposed for each act or series of acts or course of conduct by the defendants in the case involved which result in the payment of a false claim or claims by the United States. This formulation puts the emphasis where it belongs, on the acts committed by the person charged with the forfeiture.

So much for the forfeiture question. I want to touch briefly on just two thoughts with respect to the double damages issue. One is, and I think it's clear again in Mr. Justice Black's opinion in the Marcus v. Hess case that the double damages provision originally came into this statute because of the qui tam provision, the informers provision, whereby it was thought that most of these actions at that time would be brought by informers, the informer would get half of the recovery and the Government would then be made whole by its half of the recovery.

Obviously, if that was the intent, if the Government had already been paid or reimbursed, as it was in this case by a credit in the same contract, no informer would consider bringing a suit, there would be nothing to sue for. The Government hadn't been damaged.

QUESTION: What about other related statutes, like 18 U.S. Code 1001? Was there ever any informant's fee involved under that --

MR. ROSSMOORE: That's the criminal statute, isn't it,

Judge?

QUESTION: Yes.

MR. ROSSMOORE: I think there were informant's fees, but it didn't relate to the question of damages. There are many statutes where there are informant's fees. I think the Public Contracts Act, the situation has worked out pretty much as we contend here that any payment by the Government is first deducted before the doubling of damages. The informant features still remains in our statutes, although in much modified form in the 31 U.S.C. section 232 which is the successor to the revised statute 3493. At present, though, and it's only under limited circumstances the informer can get up to one-fourth of the recovery, but it's still there.

One final thought. In the Hess case itself or in the trial court in U.S. ex rel. Marcus v. Hess, there were a number of instances where the Government discovered the fraud before it made payment. The defendant's argue that since the fraud had been discovered, there were no damages and therefore there should be no forfeitures. And the district court's decision which was eventually affirmed in this court held that true, there were no damages to be doubled, but there was still a claim for forfeitures. This was pointed out again in this Court in the Rex Trailer case on page 153, footnote 5, and I think that at least in part answers the question of whether the Government can first double the damages and then

deduct any credit. I think the answer is that it cannot and should not, both because of the history of the way this statute was put together in the qui tam actions and because of the interpretations that have been placed upon it.

I yield the rest of my time to Mr. Ballan for further comments. He represents Mr. Bornstein.

MR. CHIEF JUSTICE BURGER: Mr. Ballan.

ORAL ARGUMENT OF JACK BALLAN ON BEHALF OF RESPONDENT BORNSTEIN

MR. BALLAN: Mr. Chief Justice, and may it please the Court: I don't wish to be repetitive. I hope you will bear with me if I am.

I would like to just emphasize a few points that perhaps have also been mentioned before. One is that this statute is ambiguous, and indeed the last paragraph of the circuit court's opinion indicates when it says it cries out for interpretation or revision, and perhaps that's why we are here. And I raise this because I think that the courts have been struggling with this ambiguity, these ambiguities and these overlapping sections and have come up with reasonable guidelines, not sufficient, admittedly, but reasonable guidelines to date. And may I say that in each case that I have read, I can find no exception, there has been a minimization of claims from the subcontractor through the contractor. In other words, this is the only case that I know of, and I stand to be

corrected if I'm wrong, where the acts of the subcontractor have been maximized rather than the reverse. Even in the Ueber case which is very heavily relied upon by the Government, there were 442 false invoices submitted to the two general contractors by the subcontractor. They were reduced to 54. And it makes it clear in this case that there was a pass-through that these invoices that were ultimately submitted arose out of, truly arose out of, and truly were caused by, the acts of the subcontractor.

In this case I think it's fair to say that we did not truly cause the 35 claims to be filed. We did cause claims to be filed, but not 35. And as I think Mr. Justice Powell indicated, the Government could go up to 500 in this instance if it wished to. It could look for all types of false documents and include them in their false claims. But this would be a gross injustice, I think, and would be a misreading of the statute which admittedly has some problems.

Now, I think it's fair, then, to say that the subcontractor here should be charged with his acts and not the fortuitous acts of the general contractor which are, as has been said before, totally beyond his control.

Now, Mr. Chief Justice, you indicated some concern about deterrence, as we are, and we are not here to defend or approve certainly what was done, but the deterrence does in fact take place with the criminal sanction which was imposed

and can always be imposed by the statute. And these two gentlemen received a two-year jail sentence which are in the stipulations which were suspended, and as businessmen certainly that is quite a serious deterrent.

QUESTION: Congress in numerous statutes provided these kinds of deterrent civil penalties in very large amounts.

MR. BALLAN: I think you're right, sir. To my knowledge.

QUESTION: Very often the civil penalty being much, much greater than the criminal penalty, the dollar criminal penalty.

MR. BALLAN: Well, we are dealing with this statute and how it has been interpreted. The petitioner has relied heavily on Marcus v. Hess, which is the only Supreme Court decision to deal with the question of multiple forfeitures. And in that case also there was a reduction, a minimization of claims and of penalties, of forfeitures because the courts have been struggling with this ambiguous statute and have been in each instance reducing them to a reasonable level and a reasonable standard.

With respect to the double damages, may I just say that in this instance the statute says double damages sustained are to be charged against the subcontractor, these two individuals. And may I suggest that there were no damages at all in this case, that when the restitution was made, when the payment was

made by Model, the contractor, who never went after the respondents herein, although he might have, or it might have, when that payment was made of $18,000 to the Government, the Government was rendered whole financially and economically.

QUESTION: Suppose I am hurt in an automobile accident, I incur $2,000 hospital bills as a proximate result of the negligence of the driver of the other car. Now, if I have hospital insurance that pays me off for that right away, you wouldn't say that I never sustained those damages, would you, in dealing with the tort-feasor?

MR. BALLAN: No, I wouldn't say that. I would agree with the implication of your question. However, this is a question of fraud, and I do think that when we are dealing with a tort action or a negligence action, that the proximate causes are certainly the responsibility of the original tort-feasor. But in this instance, with a fraudulent claim, with fraud being charged to the respondents, I think they should be charged only, and I think the statutes and the cases indicate, with their own acts of fraud.

QUESTION: As a matter of principle, I would think you would extend proximate cause further when you are dealing with someone who defrauds than with someone who is merely negligent.

MR. BALLAN: Well, sir, Mr. Justice Rehnquist, in this case our problem is that the upper limits of that are

totally beyond our control and do result in very unfair consequences. For example, this contract for which we were subcontractors was a $2 million contract. There were, as the Government pointed out, about five or six component parts in the sets that were sent out. We provided a small part of one of those five or six parts, namely, two tubes for each unit.

Now, the total that we received was approximately $13,000 or $16,000 I believe was what we received in payment.

Now, we are unable to control the ultimate or the subsequent subdivision or multiplication by the general contractor when he submits his invoices --

QUESTION: That's an argument on the forfeitures point, but you are making an argument on the double damages point.

MR. BAILAN: Well, on that I'm making a statutory argument, sir, and I'm referring to the rationale of the Klein case which is the only circuit court decision on this matter, and in that case they read the statute which does not provide for when the doubling takes place, and they felt that a rational approach would be to fix the amount lost, if there is restitution made, as it was in this case, to then subtract the difference and then double. And they came up with a figure indicating that there was really no loss to the Government, it was miniscule.

If Model had not made restitution, had not paid $18,000, then we certainly would have been held accountable for

a doubling of the loss of $16,000 to $18,000 or namely, $32,000 to $36,000. But the payment was made; there was no loss sustained by the Government except in its subsequent prosecution of this matter.

I believe that the rest has been stated by my colleague, and I will not repeat anything else unless there are any questions.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Jones.

REBUTTAL ARGUMENT OF KEITH A. JONES

ON BEHALF OF PETITIONER

MR. JONES: Thank you, Mr. Chief Justice.

I just wanted to address myself to the argument that there is some difference between the revised statutes and the False Claims Act as codified in 31 U.S.C. It seems to me there is no difference whatsoever in language or practical effect. In either case you look to determine whether there was a false claim. If so, you ask, did the subcontractor cause it. If so, there is a violation. And in this case you look to the second false claim, did the subcontractor cause it? Yes, he did, by his fraud. That was the second part of it.

QUESTION: What if you just look, though, to the act of the subcontractor as your opponents are suggesting and say that what's forbidden by R.S. 3490 is the doing or the committing of the act. The subcontractor's act is single in

submitting the thing to the prime.

MR. JONES: The reason I think that's an inappropriate analysis is that the doing or committing such act refers to the acts described in 5438, the acts described in 5438 were the causing of false claim will be submitted.

QUESTION: OK, how many times did the subcontractor in this case cause a false claim to be submitted?

MR. JONES: Thirty-five.

QUESTION: I would think you could argue equally well that he did it once.

MR. JONES: Well, he argues that his fraudulent course of conduct constituted a single causative act, and that's the essence as I take it, of their argument. It seems to me that's wrong for two reasons which interrelate. One is that we have here multiple acts. If you are focusing upon the acts of the respondent, we've isolated some 400-odd different fraudulent acts. On the other hand, if you are concerned with the act as defined in the statute, that act is to cause the false claim, and then it seems to me you have to look to determine whether a false claim was submitted, and if so, whether there were acts, an act or acts, of the respondent that caused that submission. In this case each one of the false claims was -- the submission of each one of the false claims was caused by respondents within the intent, I take it, of section 5438.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:05 p.m., the oral argument in the above-entitled matter was concluded.)