IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*
FRANK C. FOY AND SUZANNE B. FOY,

Qui Tam Plaintiffs-Appellants,

vs.

AUSTIN CAPITAL MANAGEMENT, LTD., *et al.*,

Defendants-Appellees.

Ct. App. No. 31,421
Santa Fe County
Hon. Judge John W. Pope
D-101-CV-2009-01189

Interlocutory Appeal from the First Judicial District, Santa Fe County
Honorable John W. Pope, District Judge

DEFENDANT/APPELLEE GUY RIORDAN'S ANSWER BRIEF

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ORAL ARGUMENT IS REQUESTED

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I. SUMMARY OF PROCEEDINGS

A. NATURE OF CASE, STATEMENT OF FACTS PERTINENT TO ISSUE ON APPEAL, COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

This case presents the issue as to whether a statutory enactment of the New Mexico legislature that permits treble damages, fines, attorney's fees and costs of suit may be applied retroactively for a period of twenty years without running afoul of the ex post facto clause of the United States and New Mexico Constitutions. The Act, the Fraud Against Taxpayer's Act, ("FATA"), NMSA 1978, § 44-9-1 et. seq., is a qui tam statutory scheme patterned after the federal False Claims Act ("FCA"), 31 USCA § 3729 et. seq., and allows citizens to bring statutory fraud suits in the name of the State of New Mexico against persons and entities who essentially present false claims to the State of New Mexico for payment.

The FATA has a retroactivity provision, NMSA 1978, § 44-9-12A, that permits claims to be brought against violators for conduct going back as far as July 1, 1987. The FATA was effective as law on July 1, 2007. Two district court judges below, one by way of a written opinion and the second by way of adoption of that opinion,

ruled that the FATA's retroactivity provision was an ex post facto law and refused to allow the FATA to be applied to conduct that pre-dated its effective date.[1]

Frank Foy, a retired employee of the New Mexico Educational Retirement Board, and his wife Suzanne Foy (the "Foys" or "Plaintiffs"), filed this qui tam suit on behalf of the State of New Mexico against Defendant Guy Riordan ("Mr. Riordan") and some seventy four (74) other named individuals and corporations on June 16, 2009. RP-000134-000206. This suit is commonly referred to by the parties as the "Austin Capital" suit. Id.

Mr. Riordan is a former stockbroker with Wachovia Securities, now known as Wells Fargo Advisors. He was placed on a task force created by Governor Bill Richardson on February 18, 2005 to address a $2.4 billion short fall facing the retired educators' pension fund. RP-000153,¶ 86-000155, ¶89; RP-000192, nos. 22-24; RP-002712-002713. Mr. Riordan was also involved as an employee of Wachovia Securities in soliciting two investments from the State of New Mexico for other investment firms and then placed with investment funds known as Crestline Investors and New Mexico Co-Investment Partners. RP-000192, nos. 22-24. Those

[1] Because the district court in this case adopted the opinion of the district court in another matter, Defendant Appellee Guy Riordan will refer to both rulings as the "district courts' rulings."

investments were made in 2004 and 2005 by the New Mexico State Investment Council. RP-000192, nos. 22-24. Wachovia Securities received a fee from those investment firms for Mr. Riordan's benefit. RP-000192, nos. 22-24.

The Plaintiffs allege that these fees were illegal kickbacks paid to Mr. Riordan due to Mr. Riordan's relationship with Governor Richardson and are seeking redress on behalf of the State of New Mexico under §§ 44-9-3 and 44-9-5 of the FATA. RP-000141, ¶ 34; RP-000146, ¶ 63; RP-000159, ¶ 106; RP-000177, ¶¶ 150, 152; RP-000187, Count 12. Mr. Riordan obviously denies that fees for his solicitation services were kickbacks or illegal in any manner. RP-004246, ¶3.

In addition to this suit, Plaintiffs brought another qui tam suit on behalf of the State of New Mexico under the FATA entitled State of New Mexico ex. rel. Foy v. Vanderbilt Capital Advisors, LLC, No. D-101-CV-2008-1895. RP-003248, ¶ 12-003249. That suit is commonly referred to by the parties as the "Vanderbilt" suit. Id.

District Court Judge John W. Pope was assigned to preside over this suit, i.e., the "Austin Capital" matter. RP-002767-002771. District Court Judge Stephen D. Pfeffer presides over the Vanderbilt suit. RP-003248, ¶ 12-003249. Mr. Riordan is not a Defendant in Vanderbilt, only in Austin Capital. Id.

On April 28, 2010, after sua sponte ordering extensive briefing on the ex post facto issue, Judge Pfeffer ruled in Vanderbilt that the retroactivity provision of the FATA, NMSA 1978, § 44-9-12A, was an impermissible ex post facto law and, thus, unconstitutional. RP-003143-003173. Judge Pfeffer's ruling was embodied in a thirty one (31) page opinion. RP-003143-003173. As a consequence, Plaintiffs in Vanderbilt were precluded from pursuing claims for conduct that pre-dated the effective date of the FATA, July 1, 2007. RP-003173. Post July 1, 2007 claims, however, have been permitted by Judge Pfeffer to go forward. RP-003165.

The Plaintiffs in Vanderbilt petitioned for interlocutory review of Judge Pfeffer's retroactivity ruling. See Order in Vanderbilt, Appeal No. 30,700; May 13, 2011 Hearing in Austin Capital, TR-69:5-16. Interlocutory review was denied by another panel of this Court. Id.

On May 17, 2010, Plaintiffs promptly filed a motion in this case, i.e., Austin Capital, asking Judge Pope to issue a declaration that the retroactivity provision of the FATA, NMSA 1978, § 44-9-12A, was constitutional. RP-003245-003253. Most, if not all of the Defendants, including Mr. Riordan, opposed said motion. RP-003258-003262; RP-003268-003282; RP-003288-003297; RP-003303-003337; RP-

003346-003354; RP-003361-003369; RP-003380-003407; RP-003411-003414; RP-003419-003431; RP-003492-003496.

On December 6, 2010, Mr. Riordan filed his own motion to dismiss based on the ex post facto clause of the United States and New Mexico Constitutions. RP-004245-004254. In his motion, Mr. Riordan argued that application of the FATA, effective on July 1, 2007, to State investments he was involved in as a solicitor in 2004 and 2005 violated that clause, and, since those were the only transactions he was named in, he asked that those claims be dismissed. RP-004245-004254.

Plaintiffs opposed Mr. Riordan's motion, and Judge Pope set a hearing on the motion for May 13, 2011. RP-004262-004272; RP-004285-004291. One week prior to the hearing, however, the Attorney General on behalf of the State of New Mexico moved to dismiss Mr. Riordan and some sixteen (16) other named Defendants on the basis that they intended to and, in fact, had already sued Mr. Riordan and others separately, not on statutory FATA claims, but on common law tort claims. RP-004331-004426.

At the May 13, 2011 hearing on Mr. Riordan's motion, Judge Pope did not rule on same at Mr. Riordan's request due to the Attorney General's motion for partial dismissal. May 13, 2011 Austin Capital Hearing, TR-9:18-23. Judge Pope, however,

did state that he had read enough briefing on the issue of the retroactive application of the FATA, did not need oral argument and was ready to rule on that issue, presumably on the Plaintiffs' motion for declaratory judgment filed back in May of 2010. May 13, 2011 Hearing, TR-68:11-69:16.[2] He then announced from the bench that he was adopting Judge Pfeffer's opinion in Vanderbilt and holding that retroactive application of the FATA was an impermissible ex post facto law. May 13, 2011 Hearing, TR-76:15-77:15. Thus, claims based on conduct that pre-dated the FATA would be barred, but claims based on conduct that post-dated the passage of the FATA would be permitted to go forward. May 13, 2011 Hearing, TR-81:12-82:7; TR-90:3-10. Judge Pope's ruling was later embodied in a written order and filed in the district court on July 8, 2011. RP-004893-004900.

Plaintiffs petitioned for interlocutory review of Judge Pope's order. RP-005183-005184. On August 31, 2011, this Court granted interlocutory review. RP-005183-005184.

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[2] Plaintiffs argue that Judge Pope's ruling was based on a motion to dismiss and should be analyzed on a 12 B (1) standard. Plaintiff's Brief in Chief, pp. 12-13. That argument is false.

The Attorney General later sought relief from the automatic stay by virtue of this appeal, requesting that this Court partially remand their motion on behalf of the State of New Mexico for the dismissal of Mr. Riordan and others from this suit. RP-005210-005212. Mr. Riordan opposed that motion, but this Court granted same. Consequently, a limited remand to the district court was entered for the purpose of hearing the State's motion for partial dismissal. RP-005210-005212.

Judge Pope heard the State's motion for partial dismissal on December 16, 2011. See Austin Capital Docket Sheet, November 2, 2011 and January 6, 2012 Notices of Hearing. The hearing could not be concluded on that day, and Judge Pope has reconvened said hearing for February 6, 2012. Id.

B. STANDARD OF REVIEW

This appeal involves review of district court rulings that a statute is unconstitutional because it is an ex post facto law. The standard of review is de novo. Bounds v. State, 149 N.M. 484, 494 (Ct. App. 2010), citing State v. Druktenis, 135 N.M. 223 (Ct. App. 2004).

II. ARGUMENT

A. PLAINTIFFS' ARGUMENT THAT THE EX POST FACTO CLAUSE OF THE UNITED STATES AND NEW MEXICO CONSTITUTIONS DOES NOT APPLY TO CIVIL STATUTES IS AN INCORRECT STATEMENT OF THE LAW.

Plaintiffs argue that the district courts' rulings are contrary to Calder v. Bull, 3 U.S. 386 (1798). Plaintiffs try to explain that Calder holds that civil statutes are not subject to the ex post facto clause. Such a position is overly simplistic. It also ignores subsequent Supreme Court precedent where civil statutes that were penal in purpose or effect were held to be subject to ex post facto analysis.

Calder v. Bull is a seriatim opinion in which three justices issued separate opinions on the constitutionality of legislation passed in the State of Connecticut that effectively, after the fact, set aside a decree of a state probate court. Calder, supra. Plaintiffs choose to rely solely on language from the opinion of Justice Chase, where he explained his understanding of the limited reach of the ex post facto clause:

> Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and [which] punishes such action . . . every law that aggravates a crime, or makes it greater than what it was, when committed . . . every law that changes the punishment, than the law annexed to the crime, when committed [,] . . . every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. at 390. The opinion of Justice Patterson in Calder, which follows Justice Chase's opinion, however, states that "ex post facto laws . . . extend to penal statutes, and no further." Calder, 3 U.S. at 397. As explained by the following paragraphs, "penal statutes" can extend to civil laws under certain conditions.

Moreover, a later opinion from the U.S. Supreme Court, citing Calder v. Bull, states, "the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender effected by them." Collins v. Youngblood, 497 U.S. 37, 41 (1990). And even though the Supreme Court has generally emphasized the four category limitation of ex post facto laws described by Justice Chase in Calder v. Bull (Collins, supra at 41-52; see also Carnell v. Texas, 529 U.S. 513, 520-39 (2000)), Plaintiffs ignore the fact that, in 2003, the Supreme Court addressed an Alaska statute, which they characterized as civil in intent, in order to determine whether that statute violated the ex post facto clause. See Smith v. Doe, 538 U.S. 84 (2003).

In Smith v. Doe, the Supreme Court was asked to consider whether Alaska's Sex Offender Registration Act ("SORA") was an impermissible ex post facto law. Even though the law was intended by the Alaska legislature to be a civil piece of legislation rather than criminal legislation, the Supreme Court nevertheless conducted

a detailed analysis to determine if the law was penal in intent, purpose or effect and thus violative of the ex post facto clause if applied to petitioner, who had previously been convicted of a sex crime. Id.

In conducting its analysis, the Supreme Court first asked whether the Alaska legislature, in enacting the law, intended to punish persons required to register under same. If it did, the law would have been held to be an impermissible ex post facto law by "transform[ing] what has been denominated a civil remedy into a criminal penalty." Smith, 538 U.S. at 92, citing Kansas v. Hendricks, 521 U.S. 346 (1997) and Hudson v. United States, 522 U.S. 93 (1997). The Supreme Court found the Alaska legislature's intent was not punitive. Id. at 92-6.

That did not end the inquiry, however. The Supreme Court then utilized seven factors identified in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) to determine if, notwithstanding the Alaska legislature's intent, the purpose or effect of the law was nevertheless punitive. Id. at 97-106. Determining that Alaska's SORA law was not punitive in purpose or effect pursuant to these seven factors, the Court held the law was not an impermissible ex post facto law. Id.

These seven factors ("Kennedy factors") are the same factors that were utilized by Judge Pfeffer in the Vanderbilt litigation to conclude that the FATA was penal in

purpose or effect and, thus, an ex post facto law if applied retroactive to its effective date. RP-003148-003173. Judge Pope adopted Judge Pfeffer's analysis and ruling in this case. May 13, 2011 Hearing, TR-76:15-77:15; TR-81:12-82:7; TR-90:3-10; RP-004893-004900.

Plaintiffs are, thus, simply wrong when they argue that civil statutes are beyond the reach of the ex post facto clause. While civil statutes can, as a general matter, be applied retroactively, if they are punitive in intent, purpose or effect, they are more properly considered "penal laws," which run afoul of the ex post facto clause of the U.S. and New Mexico Constitutions.

B. THE KENNEDY FACTORS WERE CORRECTLY APPLIED IN FINDING THE FATA TO BE A PENAL STATUTE IN PURPOSE OR EFFECT.

Judge Pfeffer assumed the intent of the New Mexico legislature in enacting the FATA was not to punish violators. RP-003148. He then analyzed the law in terms of the seven Kennedy factors, which he accurately described as follows: 1) whether any sanctions provided for in the FATA legislation have traditionally been regarded as punishment; 2) whether the sanctions under the FATA are only imposed based on a finding of scienter; 3) whether the FATA sanctions impose an affirmative disability or restraint; 4) whether the FATA sanctions promote a traditional area of punishment;

5) whether the behavior to which the FATA sanctions apply is already a crime; 6) whether the FATA sanctions have a rational connection to a non-punitive purpose; and 7) whether the FATA sanctions are excessive with respect to an alternative non-punitive purpose. RP-003148-003161, citing Smith, 538 U.S. at 97; Kennedy v. Mendoza-Martinez, 372 U.S. at 168-69.

Judge Pfeffer correctly noted that the FATA provides for mandatory treble damages to be assessed against a violator, together with a civil penalty of $5,000 to $10,000 for each violation, the costs of a civil action brought to recover those damages or penalties and reasonable attorney's fees. RP-003149-003153, citing NMSA 1978, § 44-9-3C. Judge Pfeffer then looked to caselaw interpreting the FCA, which the FATA is patterned after, and noted that several courts have found the FCA's treble damages provisions to be punitive in purpose or effect. Id, citing Vermont Agency of Natural Resources v. United States ex. rel. Stevens, 529 U.S. 765, 784-85 (2000); United States ex. rel. Sanders v. Allison Engine Co., Inc., 2009 WL 3626773*8 (S.D. Ohio 2009); United States ex. rel. Baker v. Community Health Systems, Inc., No. 1:05-cv-0279 WJ/WDS [Doc. 83] (D.N.M. 3-19-10, pp. 33-34.). Since the FATA is similar to FCA, Judge Pfeffer found the FATA's damages and penalty provisions to be punitive in purpose or effect, although he assumed the

legislature's intent in enacting the FATA was to the contrary. Id.

Notwithstanding Judge Pfeffer's assumption as to the legislature's intent, Judge Pfeffer then noted that the FATA penalties do not come into play unless a violator has acted "knowingly." RP-003148, citing NMSA 1978, §§ 44-9-2C, 44-9-3A. He thus found the scienter element of Kennedy to be satisfied, indicative that the FATA had a punitive purpose or effect. RP-003153.

Next, after finding that the FATA does not impose an affirmative disability or restraint, Judge Pfeffer noted that the FATA promotes a traditional area of punishment in that treble damages are normally used as a deterrent. He found deterrence to be one purpose behind punishment. RP-003153-003156, citing Allison Engine Co., Inc., 2009 WL 3626773*9. He also found the FATA provides multiple penalties to be assessed against a violator, indicative that the statute is not merely remedial, but is punitive in purpose or effect because it goes beyond making the State of New Mexico whole and provides an additional incentive in the form of treble damages for citizens to sue on behalf of the State in order to punish violators. Id., citing Hughes Aircraft Co. v. United States, 520 U.S. 939, 949 (1997).

Judge Pfeffer also noted that the FATA provides that fraudulent activity may be prosecuted criminally. RP-003156-003158, citing NMSA 1978, §§ 44-9-6C and

G; 44-9-12B. Judge Pfeffer further found that the FATA addressed activity that was already a crime in New Mexico. Id. These factors, according to Judge Pfeffer, indicated the FATA was punitive in purpose or effect, but he gave the FATA the benefit of the doubt, deferring to a federal court finding in Allison Engine, and found that this factor had a civil or remedial purpose or effect. Id.

Judge Pfeffer then concluded that the FATA does not have a rational connection to a non-punitive purpose. This is so because he found treble damages to be starkly viewed as punitive in nature. RP-003158-003160, citing Stevens, 529 U.S. 784-85; Cook County, Ill. v. United States ex. rel. Chandler, 538 U.S. 119, 130-32 (2003). Moreover, Judge Pfeffer noted that funds collected under the FATA are not earmarked for any specific purpose. They are to be deposited into general fund accounts. Id., citing NMSA 1978, § 44-9-7E(1) and (3)(b). This militated toward a finding that the FATA was punitive in purpose or effect in Judge Pfeffer's eyes, but, again, he gave the FATA the benefit of the doubt and assumed that the FATA had a civil purpose or effect. Id.

Finally, Judge Pfeffer concluded the FATA's provision for treble damages, fines and joint and several liability go far beyond compensating the State of New Mexico for any actual loss it may incur. RP–3160-003161, citing United States v.

Halper, 490 U.S. 435, 559 (1989), overruling on other grounds by Hudson, supra; Allison Engine, 2009 WL 3626773*9. See also RP-003161, citing NMSA 1978, § 44-9-13. This was also indicative of a punitive statute in purpose or effect according to Judge Pfeffer. Id.

In all, Judge Pfeffer found the majority of the Kennedy factors led to a conclusion that the FATA was a punitive statute, and, when considered in relation to the statute on its face, the FATA to be a penal law. He also found the FATA to be "unworkable" if applied retroactively. He therefore ruled the Act's retroactivity provision, NMSA 1978, § 44-9-12A, was unconstitutional as violative of the ex post facto clause under the United States and New Mexico Constitutions. RP-003164-003165.

Judge Pfeffer's findings as to the seven Kennedy factors and his consideration of the Act on its face are well reasoned. It was also reasonable for Judge Pope to adopt and incorporate same in his ruling in this case in the absence of any caselaw in New Mexico to the contrary. Any argument by Plaintiffs that the district courts misapplied the Kennedy factors misses the mark, particularly where Judge Pfeffer gave the FATA the benefit of the doubt on two (2) Kennedy factors despite his personal belief that those two (2) factors also militated toward a finding that the

FATA was punitive in purpose or effect.

C. THERE IS LITTLE DIFFERENCE BETWEEN THE FCA AND THE FATA. GIVEN THAT THE FATA WAS ENACTED IN 2007 AND HAS NO INTERPRETATIVE CASE LAW, IT WAS REASONABLE FOR THE DISTRICT COURTS TO LOOK TO FEDERAL CASE LAW INTERPRETING THE FCA FOR GUIDANCE IN ANALYZING THE FATA'S RETROACTIVITY PROVISION.

Plaintiffs argue that it was wrong for the district courts to look to federal case law that interprets the FCA in analyzing the FATA's retroactivity provision because the two acts are significantly different. This argument is specious.

The FATA was enacted in 2007 and made effective on July 1 of that year. As of the date Judges Pfeffer and Pope were faced with the retroactivity issue, there was no case law in New Mexico interpreting the FATA.

It was reasonable for the district courts to look to federal case law in determining the legality of the FATA's retroactivity provision because, in reality, the FATA is a clone of the FCA. By way of example, this Court should look at the key provisions of the FATA and FCA in terms of what the two acts prohibit. The FATA makes it essentially illegal for a person to knowingly present a false claim to the State of New Mexico to obtain payment on same; to conspire to do so; to conspire to avoid an obligation to the State of New Mexico; to deliver less property or money to the

State of New Mexico than is reflected on a receipt for same; to falsely represent a material characteristic of property due the State of New Mexico; or to fail to correct a false claim presented to the State of New Mexico once a person becomes aware the claim is false. NMSA 1978, § 44-9-3. Acts prohibited by the FCA are virtually identical. See 31 USCA § 3729(a) for purposes of comparison.

If that was not enough, the scienter requirement under both acts is identical. Any prohibitive acts must be "knowingly" committed. Compare the FATA, NMSA 1978, §§ 44-9-2C and 44-9-3B, to the FCA, 31 USCA § 3729(b) and (c). The penalties for violation of both acts are also identical. Compare the FATA, NMSA 1978, § 44-9-3C, to the FCA, 31 USCA § 3729(a)(7)(A)-(C).

Moreover, the fact that the FATA does not provide for criminal penalties in the act itself whereas the FCA does (as Plaintiffs argue in their Brief) is of little consequence. The FATA remedies are "not exclusive and shall be in addition to any other remedies provided for in any other law or available under common law." NMSA 1978, § 44-9-14. And, as long as the Attorney General "determines and certifies in writing" that a FATA action is in the interest of the State of New Mexico, a statutory FATA claim and a criminal prosecution based on the same conduct can run on parallel tracks. A criminal judgment that is entered before a civil judgment on

a FATA claim based on the same conduct also estops the Defendant from denying the elements of fraud in the FATA action. NMSA 1978, § 44-9-12B. In short, the effect of the FATA is the same as the FCA, namely, that one can be sued civilly and prosecuted criminally for the same conduct.

The FATA being a clone of the FCA, it was therefore reasonable and appropriate for the district courts, both in the Vanderbilt matter and in this matter by virtue of Judge Pope adopting Judge Pfeffer's retroactivity ruling in Vanderbilt, to look to federal case law for guidance.[3] Additionally, our courts have specifically adopted the federal approach used by Judge Pfeffer and adopted by Judge Pope in determining whether a law is penal in purpose or effect and, if so, whether it is an impermissible ex post facto law. In State v. Druktenis, 135 N.M. at 332-36, this Court cited to Kennedy v. Mendoza-Martinez, supra, extensively in addressing whether New Mexico's Sex Offender Registration and Notification Act, if applied to convictions prior to its effective date, would be an impermissible ex post facto law. This Court highlighted the seven Kennedy factors (Druktenis, supra at 332) and went

[3] As the Topiary Defendants point out in their Answer Brief, the Massachusetts False Claims Act has every feature that Plaintiffs here argue distinguishes the FATA from the FCA. Despite same, a court has ruled that retroactive application of Massachusetts' False Claims Act violates the ex post facto clause. Massachusetts v. Schering Plough, 779 F. Supp. 2d 224, 238 (D. Mass. 2011).

so far as to state that the New Mexico Supreme Court considered the Kennedy framework as "the test" in determining whether a statute is penal in purpose or effect and, thus, an ex post facto law. Id., citing One (1) 1984 White Chevy, 132 N.M. 187 (2002). Therefore, Plaintiffs' reliance on San Juan Agricultural Water User's Ass'n. v. KNME-TV, 150 N.M. 64 (2011) as authority for an argument that reliance on federal case law was inappropriate by the district courts is misplaced. San Juan Agricultural Water User's Ass'n. is not even an ex post facto case.

D. PLAINTIFFS WERE NOT ENTITLED TO ORAL ARGUMENT BEFORE THE DISTRICT COURTS ISSUED THEIR EX POST FACTO RULINGS.

"The due process clause of the Constitutions of the United States and New Mexico requires that no litigant suffer judgment without being given notice and the opportunity to be heard in the matter." James v. Brumlop, 94 N.M. 291, 295 (Ct.App. 1980), citing In re Nelson, 78 N.M. 739 (1968). The opportunity to be heard, however, does not include a requirement that a court provide oral argument on a motion. All that is required is that a litigant be given an opportunity to advocate as the movant in writing or advocate as the non-movant in writing. It is entirely discretionary with the deciding court whether to grant or deny oral argument. James v. Brumlop, supra, (". . .the motion should be decided on its merits, with oral

argument being heard only if desired by the trial court."). See also LR1-306H ("the court may grant or deny a request for hearing and if the request is denied, the district court shall make a decision based on the papers filed.").

Plaintiffs were not entitled as a matter of right to oral argument before Judge Pfeffer issued his retroactivity ruling in Vanderbilt and before Judge Pope adopted Judge Pfeffer's ruling in this case. Plaintiffs concede that to be the case (Plaintiffs' Brief in Chief, p. 16 ". . . courts are authorized to decide matters without oral argument, . . ."). In any event, Plaintiffs were not prejudiced by the lack of oral argument. In response to Mr. Riordan's ex post facto motion filed in December of 2010, Plaintiffs stated in their response brief that "these retroactivity issues have been briefed and beaten to death several times over, in this case and in the Vanderbilt case." RP-004262. In light thereof, Plaintiffs should not be heard to complain that the district courts erred by not providing oral argument before ruling that retroactive application of the FATA violates the ex post facto clause of the U.S. and New Mexico Constitutions, particularly where due process does not require same.

E. DOUBLE JEOPARDY CASELAW IS IRRELEVANT TO WHETHER THE FATA IS AN EX POST FACTO LAW IF APPLIED RETROACTIVELY.

Plaintiffs argue that the district courts' retroactivity rulings are "plain error,

because [the ruling] failed to distinguish between punishment for a crime, and punishment for a civil wrong." In addition to being contrary to the holding in Colbert v. Journal Pub. Co., 19 N.M. 156 (1914), the Plaintiffs further argue that the district court's retroactive rulings are contrary to Hudson v. United States, supra, and United States ex. rel. Marcus v. Hess, 317 U.S. 537 (1943).

First of all, Colbert is a libel case involving private litigants in which the defendant was arguing that a punitive damages instruction by the trial court was erroneous because the court should not have adopted a rule authorizing punitive damages where the complained of conduct also constituted a crime. Colbert, supra. Colbert is not an ex post facto case.[4] Colbert is also inapposite to this case because there is really one Plaintiff in this matter, i.e., the State of New Mexico, who is not a private litigant. Thus, the purpose for allowing punitive damages for an act that is also criminal is absent here, namely to address both the wrong to the public and the wrong to the individual sufferer. Colbert, supra, citing Cosgriff v. Miller, 10 Wyo. 190, 236 (98 Am. St. Rep. 977).

Hudson and the case it overruled, United States v. Halper, 490 U.S. 435 (1989),

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[4] Plaintiffs' citation to Colbert on the appropriateness of punitive damages in general will be addressed in a later section of this brief.

are also not ex post facto cases. They are double jeopardy cases where the United States Supreme Court addressed multiple criminal punishments for the same offense. (emphasis added). The Supreme Court did not address whether a civil statute, remedial in intent but penal in purpose or effect, could be applied retroactively to punish wrongdoers, albeit through treble damages, penalties, attorney's fees and costs of suit after the fact. Id. That is the issue this Court must decide.

What is interesting to note about the Hudson case, however, since Plaintiffs have cited it, are the following paragraphs in the beginning of the Supreme Court's legal analysis:

> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. (internal citation omitted) A court must first ask whether the legislature 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.' (internal citation omitted). Even in those cases where the legislature 'has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect' (internal citation omitted) as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.' (internal citation omitted).
>
> In making this latter determination, the factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 169 83 S.Ct. 554, 567-568, 9 L. Ed. 2d 644 (1963), provide useful guideposts including: 1) "[w]hether the sanction involves an affirmative disability or restraint"; 2) "whether it has historically been regarded as punishment"; 3) "whether it comes into play only on a finding of scienter"; 4) "whether its operation will

> promote the traditional aims of punishment-retribution and 'deterrence'"; 5) "whether the behavior to which it applies is already a crime"; 6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and 7) "whether it appears excessive in relation to the alternative purpose assigned." It is important to note, however, that these factors must be considered in relation to the statute on its face," (internal citation omitted), and "only the clearest proof" will suffice to override (internal citation omitted) legislative intent and transform what has been denominated a civil penalty into a criminal penalty. (internal citation omitted).

Hudson 522 U.S. at 99-100.

The reason the Supreme Court overruled Halper in Hudson is that, according to Justice Rehnquist who wrote the majority opinion, Halper "[had] elevated a single Kennedy factor-whether the sanction appeared excessive in relation to its non-punitive purposes - to dispositive status." Hudson, supra at 101. According to Justice Rehnquist, "[b]ut as we emphasized in Kennedy itself, no one factor should be considered controlling as they 'may often point in different directions.'" Id. (internal citation omitted).

What this shows, even though Hudson is a double jeopardy case and thus distinguishable, is that the Kennedy factors are still the relevant approach in determining the penal purpose or effect of statutes, provided one of those factors is not used dispositively by a court to the exclusion of the others. As stated several

times in this brief, those factors were the same factors that were utilized by the district courts in determining that the FATA was a penal law and an impermissible ex post facto law if applied retroactively. Hudson, therefore, is of no assistance to Plaintiffs. To the contrary, it supports a conclusion that the district courts utilized the correct analysis in finding the FATA to be an impermissible ex post facto law if applied retroactively.

Another case cited by Plaintiffs, United States ex. rel. Marcus v. Hess, 317 U.S. 537 (1943), is likewise a double jeopardy case. No ex post facto issue was raised therein, and, in any event, that case has been overruled by statute. See Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608. Plaintiffs' reliance on Hess is, thus, misplaced.

F. IT IS THE APPLICATION OF TREBLE DAMAGES AND THE OTHER VESTIGES OF PUNISHMENT RETROACTIVELY THAT CAUSED THE FATA TO BE CONSIDERED A PENAL STATUTE SUBJECT TO THE EX POST FACTO CLAUSE.

The availability of treble damages and punitive damages, in general, are not at risk of being invalidated should the district courts' rulings be affirmed, contrary to what Plaintiffs argue to this Court.

According to Plaintiffs, the FATA simply incorporates the torts of fraud and reckless misrepresentation, which were already actionable at common law at the time

of Mr. Riordan's and others' alleged acts, and that, therefore, Defendants cannot argue "that their actions were lawful when committed, only to be made unlawful after the fact." They also argue that if the district court rulings are affirmed, the concept of treble damages or punitive damages in general are imperiled in New Mexico. Plaintiffs' position is not well taken.

Initially, it must be understood that the Foys have no standing to bring common law claims on behalf of the State of New Mexico against Mr. Riordan, nor did they ever have such standing for the alleged conduct complained of. See NMSA 1978, § 44-9-5 as amended by New Mexico House Bill No. 314, § 4A ("A person may bring a civil action for a violation of § 44-9-3 NMSA 1978 on behalf of the person and the State. The person shall not assert any claim other than a claim pursuant to § 44-9-3 NMSA 1978 on behalf of the State. The action shall be brought in the name of the State. The person bringing the action shall be referred to as the qui tam plaintiff.")

Additionally, even if the Plaintiffs could have brought such claims because fraud and reckless misrepresentation were already actionable under the common law, the FATA would "change the punishment, than the law annexed to the crime, when committed" by permitting treble damages and other penalties, where previously treble damages and those penalties were not available for such conduct. See Calder, 3 U.S.

at 390. Plaintiffs ignore this fact, as they have done consistently throughout their brief.

Treble damages, in general, under certain statutory schemes, such as the FATA itself or the Unfair Practices Act, NMSA 1978, § 57-12-1 et. seq., are not imperiled should this Court affirm the district courts' rulings. Treble damages under the FATA, NMSA 1978, § 44-9-3C, will still be permitted for conduct that post-dates the effective date of the Act, i.e., July 1, 2007. The treble damages provision under the Unfair Practices Act, NMSA 1978, § 57-12-10B, will still be viable, as well, as the Unfair Practices Act does not contain a retroactivity provision. Id.

The district courts' rulings also do not imperil punitive damages awards in general and, thus, run afoul of the holding in Colbert, supra, as Plaintiffs argue. It was not punitive damages in general which the district courts found to be troubling under the FATA. It was treble damages together with other penalties prescribed by the FATA that had a punitive purpose or effect that concerned the district courts and which factored into the conclusion that the FATA was a penal statute and thus subject to the ex post facto clause of the United States and New Mexico Constitutions if applied retroactively, pursuant to the United States Supreme Court opinion in Smith v. Doe. RP-00343-003173. Plaintiffs' argument about the imperilment of treble or

punitive damages in general simply goes too far and mischaracterizes the district courts' rulings.

G. THE DISTRICT COURTS WERE NOT REQUIRED TO REWRITE § 44-9-12A, BUT ESSENTIALLY DID SEVER SAME FROM THE FATA BY RULING THAT THE ACT COULD NOT BE APPLIED RETROACTIVELY, BUT PERMITTING POST-JULY 1, 2007 CLAIMS TO GO FORWARD.

Plaintiffs argue that the district courts should have just severed the treble damages provision of the FATA by instead permitting double damages for conduct that pre-dated the July 1, 2007 effective date of the Act, pursuant to the severability provision of the FATA, NMSA 1978, § 44-9-15, and New Mexico's generic severance statute, NMSA 1978, § 12-2A-9.[5] That is not severance, but a re-writing of the statute, itself. To have gone that route would have resulted in "judicial legislation," something that courts are not permitted to do. United States v. National Treasury Employees Union, 513 U.S. 454, 479 n.26 (1995). The district courts were, thus, correct in refusing such an invitation. RP-003171-003172.

What the district courts did do was to rule that subsection A of § 44-9-12, the retroactivity provision, was unconstitutional. RP-003143-003173; May 13, 2011

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[5] In the district court, Plaintiffs argued for severance of punitive damages as a way to save the FATA from constitutional infirmities. RP-003171-003172.

Hearing, TR-76:15-77:15; TR-81:12-82:7; TR-90:3-10; RP-004893-004900. It permitted plaintiffs to avail themselves of the rest of the FATA. So, in essence, the district courts did engage in severance, and they were legally correct in doing so in that fashion.

III. CONCLUSION

The district courts' rulings that the FATA could not be applied retroactively to conduct that pre-dated its effective date were well-reasoned and correct according to existing caselaw. Those rulings should therefore be affirmed.

Respectfully submitted,

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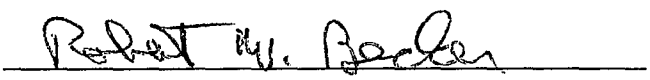
IV. STATEMENT OF COMPLIANCE

I CERTIFY that the body of Defendant/Appellee Guy Riordan's Answer Brief does not exceed thirty five (35) pages with the applicable type-volume limitation in that it contains six thousand two hundred fifty (6,250) words and does not exceed eleven thousand (11,000) words as indicated by the word-count total of the word processing system, WordPerfect, used to prepare same.



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V. CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012, a true and correct copy of Defendant/Appellee Guy Riordan's Answer Brief was served via email to the following:

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