IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff,
ex rel. FRANK C. FOY and SUZANNE B. FOY, *qui tam* Plaintiffs

Appellants,

v.

Santa Fe County
John W. Pope, District Judge
D-101-CV-2009-01189
Ct. App. No. 31421

AUSTIN CAPITAL MANAGEMENT, LTD; *et al.*

Defendants/Appellees.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
DEC 07 2011
Wendy F Jones

BRIEF IN CHIEF

VICTOR R. MARSHALL & ASSOCIATES, P.C.
Victor R. Marshall, Esq.
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400
505-332-3793 Fax
Counsel for Appellants

Oral Argument Is Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
PART ONE – SUMMARY OF PROCEEDINGS 1
Nature of the cases below 1
Statement of Facts 3
Course of proceedings and disposition below 5
The federal False Claims Act 7
How the New Mexico Legislature designed FATA to make it purely civil and expressly retroactive, as permitted by the Constitution 9
PART TWO – ARGUMENT 12
The lower court decision is subject to *de novo* review 12
The lower court decision violates numerous state and federal precedents 13
I. THE DISTRICT COURT FAILED TO READ THE TEXT OF THE STATUTE, SO IT OVERLOOKED THE DISPOSITIVE POINT OF LAW: FATA IS AN ENTIRELY CIVIL STATUTE, AND RETROACTIVE CIVIL STATUTES ARE PERMITTED BY THE FEDERAL AND STATE CONSTITUTIONS 15
A. The District Courts struck down FATA as unconstitutional without ever holding a hearing 15
B. The District Court erred by following federal law when New Mexico law is different 17
C. New Mexico's Fraud Against Taxpayers Act is a purely civil statute, unlike its federal counterpart 21
II. RETROACTIVE CIVIL STATUTES ARE CONSTITUTIONAL 22
A. The Court's ruling is contrary to *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91, 396, 397 (1798), which holds that retroactive civil statutes are not subject to the *ex post facto* clause 22
B. The opinion violates *Colbert v. Journal Publishing* (1914), in which the New Mexico Supreme Court held that civil punitive damages do not constitute punishment for a crime 25

III. THE DISTRICT COURT ERRED BY EQUATING CIVIL PUNITIVE DAMAGES WITH CRIMINAL PENALTIES, CONTRARY TO *HUDSON*, *COLBERT*, AND *MARCUS* 27
IV. THE RULING BELOW IS CONTRARY TO MANY OTHER CONTROLLING PRECEDENTS 34
A. Remedial and curative statutes are constitutional 34
B. A statute is not retroactive if it applies only to cases filed after the effective date of the statute 35
C. FATA does not violate the due process or equal protection clauses because its consequences are not "particularly harsh and oppressive" 36
V. FATA SIMPLY INCORPORATES THE TORTS OF FRAUD AND RECKLESS MISREPRESENTATION, WHICH WERE ALREADY ACTIONABLE AT COMMON LAW WHEN THE DEFENDANTS COMMITTED THEIR WRONGFUL ACTS. SO DEFENDANTS CANNOT ARGUE THAT THEIR ACTIONS WERE LAWFUL WHEN THEY COMMITTED THEM, ONLY TO BE MADE UNLAWFUL AFTER THE FACT 37
VI. THE FAULTY ANALYSIS OF THE DISTRICT COURT WOULD INVALIDATE ALL PUNITIVE DAMAGES IN CIVIL CASES 42
VII. FATA CONTAINS A MANDATORY SEVERANCE CLAUSE, WHICH THE LOWER COURTS REFUSED TO ENFORCE 46
CONCLUSION 48
REQUEST FOR ORAL ARGUMENT 49

This brief, according to the word count provided by WordPerfect Version X5, the body of the foregoing brief contains 10,286 words, exclusive of those parts excepted by Rule 12-213(F)(1). The text of the brief is composed in 14 point proportionally-spaced typeface (Calisto MT).

TABLE OF AUTHORITIES

New Mexico Cases:

Blancett v. Dial Oil Co., 2008-NMSC-011, 143 N.M. 368, 176 P.3d 1100 10
Bradbury & Stamm Constr. Co. v. Bureau of Revenue, 70 N.M. 226, 372 P.2d 808 (1962) 47-48
City of Albuquerque v. One 1984 White Chevy, 2002-NMSC-014, 132 N.M. 187, 46 P.3d 94 14,33
City of Albuquerque v. State ex rel. Village of Los Ranchos, 111 N.M. 608, 808 P.2d 58 (Ct. App. 1991) 35
Colbert v. Journal Publishing Co., 19 N.M. 156, 142 P. 146 (1914) 13,25-27,42,44
Cutter Flying Serv., Inc. v. Straughan, 80 N.M. 646, 459 P.2d 350 (1969) . 35,41
Espanola Housing Auth. v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977) 16
Grygorwicz v. Trujillo, 2006-NMCA-089, 140 N.M. 129, 140 P.3d 550 15
Hansman v. Bernalillo Co. Assessor, 95 N.M. 697, 625 P.2d 1214 (Ct. App. 1980) 35
Jicarilla Appache Nation v. Rodarte, 2004-NMSC-035, ¶ 15, 136 N.M. 630, 103 P.3d 554 17
Lion's Gate Water v. D'Antonio, 2009-NMSC-057, 147 N.M. 523, 226 P.3d 622 12
Lucero v. Board of Regents, 91 N.M. 770, 581 P.2d 458 (1978) 36
Melaven v. Schmidt, 34 N.M. 443, 280 P. 900 (1929) 35
New Mexico Public Schools Ins. Auth. v. Arthur J. Gallagher & Co., 2008-NMSC-067, 145 N.M. 316, 198 P.3d 342 13
Paiz v. State Farm Fire & Casualty Co., 118 N.M. 203, 880 P.2d 300 (1994) 41
In re Peraltareavis, 8 N.M. 27, 41 P. 538 (1895) 7
San Juan Agricultural Water Users Ass'n v. KNME-TV, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884 15,18-19
State v. Drucktenis, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050 15,44
State v. Frawley, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144 48
State v. Kirby, 2003-NMCA-074, 133 N.M. 782, 70 P.3d 772 15,33-34
State v. Mears, 79 N.M. 715, 449 P.2d 85 (Ct. App. 1968) 35-36
State v. Nunez, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 14,23
State v. Padilla, 2008-NMSC-006, 143 N.M. 310, 176 P.3d 299 45

State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 904 P.2d 1044 (1995) 14
Weidler v. Big J Enterprises, Inc., 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089 36-37,41,46
Wilson v. New Mexico Lumber & Timber Co., 42 N.M. 438, 81 P.2d 61 (1938) 13,35

Cases from Other Jurisdictions:

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 13,22-23
Collins v. Youngblood, 497 U.S. 37 (1990) 23
Cook County v. United States ex rel. Chandler, 538 U.S. 119 (2003) 45
Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 11
Fern v. United States, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990) 24-25
Hudson v. United States, 522 U.S. 93 (1997) 14,27-30,44,46
Kennedy, Attorney General v. Mendoza-Martinez, 372 U.S. 144 (1963) 43-44
In re Meyer, 357 B.R. 635 (Bankr. D.N.M. 2006) 23
Smith v. Doe, 538 U.S. 84 (2003) 14
United States v. Halper, 490 U.S. 435 (1989) 27
United States ex rel. Colucci v. Beth Israel Med. Center, 603 F. Supp. 2d 677 (S.D.N.Y. 2009) 45
United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 13,31-32

Constitutions, Statutes and Court Rules:

N.M. Const. art. XX, § 22 39
NMSA 1978, § 12-2A-9 47
NMSA 1978, § 38-1-3 20,38
NMSA 1978, §§ 41-9-1 to -15 . . . . *passim*
NMSA 1978, § 55-1-103 40
NMSA 1978, §§ 57-12-1 to -22 40
NMSA 1978, § 58-13B-30 40
NMSA 1978, § 58-13B-31 40
NMSA 1978, § 58-13B-32 40
NMSA 1978, § 58-13B-33 40
NMSA 1978, § 58-13B-40 40
NMSA 1978, § 59A-16-3 40
NMSA 1978, § 59A-16-4 40

NMSA 1978, § 59A-16-5 40
NMSA 1978, § 59A-16-8 40
UJI 13-1632 NMRA 39
UJI 13-1707 NMRA 40
UJI 13-1827 NMRA 15,41,42-43
18 U.S.C. § 287 7
31 U.S.C. §§ 3729-3733 7,10
U.S. Const. art. I, § 9 21

Other Authorities:

Steven Pinker, *The Language Instinct* at 232 (1994) 30
Restatement of Restitution (1937) 12

PART ONE – SUMMARY OF PROCEEDINGS

Nature of the cases below.

This is an interlocutory appeal by the Plaintiff State of New Mexico and the *qui tam* plaintiffs Frank and Suzanne Foy from a decision by the District Court (Hon. John Pope) on July 8, 2011, holding that the Fraud Against Taxpayers Act is unconstitutional. NMSA 1978, §§ 44-9-1 to -16 (hereafter "FATA"). In his order [RP 4893-4900], Judge Pope simply adopted by reference an earlier decision by Judge Stephen Pfeffer in the companion case, *State ex rel. Foy v. Vanderbilt Capital Advisors, LLC*, D-101-CV-2008-1895, Order of Dismissal (Apr. 28, 2010). [RP 3143-3174]

Since Judge Pope adopted Judge Pfeffer's opinion *in toto* without further analysis, the two decisions are identical, and this brief will refer to them together. Neither judge held a hearing before striking down the statute.

The District Courts ruled that New Mexico's Fraud Against Taxpayers Act violates the *ex post facto* clause of the United States Constitution because it allows the State to recover for frauds prior to July 1, 2007, the effective date of the statute. FATA contains an express 20 year retroactivity clause which allows the State to recover damages for fraud and reckless misrepresentation

against the State, if those frauds occurred on or after July 1, 1987. Section 44-9-12(A) states:

> A civil action pursuant to the Fraud Against Taxpayers Act [44-9-1 NMSA 1978] may be brought at any time. A civil action pursuant to the Fraud Against Taxpayers Act may be brought for conduct that occurred prior to the effective date of that act, but not for conduct that occurred prior to July 1, 1987.

In the *Vanderbilt* case, Judge Pfeffer reasoned that FATA provides for mandatory trebling of damages, and that these damages are "punitive" or "penal" in nature. In Judge Pfeffer's view, FATA imposes "punishment," and therefore it must be treated as criminal legislation under the Constitution. So Judge Pfeffer concluded that the statute violates the *ex post facto* clause. In the instant case, Judge Pope simply adopted Judge Pfeffer's *Vanderbilt* ruling by reference. [RP 4894]

The District Courts reached these conclusions even though FATA is an entirely civil statute. FATA creates no crimes. Furthermore, the statute's provisions are not linked to, or predicated upon, the commission of any crime. FATA simply provides more effective civil remedies for the long-established torts of fraud, reckless misrepresentation, and conspiracy, if those torts were committed against the State of New Mexico. These common law torts were in effect at all relevant times prior to July 1, 2007. Under New Mexico's

common law, the commission of these torts gave rise to a civil action for compensatory damages, and also for "punitive" damages in amounts greater than the treble damages authorized in FATA.

In striking down FATA, the District Courts relied heavily on federal cases construing the federal False Claims Act. This is plain error, because this case is governed by FATA, a New Mexico statute, not the federal FCA statute. The lower courts failed to notice that the text of FATA is significantly different from the text of FCA. By design, the Legislature wrote a different statute – because it intended to reach a different result than the federal cases. The Legislature eliminated any crime from FATA, in order to create a purely civil statute, which can be applied retroactively under the federal and state constitutions.

Statement of Facts.

(Note: for purposes of this appeal, the facts alleged in the complaint are taken as true. *See* Standard of Review below.)

The *Austin Capital* and *Vanderbilt* lawsuits each seek to recover several hundred million dollars in damages for the New Mexico Educational Retirement Board ("ERB") and the State Investment Council ("SIC"), using New Mexico's Fraud Against Taxpayers Act.

The SIC and the ERB suffered massive losses due to the fraudulent schemes alleged in the lawsuits. The amount of losses cannot be exactly determined at this time, but in all likelihood the SIC and the ERB suffered around half a billion dollars in actual damages. Many of the defendants are Wall Street firms and investment advisors who defrauded the ERB and the SIC in two ways. First, the financial firms deliberately or recklessly misrepresented the investment products and services which they sold to the State. Second, they paid bribes and kickbacks to obtain investment money from the ERB and SIC. Other defendants include Marc Correra, who obtained at least $22 million in kickbacks; his father, Anthony Correra; Gary Bland, former State Investment Officer at the SIC; and Bruce Malott, former chairman of the ERB. All of them conspired to steer state investments to Wall Street firms that were willing to pay kickbacks.

Some of the acts of conspiracy and fraud began as early as 2003 or 2004, and some of them continued to the present time. Accordingly, some of the wrongful acts occurred before July 1, 2007, and some of them occurred afterwards. Both District Courts recognized that their rulings on retroactivity did not affect FATA claims which arose after 7/1/07, so the cases are continuing with respect to post 7/1/07 claims. However, by barring claims

which arose prior to 7/1/07, the District Court rulings could potentially cost the State several hundred million in recoveries under FATA.

Course of proceedings and disposition below.

Frank Foy filed the original *Vanderbilt* complaint on July 14, 2008. This was the first complaint ever filed under FATA. It was filed under seal as required by FATA. The Attorney General declined to intervene, but he agreed that Foy could proceed with the case on behalf of the State. The complaint was unsealed on January 14, 2009.

The amended *Austin Capital* complaint was filed on June 9, 2009. It was unsealed on June 19, 2009. This case was delayed by several months because defendants disqualified all of the judges in the First Judicial District. Ultimately it was assigned to Judge Pope of the Thirteenth Judicial District.

Meanwhile, the *Vanderbilt* defendants filed motions to dismiss on almost every conceivable ground. However none of them raised the retroactivity claim. *Sua sponte*, Judge Pfeffer raised the issues of double jeopardy and retroactivity, and asked for briefs. The Attorney General submitted two Amicus briefs arguing that FATA was constitutional in all respects, as did Mr. Foy. [RP 4911-4951] Judge Pfeffer decided the constitutional questions on the briefs, without the benefit of oral argument. On April 28, 2010, he issued

an Order of Dismissal holding that FATA was unconstitutional as *ex post facto* legislation. He certified his ruling for interlocutory appeal, which was denied.

The *Austin Capital* defendants sent a copy of Judge Pfeffer's opinion to Judge Pope, and asked for a similar ruling. Judge Pope received some briefing but did not hold a hearing. On July 8, 2011, he issued the Order on May 13, 2011 Hearing adopting Judge Pfeffer's opinion. Like Judge Pfeffer, he certified the issue for interlocutory appeal.

On July 28, 2011, the Investment and Pensions Oversight Committee of the New Mexico Legislature held hearings for several hours on the *Vanderbilt* and *Austin Capital* rulings. Recognizing the importance of these issues, both monetarily and constitutionally, the Committee voted to send a letter to the Court of Appeals asking it to grant immediate interlocutory review. This legislative letter was filed as a proposed *amicus curiae* request on August 4, 2011.

The application for interlocutory review was granted on August 30, 2011. A motion for immediate certification to the Supreme Court was denied.

The federal False Claims Act.

In broad outline FATA is modeled after the federal False Claims Act ("FCA"), also known as "Lincoln's Law." The FCA was enacted during the Civil War to combat crime in procuring supplies for the Union Army. 12 Stat. 696 (1863). The Union Army suffered from shoddy supplies, like uniforms that fell apart, and gunpowder that did not fire. To combat substandard suppliers, who sometimes conspired with quartermasters in the armed forces, Congress made it a crime to defraud the government in the procurement process.

Violation of the False Claims Act was a serious crime: at various times offenders were subject to a maximum of life imprisonment at hard labor. Currently, the maximum sentence is five years imprisonment, plus a fine. 18 U.S.C. § 287. For an example of criminal sanctions under the False Claims Act, *see In re Peraltareavis*, 8 N.M. 27, 41 P. 538 (1895), where the New Mexico Supreme Court denied *habeus corpus* to an FCA prisoner. Lincoln's Law also included an ancillary provision for the recovery of damages from the violator, and this provision has been greatly expanded over the years. The criminal provisions of the FCA are now codified at 18 U.S.C. § 287, while the civil provisions now appear at 31 U.S.C. §§ 3729-3733.

Lincoln's Law introduced a major innovation: it authorized private citizens to bring suit on behalf of the United States to recover the damages suffered by the government due to fraud. Although this was an innovation in the federal statutes, the concept had long been recognized by the common law of England. At common law, a writ of *qui tam* was a writ whereby a private individual who assists a prosecution can receive all or part of any recovery. Its name is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning "[he] who sues in this matter for the king as [well as] for himself." A more literal translation would be "who as much for [our] lord the king as for himself in this action pursues" or "follows."

The purpose of a *qui tam* statute is to protect the public treasury by giving private citizens an incentive to pursue litigation on behalf of the government. As a reward, the *qui tam* plaintiff receives a percentage of any recovery, including any settlement of the *qui tam* action or any related action. The *qui tam* concept recognizes that rewarding private plaintiffs increases the chances that frauds against the government will be actually pursued in court. *Qui tam* encourages whistleblowers to come forward, and it increases the amount of damages recovered for the government, due to frauds and

misrepresentations which the government would not have pursued on its own initiative.

How the New Mexico Legislature designed FATA to make it purely civil and expressly retroactive, as permitted by the Constitution.

In broad outline, FATA follows the FCA by authorizing private (*qui tam*) plaintiffs to bring actions on behalf of the State of New Mexico to recover damages suffered by the State as a result of fraud, misrepresentation and conspiracy. Like the FCA, FATA provides a 25 to 30 per cent reward to a *qui tam* plaintiff who succeeds in making a recovery for the State via litigation or settlement. § 44-9-7(B). Like the FCA, FATA also provides for an award of attorneys fees to a successful *qui tam* plaintiff. § 44-9-7(D).

However, FATA incorporates several major textual changes from the FCA to transform the State's *qui tam* statute into a purely civil statue. These legislative modifications were made so that FATA can reach back 20 years to remediate frauds against the State. It is clear from the statutory changes that the Legislature was dissatisfied with the federal cases holding that the FCA was not retroactive, so it rewrote the statute to make it retroactive and constitutional at the same time. These textual changes are crucial to the retroactivity analysis, yet they were overlooked or misapprehended by the lower courts.

– First, FATA contains an express retroactivity clause and no statute of limitations. Section 44-9-12(A) provides:

> A civil action pursuant to the Fraud Against Taxpayers Act [44-9-1 NMSA 1978] may be brought at any time. A civil action pursuant to the Fraud Against Taxpayers Act may be brought for conduct that occurred prior to the effective date of that act, but not for conduct that occurred prior to July 1, 1987.

By contrast, the FCA was not intended to be retroactive, and it is subject to a six year statute of limitations. 31 U.S.C. § 3731(b).

– Second, the Legislature was aware of the problems created by retroactive criminal statutes, so it eliminated any criminal provisions or penalties from FATA, so that the *ex post facto* clause does not apply at all. Unlike the FCA, FATA is an entirely civil statute. It is simply not a crime to violate FATA. By contrast, violation of the FCA is a felony.

– Third, the Legislature explicitly stated nineteen times in the statutory text that FATA is a civil statute. The courts defer to the Legislature's civil designation in the absence of a clear showing otherwise. *Blancett v. Dial Oil Co.*, 2008-NMSC-011, ¶ 8, 143 N.M. 368, 176 P.3d 1100.

– Fourth, unlike the FCA, FATA expressly incorporates the common law of New Mexico. *See* § 44-9-14 (FATA's remedies are in addition to the common law). Under the common law, fraud and reckless misrepresentation

have always been actionable, and also "punishable" by punitive damages. Therefore, when the defendants defrauded the State prior to July 1, 2007, they were violating the substantive civil laws which were in existence at the time. They were committing torts which have always been actionable under New Mexico common law, for actual and punitive damages. By contrast, "[t]here is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Unlike state law, federal law is almost entirely statutory.

– Fifth, FATA simply provides more effective remedies for the pre-existing common law torts of fraud, reckless misrepresentation, and conspiracy, if those torts have been committed against the State. So FATA makes no changes in the substantive civil law. It does not change the rules of conduct. FATA simply creates more effective remedies for conduct which was already against the law. By offering a reward to the *qui tam* plaintiff and an award of attorneys fees to the plaintiff, FATA increases the chances that damages for these torts will actually be pursued and recovered – by the *qui tam* plaintiff. FATA recognizes that the government has limited fiscal resources to pursue these claims, so it creates financial incentives for private plaintiffs and the private bar to pursue the public good.

– Sixth, FATA adds an additional and powerful restitutionary provision which is not found in the federal statute. Section 44-9-3(A)(9) imposes a reporting and restitution requirement on the inadvertent beneficiaries of an earlier false claim. This provision is entirely absent from FCA. The Legislature added it to make FATA more effective and broad reaching than the federal statute. Once again, FATA simply codifies the common law, which already imposes a liability to make restitution, even in the absence of statute. *See generally* Restatement of Restitution (1937).

– Seventh, FATA contains a mandatory severance clause. *See* § 44-9-15, discussed below. The FCA has no severance clause.

PART TWO – ARGUMENT

The lower court decision is subject to *de novo* review.

This interlocutory appeal presents pure questions of law including questions of statutory construction. Therefore, the decision below is subject to *de novo* review by this court. *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 18, 147 N.M. 523, 226 P.3d 622. Additionally, since the District Court partially dismissed the case under Rule 12, all factual allegations in the complaint are taken as true, and all inferences are drawn in favor of the

complaint. *New Mexico Public Schools Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11, 145 N.M. 316, 198 P.3d 342.

The lower court decision violates numerous state and federal precedents.

The District Court ruling cannot be reconciled with numerous controlling cases from the New Mexico Supreme Court, and the New Mexico Court of Appeals, and the federal Supreme Court. For ease of reference, some of the more important precedents are listed here, in chronological order:

- *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) – the *ex post facto* clause applies only to criminal statutes, but not to civil statutes;

- *Colbert v. Journal Publishing Co.*, 19 N.M. 156, 142 P. 146 (1914) – the common law authorizes the award of punitive damages in a civil case as a civil remedy, not a sanction for committing a crime;

- *Wilson v. New Mexico Lumber & Timber Co.*, 42 N.M. 438, 440, 81 P.2d 61, 62 (1938) – statutes dealing with remedial procedures are constitutional;

- *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) – an award of two times actual damages under federal False Claims Act can be considered compensatory and non-punitive for constitutional purposes;

- *State ex rel. Schwartz v. Kennedy*, 120 N.M. 619, 904 P.2d 1044 (1995) – revocation of a driver's license for DWI does not constitute "punishment" for purposes of double jeopardy;

- *Hudson v. United States*, 522 U.S. 93 (1997) – constitutional analysis must differentiate between civil and criminal punishments;

- *State v. Nunez*, 2000-NMSC-013, ¶ 57, 129 N.M. 63, 2 P.3d 264 – forfeiture of an automobile may violate double jeopardy because the forfeitures "are expressly predicated on [a] violation of the Controlled Substances Act," and "[t]he forfeiture statute entirely subsumes the criminal offense";

- *City of Albuquerque v. One 1984 White Chevy*, 2002-NMSC-014, 132 N.M. 187, 46 P.3d 94 – civil forfeiture statute is constitutional even though it may cause a degree of punishment, because that does not override the statute's primarily remedial purpose;

- *Smith v. Doe*, 538 U.S. 84 (2003) – a statute that requires registration by past sex offenders does not violate the *ex post facto* clause, even though the statute has criminal components, and even though the statute applies to conduct that occurred prior to the statute's enactment;

- *State v. Kirby*, 2003-NMCA-074, 133 N.M. 782, 70 P.3d 772 – monetary damages are civil remedies, not criminal, even though civil damages have some punitive and deterrent aspects;

- *State v. Drucktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050 – sex offender registration statute is constitutional even though it operates retroactively;

- *Grygorwicz v. Trujillo*, 2006-NMCA-089, 140 N.M. 129, 140 P.3d 550 – extending statute of limitations does not violate *ex post facto* clause;

- *San Juan Agricultural Water Users Ass'n v. KNME-TV*, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884 – it is error to rely on federal law when a New Mexico statute differs from a federal statute on the same topic; and

- UJI 13-1827 NMRA – the purpose of punitive damages is to punish and deter.

I. THE DISTRICT COURT FAILED TO READ THE TEXT OF THE STATUTE, SO IT OVERLOOKED THE DISPOSITIVE POINT OF LAW: FATA IS AN ENTIRELY CIVIL STATUTE, AND RETROACTIVE CIVIL STATUTES ARE PERMITTED BY THE FEDERAL AND STATE CONSTITUTIONS.

A. The District Courts struck down FATA as unconstitutional without ever holding a hearing.

It is serious business for the judiciary to strike down part of a statute as unconstitutional, and it ought not to be undertaken lightly by any court.

Espanola Housing Auth. v. Atencio, 90 N.M. 787, 788, 568 P.2d 1233, 1234 (1977) (statute is presumed to be constitutional and will be upheld unless challenger presents proof beyond a reasonable doubt that the Legislature has enacted a statute which is unconstitutional). At a minimum, the lower courts should have conducted a hearing, if only out of respect for the Constitution and the Legislature.

It is telling that none of the defendants even raised the *ex post facto* argument in their multiple motions to dismiss the *Vanderbilt* case. This strongly suggests that they researched the issue and found it to be without merit. Judge Pfeffer raised the issue *sua sponte,* and wrote his decision without the benefit of a hearing.

Likewise, Judge Pope did not conduct a hearing. He simply incorporated Judge Pfeffer's ruling by reference. On its face, this is a dubious practice, because every judge should use his own best judgment on every case, especially on constitutional questions.

With all due respect to these capable judges, refusing to hear oral argument does not show due respect for the Legislature or the Constitution. *See* Amicus Request by Investments and Pensions Oversight Committee. Although courts are authorized to decide matters without oral argument, more

thorough consideration was warranted by the importance of FATA, and the constitutional issues, and the hundreds of millions at stake. Without oral argument, the State had no opportunity to walk through this complex new statute, demonstrating how FATA was drafted as a purely civil statute, so that it can be applied retroactively. As a result, the lower courts simply overlooked the crucial point: by design, FATA is quite different than the FCA. FATA was carefully written to make it both retroactive and constitutional.

When the New Mexico Legislature decided to enact its own *qui tam* statute in 2007, it was well aware of the federal case law, such as *Hughes Aircraft* (1997) and *Landgraf* (1994) and *Kennedy v. Mendoza-Martinez* (1963). See *Jicarilla Appache Nation v. Rodarte*, 2004-NMSC-035, ¶ 15, 136 N.M. 630, 103 P.3d 554 (legislature is presumed to be aware of existing law). The New Mexico Legislature intended to depart from the federal statute and the federal cases, so it wrote a different *qui tam* statute for New Mexico.

B. The District Court erred by following federal law when New Mexico law is different.

The lower court mistakenly assumed that FATA is substantially identical to the False Claims Act. However, a side by side comparison of the two statutory texts shows that the New Mexico Legislature made numerous changes to make FATA a non-criminal statute, so that it could be applied

retroactively. *See above.* The lower court then relied heavily on federal court cases interpreting the FCA, without realizing that those federal cases deal with a different statute in a different legal system. The lower courts relied heavily on federal cases like *Hughes Aircraft* and *Landgraf*, without realizing that the Legislature was also cognizant of those cases. The Legislature wished to achieve a different result: retroactivity.

This oversight is reversible error under the Supreme Court's recent decision in *San Juan Agricultural Water Users*, 2011-NMSC-011, ¶ 38. That case involved the interpretation of New Mexico's Inspection of Public Records Act ("IPRA"), which is modeled in some respects on the federal Freedom of Information Act ("FOIA"). The Supreme Court reversed the District Court and the Court of Appeals for relying on federal court interpretations of FOIA, when the New Mexico Legislature had decided to enact a significantly different statute in IPRA. *See id.* II. "D. Federal FOIA Interpretations Do Not Control Interpretation of IPRA," ¶¶ 37-41.

> There are several reasons why we must decline to follow federal FOIA caselaw when interpreting IPRA. . . . The text of IPRA is significantly different from the text of FOIA. . . . The differences in substantive text and legislative purposes make the application of federal FOIA law inappropriate . . . .

Id. ¶ 38.

> Federal courts interpret FOIA within a legal framework different from that found in our state court jurisprudence. . . . [F]ederal courts are constrained by the limited federal jurisdiction delegated to them under Article III of the United States Constitution. . . . [whereas] "New Mexico state courts are not subject to such jurisdictional limitations . . . ."

Id. ¶ 39.

> A significant difference between federal and state courts is that, unlike state courts, federal courts do not presume that Congress intended for the common law to apply when interpreting a statute. . . . "[A] state court, because it possesses common-law authority, has significantly greater power than a federal court to recognize a cause of action not explicitly expressed in the statute" and may do so in order to further public policy.

Id. ¶ 40.

All of these Supreme Court holdings apply to the present case. The lower courts cited and relied on federal cases without any regard for the differences between federal and state jurisprudence. The state statute (FATA) has significantly different text than the federal statute (FCA). The purpose of FATA is to maximize the State's monetary recoveries, not to convict anyone of a crime, unlike the FCA. State courts are not constrained by the limited jurisdiction of the federal courts. And New Mexico state courts utilize the common law when interpreting statutes, such as the torts of fraud and

misrepresentation which were in effect at all relevant times, unlike the federal courts. *See* NMSA 1978, § 38-1-3 (common law is the rule of practice and decision in all cases).

By actually reading FATA and comparing and contrasting its text with the federal False Claims Act, one can clearly see that New Mexico eliminated criminality in order to gain retroactivity. The New Mexico Legislature traded off criminal sanctions in order to obtain a more important public goal: recovery of civil damages by the State. While Congress opted for criminal sanctions and no retroactivity in the False Claims Act, the New Mexico Legislature made the opposite choice. It opted for retroactivity and no criminal sanctions. As a matter of public policy, the Legislature decided that it was more important to maximize civil damages than to put offenders in prison.

In short, the District Court's opinion is a careful analysis of the federal False Claims Act, and some of the federal cases construing the federal statute. But as an analysis of FATA and New Mexico law, the opinion below is a gigantic non-sequitur. The opinion below is completely off the mark, because it fails to recognize that the Legislature deliberately made major changes from

the federal statute when it designed and enacted a *qui tam* statute for New Mexico.

C. New Mexico's Fraud Against Taxpayers Act is a purely civil statute, unlike its federal counterpart.

It is not a crime to violate FATA. Since FATA is a civil statute, it cannot violate the *ex post facto* clause found in U.S. Const. art. I, § 9. The *ex post facto* clause applies only to criminal statutes, not civil statutes. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91, 396, 397 (1798); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *State v. Nunez*, 2000-NMSC-013, ¶ 112, 129 N.M. 63, 2 P.3d 264; *State v. Drucktenis*, 2004-NMCA-032, 135 N.M. 223, 86 P.3d 1050 (statute does not violate *ex post facto* clause because it is not a penal statute which disadvantages the offender).

The False Claims Act is quite different from FATA in this regard. A violation of the FCA can be prosecuted and punished as a crime, with imprisonment for up to five years under 18 U.S.C. § 287. Therefore, any retroactive expansion of the False Claims Act would create a retroactive expansion of the criminal laws, in violation of the *ex post facto* clause. Not so with FATA, since violation of FATA is not a criminal offense.

II. RETROACTIVE CIVIL STATUTES ARE CONSTITUTIONAL.

A. The Court's ruling is contrary to *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91, 396, 397 (1798), which holds that retroactive civil statutes are not subject to the *ex post facto* clause.

In the very earliest years of the United States, the fledgling Supreme Court was asked to decide whether the *ex post facto* clause applied to civil legislation. The court held that the clause applied only to criminal statutes. It defined an *ex post facto* statute as:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. 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. . . . But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or encrease the punishment, or change the rules of evidence, for the purpose of conviction
>
> * * * *
>
> The words, ex post facto, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, and penalties. . . . Here the meanings, annexed to the terms ex post facto laws, unquestionably refers to crimes, and nothing else.

Id. [emphases added].

Calder is one of the most ancient and venerable Supreme Court precedents, and it has been reaffirmed innumerable times. It remains the law to this day. *Collins v. Youngblood*, 497 U.S. 37, 41, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990).

Therefore, the general rule is that retroactive civil statutes are constitutional.

> If Congress wishes to pass or amend a civil law and make it retroactive, it can do that. *See, e.g., Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 863 (8th Cir. 2002).

In re Meyer, 357 B.R. 635, 636 (Bankr. D.N.M. 2006). As the New Mexico Supreme Court stated in *State v. Nunez*, 2000-NMSC-013, ¶ 112, 129 N.M. 63, 2 P.3d 264:

> The threshold question in retroactively applying a new rule of criminal law is whether doing so would violate constitutional prohibitions against ex post facto laws. . . . Generally, this means "that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990).

[Emphasis added.]

The courts accord judicial deference to retroactive civil statutes:

> Unlike *ex post facto* criminal legislation, retroactive civil legislation is not expressly prohibited by the Constitution. Mere retroactive application does not make a civil statute unconstitutional. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 554, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Therefore, retroactive civil legislation is impermissible only if it contravenes a specific provision of the Constitution. Because the *ex post facto* clause does not apply to civil statutes, to be invalid a civil statute must violate a constitutional provision such as the *Due Process Clause of the Fifth Amendment*, the *equal protection clause* or the clause forbidding impairment of contractual obligations. . . . The Due Process Clause does not prohibit retrospective civil legislation, "unless the consequences are particularly 'harsh and oppressive.' *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87 (1938).
>
> ****
>
> Observed from another perspective, any retroactive effect of the Act accomplishes a rational purpose. Curative statutes are viewed with favor by the courts even when applied retroactively, *see Patlex Corp., 758 F.2d at 603*, and any retroactive application is generally entitled to be liberally construed. *See Temple University v. United States, 769 F.2d 126, 134 (3d Cir. 1985). See also generally,* Hochman, *supra* at 692. "Curative" legislation may be defined as "legislation enacted to cure defects in prior law." *See Temple University, 769 F.2d at 134 n.5* (citing 2A C, Sands, *Sutherland Statutory Construction,* § 41.11 at 289 (4th ed. 1973)). *See also Graham & Foster v. Goodcell, 282 U.S. 409, 429, 51 S. Ct. 186, 75 L. Ed. 415 (1930)* (Curative

> statute designed to remedy mistakes and defects in the administration of government).

Fern v. United States, 15 Cl. Ct. 580, 589, 1988 U.S. Cl. Ct. LEXIS 156 (1988) (some citations omitted).

As a matter of statutory interpretation, statutes are usually presumed not to operate retroactively, but this can be overcome by a clear statement of legislative intent – such as the explicit statement in § 44-9-12(A).[1]

B. The opinion violates *Colbert v. Journal Publishing* (1914), in which the New Mexico Supreme Court held that civil punitive damages do not constitute punishment for a crime.

In *Colbert*, the New Mexico Supreme Court held that the award of punitive damages in a civil case did not constitute punishment for a crime, even though the award was based on the very same conduct which constituted the crime.

> We. . . will . . . briefly consider appellant's contention that this court ...should not adopt the rule authorizing punitive damages generally in cases of tort; and, the further contention that where the wrong complained of also constitutes a crime, punitive damages should not be allowed.

* * * *

[1] Most of the federal decisions rest primarily on the grounds that Congress did not intend the False Claims Act to be retroactive.

With the contention of appellant, however, we are unable to agree. As stated in the brief of appellee, under the common law of England, expressly adopted in this jurisdiction by statute, punitive damages were allowed in cases of tort where gross negligence, malice, or other circumstances of aggravation are shown, and until our legislature provides a different rule upon the subject, it is our duty to declare and enforce the common law rule.

We fully agree with Mr. Justice Grier who, in the case of *Day vs. Woodworth, 54 U.S. 363, 13 HOW 363, 14 L. Ed. 181*, said:

"It is a well established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called, exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff."

* * * *

[W]e concede that some jurisdictions have held that the doctrine of exemplary damages does not apply to actions for wrongs which are also criminal offenses. The great weight of authority, however, is to the contrary. 1 Sedgwick on Damages (9th Ed.), Sec. 386.

As stated by the Supreme Court of Wyoming: "Where the act is punishable criminally, the judgment for the act as an offense against the criminal laws is for the wrong done the public, while the damages awarded in a civil action, although punitive and inflicted by way of example and punishment, are for the offense committed wantonly or maliciously against an individual sufferer." *Cosgriff. vs. Miller, 10 Wyo. 190, 68 P. 206, at 217.*

> It is our opinion, therefore, that a wrongful act punishable as an offense, does not preclude exemplary damages therefor in a civil act sounding in tort. *Summers vs. Keller, 152 Mo. App. 626, 133 S.W. 1180.* See also *Anderson vs. International Harvester Co., etc. (Minn.), 104 Minn. 49, 116 N.W. 101, 16 L. R. A. (N. S.) 440,* and case note.

III. THE DISTRICT COURT ERRED BY EQUATING CIVIL PUNITIVE DAMAGES WITH CRIMINAL PENALTIES, CONTRARY TO *HUDSON*, *COLBERT*, AND *MARCUS*.

The District Courts ruled that FATA violates *ex post facto* because it imposes "punishment," in the form of treble damages. This is plain error, because the District Courts failed to distinguish between punishment for a crime, and punishment for a civil wrong, as explained in *Colbert, supra.* As it turns out, this is the very same error which the Supreme Court committed in *United States v. Halper*, 490 U.S. 435 (1989). Eight years later, the Supreme Court corrected its own mistake, by overruling *Halper.*

In *Hudson v. United States*, 522 U.S. 93 (1997), the U.S. Supreme Court came to the realization that it is impossible to analyze sanctions under the Constitution without differentiating between criminal punishment and civil punishment. Criminal punishment is punishment for committing a crime, whereas civil punishment is punishment for committing a civil wrong, such as a tort. The criminal and civil laws overlap, because they may operate on the

same facts, and they both can impose some degree of "punishment." However, the federal Constitution treats them very differently, for historical reasons found in the evolution of English law. The Constitution imposes many restrictions on the criminal laws, for good reasons, whereas it imposes fewer restrictions on the civil laws, also for good reasons.

In *Hudson*, the Court held that *Halper* incorrectly bypassed the threshold question: Whether the punishment at issue is a criminal punishment or a civil punishment.

> We have long recognized that the *Double Jeopardy Clause* does not prohibit the imposition of any additional sanction that could, "'in common parlance,'" be described as punishment. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549, 87 L. Ed. 443, 63 S. Ct. 379 (1943) (quoting *Moore v. Illinois*, 55 U.S. 13, 14 HOW 13, 19, 14 L. Ed. 306 (1852)). The Clause protects only against the imposition of multiple *criminal* punishments for the same offense, *Helvering v. Mitchell*, 303 U.S. 391, 399, 82 L. Ed. 917, 58 S. Ct. 630 (1938); *see also Hess*, 317 U.S. at 548-549 ("Only" "criminal punishment" "subjects the defendant to 'jeopardy' within the constitutional meaning"); . . . .
>
> Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. *Helvering, supra*, at 399.
>
> Our opinion in *United States* v. *Halper* marked the first time we applied the *Double Jeopardy Clause* to a sanction without first determining that it was criminal in nature. . . .

> As the *Halper* Court saw it, the imposition of "punishment" of any kind was subject to double jeopardy constraints, and whether a sanction constituted "punishment" depended primarily on whether it served the traditional "goals of punishment," namely "retribution and deterrence." . . . .
>
> We believe that *Halper*'s deviation from longstanding double jeopardy principles was ill considered. As subsequent cases have demonstrated, *Halper*'s test for determining whether a particular sanction is "punitive," and thus subject to the strictures of the *Double Jeopardy Clause*, has proved unworkable. We have since recognized that all civil penalties have some deterrent effect. . . . If a sanction must be "solely" remedial (*i.e.*, entirely nondeterrent) to avoid implicating the *Double Jeopardy Clause*, then no civil penalties are beyond the scope of the Clause.
>
> * * *
>
> The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between "punitive" and "nonpunitive" penalties.

Hudson, 522 U.S. at 101-02, 103.

In effect, the U.S. Supreme Court in *Hudson* reaffirmed the result and reasoning which the New Mexico Supreme Court had reached many years earlier in *Colbert v. Journal Publishing*.

In the present case, the district court committed the *Halper* error: the lower court decision focuses on whether treble damages are "punishment." That is the wrong question. The correct question is: Does the statute impose punishment <u>for a crime</u>, or punishment for a civil wrong, such as a tort ?

Semantic confusion. In *Hudson*, the Supreme Court encountered one of the inherent difficulties of the English language. In English, exact meanings are almost never conveyed by a single word, standing alone. Thus the words "penal," "punishment," "punitive," and "penalty" are all ambiguous: these words could refer to criminal punishment, or civil punishment, or social punishment, depending on context. But the exact meaning of these words cannot be ascertained from the single word standing alone, without additional words, modifiers, context, grammar and syntax. In linguistic terminology, English is an "isolating" language, rather than an "inflecting" language, or an "agglutinating" language, which convey more meaning in a single word. Steven Pinker, *The Language Instinct* at 232 (1994). Thus the *Hudson* court recognized that *Halper* was incorrect, because the word "punishment" alone is too vague to be used for constitutional analysis. So the Court added the modifiers "criminal" or "civil," and most of the confusion disappeared.

In this case, the lower court lapsed back into *Halper's* semantic confusion. Throughout his opinion, Judge Pfeffer repeatedly characterizes FATA as "penal," "punitive," and "primarily punitive" [RP 3145, 3153, 3155], without differentiating between civil and criminal punishments.

Marcus v. Hess. The lower court ruling is also at odds with *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In *Marcus*, Justice Hugo Black, speaking for a unanimous Supreme Court, upheld the False Claims Act against a double jeopardy challenge. The Supreme Court held in *Marcus* that an award of two times actual damages under federal False Claims Act can be considered compensatory and non-punitive for constitutional purposes:

> *Helvering v. Mitchell*, 303 U.S. 391 . . . emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to "jeopardy" within the constitutional meaning. *Id.*, 303 U.S. 397, 398 . . . .
>
> * * *
>
> It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty. Long ago, this Court said, "A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance to be

> twice punished for the same offense." *Moore v. Illinois*, 14 How. 13, 19, 20 . . . .
>
> * * *
>
> This remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered. As to the double damage provision, it can not be said that there is any recovery in excess of actual loss for the government, since in the nature of the qui tam action the government's half of the double damages is the amount of actual damages proved. But in any case, Congress might have provided here as it did in the anti-trust laws for recovery of "threefold the damages * * * sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 . . . . Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men are aften punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." *Day v. Woodworth*, 13 How. 363, 371 . . . . This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 523 . . . . Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. *O'Sullivan v. Felix*, 233 U.S. 318, 324 . . . . The law can provide the same measure of damage for the government as it can for an individual.

313 U.S. at 548-51.

Nunez, Kirby, Drucktenis. The District Court's decision cannot be reconciled with the New Mexico Supreme Court rulings in *Schwartz*; *White Chevy*; and the Court of Appeals ruling in *State v. Kirby*, 2003-NMCA-074, 133 N.M. 782, 70 P.3d 772. "Although a civil penalty may cause a degree of punishment for the defendant, such a subjective effect cannot override the legislation's primarily remedial purpose." *White Chevy*, 2002-NMSC-014, ¶ 11. *Kirby* holds that "monetary assessments are traditionally a form of civil remedy" and that "Monetary penalties have historically been regarded as civil, not criminal, penalties." 2003-NMCA-074, ¶ 31. *Kirby* also states that the *Halper* analysis has been largely disavowed in *Hudson*.

Smith v. Doe, 538 U.S. 84 (2003); *State v. Nunez*, 2000-NMSC-013, ¶ 57, 129 N.M. 63, 2 P.3d 264; and *Kirby* all strongly support the conclusion that FATA is constitutional. *Smith* holds that a sex criminal may be forced to register for crimes committed before the effective date of the statute. (*Druktenis* also upholds a similar statute against a retroactivity challenge.) *Nunez* holds that a civil forfeiture may be considered a criminal penalty if it is predicated on the commission of a crime. 2000-NMSC-013, ¶ 57. Unlike the Controlled Substances Act in *Nunez*, FATA contains no crimes, and no forfeitures either. *Kirby* holds that the civil penalties in the Securities Act cannot be treated as

sanctions for a crime, even though the Securities Act does contain a felony. *A fortiori*, the ruling in *Kirby* supports the constitutionality of FATA.

IV. THE RULING BELOW IS CONTRARY TO MANY OTHER CONTROLLING PRECEDENTS.

A. Remedial and curative statutes are constitutional.

In *Kirby*, the Securities Act was upheld against a double jeopardy challenge, even though the Securities Act includes a felony in § 58-13B-39. "The Securities Act, as a whole, has remedial purpose." 2003-NMCA-074, ¶ 23. Its purpose is "protecting the public from the many means promoters may use to separate the unwary from their money." *Id.* ¶ 24 (quoting *State v. Ramos*, 116 N.M. 123, 126, 860 P.2d 765, 768 (1993)).

FATA shares the same remedial purpose – to protect the State from the many means promoters may use to separate the State from its money, which is ultimately the taxpayers' money. If the Securities Act is secure against double jeopardy challenge, even though the Securities Act creates a felony, then *a fortiori* FATA is even more secure, since FATA creates no crime.

B. A statute is not retroactive if it applies only to cases filed after the effective date of the statute.

Since FATA's innovations are procedural and remedial, rather than substantive, FATA can be viewed as not retroactive at all, since it applies only to cases filed after its effective date. *See Cutter Flying Serv., Inc. v. Straughan*, 80 N.M. 646, 459 P.2d 350 (1969), which holds that a statute allowing attorneys fees is valid as affecting debts incurred before the statute, because the statute applies only to cases filed after the statute's effective date. Likewise, in *Melaven v. Schmidt*, 34 N.M. 443, 280 P. 900 (1929), the Supreme Court held that the Legislature could retroactively change the measure of a shareholder's liability.

As the Court of Appeals said in *Hansman v. Bernalillo Co. Assessor*, 95 N.M. 697, 701, 625 P.2d 1214, 1218 (Ct. App. 1980), "A retroactive statute, clearly intended by the legislature to so operate, is permissible." This is especially true for statutes dealing with remedial procedure. *Wilson v. New Mexico Lumber & Timber Co.*, 42 N.M. 438, 440, 801 P.2d 61, 62 (1938).

Furthermore, a "statute does not operate retroactively merely because some of the facts or conditions which are relied upon existed prior to the enactment." *City of Albuquerque v. State ex rel. Village of Los Ranchos*, 111 N.M. 608, 616, 808 P.2d 58, 66 (Ct. App. 1991). *See also State v. Mears*, 79 N.M. 715,

449 P.2d 85 (Ct. App. 1968); *Lucero v. Board of Regents*, 91 N.M. 770, 581 P.2d 458 (1978).

In effect, FATA extends the statute of limitations for certain torts committed against the State. Civil statutes of limitations are considered procedural and remedial, and therefore extensions are not invalid as *ex post facto* legislation. *Grygorwicz v. Trujillo*, 2006-NMCA-089, 140 N.M. 129, 140 P.3d 550.

C. FATA does not violate the due process or equal protection clauses because its consequences are not "particularly harsh and oppressive."

In certain extreme cases, civil penalties might violate the due process clause if they become excessive, harsh, and oppressive in relation to the amount of actual damages. But excessiveness is simply not an issue in *Austin* or *Vanderbilt*. First, treble damages are not harsh or excessive, because much greater multiples have been held to be constitutional. *Weidler v. Big J Enterprises, Inc.*, 1998-NMCA-021, ¶ 48, 124 N.M. 591, 953 P.2d 1089. Second, FATA does include a civil penalty of "not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) for each violation" [§ 44-9-3(C)(2)], but this is an infinitesimal fraction of the actual damages in this case. In these cases, a civil penalty of five to ten thousand

dollars per violation is *de minimis*. Third, Judge Pfeffer was concerned that the State lost $90,000,000 in lost principal on just one investment. Therefore, just assuming a trebling of that amount under FATA, the total award would exceed actual damages by $180,000,000. Judge Pfeffer opined that this additional amount is constitutionally excessive. [RP 3161]. This is fallacious reasoning which would have the effect of shielding defendants who perpetrate huge frauds, like the defendants in this case. Excessiveness must be measured in relative terms, in their proportionality to actual damages, rather than absolute terms. *Weidler, supra.* FATA actually imposes a limitation on the ratio of punitive damages which could otherwise be awarded.

In the present case, the defendants might be liable for hundreds of millions in FATA damages, but that is because they inflicted hundreds of millions in losses on the public treasury.

V. FATA SIMPLY INCORPORATES THE TORTS OF FRAUD AND RECKLESS MISREPRESENTATION, WHICH WERE ALREADY ACTIONABLE AT COMMON LAW WHEN THE DEFENDANTS COMMITTED THEIR WRONGFUL ACTS. SO DEFENDANTS CANNOT ARGUE THAT THEIR ACTIONS WERE LAWFUL WHEN THEY COMMITTED THEM, ONLY TO BE MADE UNLAWFUL AFTER THE FACT.

In terms of fundamental fairness, the gravamen of any retroactivity challenge is that the defendants committed acts which were lawful at the time,

only to have them declared unlawful after the fact. The defendants cannot make this claim, because FATA merely recapitulates the torts of fraud and misrepresentation, which have existed under the common law in New Mexico since time immemorial. *See* NMSA 1978, § 38-1-3 ("common law . . . shall be the rule of practice and decision"). FATA simply provides more efficacious remedies for conduct which was already wrongful and tortious as a matter of substantive law.

In truth, underneath all of the verbiage, the defendants' real complaint is that FATA made it more likely that they would be caught. Except for FATA and Frank Foy, the defendants would have gotten away with the frauds which they perpetrated on the State. So FATA is working the way it is supposed to. Naturally, the defendants consider this to be grossly unfair.

Liability under the Fraud Against Taxpayers Act is based upon the long-established torts of fraud and reckless misrepresentation. *See* NMSA 1978, § 44-9-3, which prohibits "a false or fraudulent claim," and "a false, misleading or fraudulent record or statement." FATA expressly adopts actual fraud as one basis for liability, *i.e.* misrepresentation with "actual knowledge of the truth or falsity of the information." FATA also extends to the tort of misrepresentation with "deliberate ignorance" or "reckless disregard" of the

truth or falsity of the information. NMSA 1978, § 44-9-2(C). These types of misrepresentations were established as torts in New Mexico long before the defendants committed their wrongful acts. And FATA also incorporates the tort of conspiracy in § 44-9-3(A)(4).

These are not new rules of conduct. So whenever the defendants committed these acts, they were against the substantive civil law of New Mexico, regardless of date. It makes no different whether they occurred in 2003, or 2008, or 2010.

Under the common law, misrepresentation is a tort. Indeed, the common law on misrepresentation is broader than FATA. The common law goes beyond FATA to encompass less culpable forms of misrepresentation, such as negligent or innocent misrepresentation. *See, e.g.,* UJI 13-1632 NMRA. Therefore, when the defendants knowingly or recklessly misrepresented the investment products which were sold to the State of New Mexico, the defendants committed torts which were actionable under the common law. These misrepresentations also were breaches of the fiduciary duties imposed by the common law, and by Article XX, § 22 of the New Mexico Constitution, enacted in 1998.

These misrepresentations were also actionable under any number of statutes in force at all times since the year 2000. *See, e.g.,* NMSA 1978, § 58-13B-30 (fraud or deceit, untrue statement); § 58-13B-31 (market manipulation, quoting a fictitious price); § 58-13B-32 (inside information); § 58-13B-33 (fraud or deceit by investment adviser); § 58-13B-40 (civil liability); §§ 57-12-1 to -22 (Unfair Practices Act); § 55-1-103 (supplementary general principles of law applicable – the principles of law and equity, including the law merchant, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake); § 59A-16-3 (unfair or deceptive or fraudulent practices); § 59A-16-4 (misrepresentation), § 59A-16-5 (false information); § 59A-16-8 (falsification and omission of records, misleading financial statements); and UJI 13-1707 NMRA (violation of Unfair Practices Act).

So, are the defendants seriously arguing that before 7/1/07 they had a vested right to commit fraud? To bribe public officials? To conspire to breach their fiduciary duties? Are the defendants arguing that they had a settled expectation that they could commit these wrongs without civil liability? Do the defendants claim a vested property right, or a vested contract right, in defrauding the State?

As discussed above, a statute may provide new remedies without violating the Constitution. Nevertheless, all of the remedies in FATA were already available under existing common law and statutes. For example, FATA provides for punitive or exemplary damages which are two times the actual damages. However the common law already provides for punitive damages with multipliers much higher than two times. *See, e.g., Weidler v. Big J Enterprises, Inc.*, 1998-NMCA-021, ¶ 48, 124 N.M. 591, 953 P.2d 1089 (affirming ratio of punitive damages to actual damages of eight to one). And the common law also provides for punitive damages for conduct which is less culpable than fraud. Punitive damages are allowed for acts which are "reckless," "wanton," or "in bad faith." *See* UJI-1827 and *Paiz v. State Farm Fire & Casualty Co.*, 118 N.M. 203, 213, 880 P.2d 300, 310 (1994) (reckless or bad faith breach of contract). Likewise, attorneys fees were already available under various statutes, and in some instances under the common law. *See Cutter Flying Serv., supra* (the Legislature may allow attorneys fees for conduct prior to enactment of the statute).

Thus all of the substantive wrongs in FATA were already wrongful under existing common law and statutes. The statute comes as no surprise to the defendant-tortfeasors, since the rules of conduct were already established at

common law. Defendants simply cannot excuse themselves by arguing that they did not know that they were violating the substantive law of this state.

VI. THE FAULTY ANALYSIS OF THE DISTRICT COURT WOULD INVALIDATE ALL PUNITIVE DAMAGES IN CIVIL CASES.

Judge Pfeffer struck down FATA under the *ex post facto* clause because he opined that FATA imposes punishment, and therefore it must be treated as a criminal law subject to the *ex post facto* clause. The lower court ruling must be reversed, because it would invalidate all awards of punitive damages in civil cases.

Judge Pfeffer states that "the *ex post facto* prohibition also applies in civil cases where the civil penalty is punitive in nature." [RP 3145] If Judge Pfeffer's analysis were correct, then New Mexico judges and juries have been violating the Constitution for more than a century. New Mexico courts have always awarded punitive damages in civil cases without any of the protections that apply to the criminal laws. *See Colbert, supra*. If the *ex post facto* clause applies to FATA, then so would all the other constitutional provisions which apply to criminal proceedings, such as: double jeopardy; proof beyond a reasonable doubt; and a unanimous jury.

Judge Pfeffer's reasoning flies in the See UJI 13-1827, which reads in part as follows:

> Punitive damages are awarded fro the limited purposes of punishment and to deter others from the commission of like offenses.

In New Mexico, punishment has always been one of the purposes of the civil laws.

So how did the lower court arrive at this aberrational result? First, it failed to read the statute carefully. Second, it followed federal law rather than state law. Third, it committed the *Halper* mistake. Fourth, it misconstrued and misapplied the so-called *Kennedy v. Mendoza-Martinez* factors.

Misapplying *Kennedy v. Mendoza-Martinez*. The lower court relied heavily on *Kennedy, Attorney General v. Mendoza-Martinez*, 372 U.S. 144 (1963). As this Court recognized in *Drucktenis*, 2004-NMCA-032, ¶¶ 29, 31, the *Kennedy v. Mendoza-Martinez* factors are "neither exhaustive nor dispositive." *Kennedy* is not a very accurate tool for analyzing retroactivity questions.

For one thing, *Kennedy* is a due process case, not a retroactivity case at all. The case involved the constitutionality of the Nationality Acts of 1940 and 1952, which authorized the forfeiture of American citizenship by a citizen who has left or remained outside the United States to evade military service. 373 U.S. at 146. The statutes automatically imposed forfeiture of citizenship without any prior court or administrative proceedings. *Id.* at 164. The

Supreme Court held that this was punishment for the crime of draft dodging, which could not be imposed without the due process protections afforded by the Fifth and Sixth amendments. Retroactivity was not an issue in *Kennedy*, so this is one reason why *Kennedy* is not a good template for deciding retroactivity questions, as *Drucktenis* indicates.

In any event, the District Court's application of the *Kennedy* factors is incorrect. And the District Court did not properly weigh the other more relevant factors which must be considered in a retroactivity analysis, such as all of the cases discussed above.

The District Court's scoring under *Kennedy v. Mendoza-Martinez* is simply incorrect. The District Court scored four factors against FATA's constitutionality, and it misapplied each of these four factors.

Factor number 1 is whether the sanction "has been regarded in our history and traditions as a punishment." Judge Pfeffer concluded that punitive damages have been traditionally regarded as punishment. First, this may be true, but they are civil punishments, not criminal punishments. *See Colbert*; *Hudson*; and the Uniform Jury Instructions. Second, monetary damages have historically and traditionally been treated as civil remedies.

> To begin with it is important to realize that treble damages have a compensatory side, serving remedial

> purposes in addition to punitive objectives. While the tipping point between pay-back and punishment defies general formulation, being dependent on the workings of a particular statute and the course of particular litigation, the facts about the FCA show that the damages multiplier has compensatory traits along with the punitive.

Cook County v. United States ex rel. Chandler, 538 U.S. 119, 130 (2003) (citations omitted); *see also United States ex rel. Colucci v. Beth Israel Med. Center*, 603 F. Supp. 2d 677, 680 (S.D.N.Y. 2009).

Factor number 2 is whether the sanction "comes into play only upon a finding of scienter." This test is overbroad, because most common law torts require some degree of scienter. *State v. Padilla*, 2008-NMSC-006, ¶ 14, 143 N.M. 310, 176 P.3d 299 (quoting *Black's Law Dictionary* definition of scienter).

Factor number 4 is whether the sanction "promotes the traditional aims of punishment." Certainly punishment is one purpose of punitive damages, as jurors are instructed, but it is civil punishment, not criminal punishment. In FATA, the 3X statutory damages are less than what is already allowed by tort law.

Factor number 7 is whether the sanction is "excessive." Judge Pfeffer decided that statutory damages of 3X are constitutionally "excessive." This is plainly erroneous, because New Mexico common law authorizes punitive

damages in much greater multiples than 3X, without being "excessive." *Weidler v. Big J Enterprises, Inc.*, 1998-NMCA-021, ¶ 48, 124 N.M. 591, 953 P.2d 1089 (affirming ratio of punitive damages to actual damages of eight to one).

Under the District Court's mistaken interpretation of *Kennedy*, then it would follow that awards of punitive damages under the common law cannot be imposed without the heightened protections of the criminal laws such as *ex post facto*, double jeopardy, the reasonable doubt standard, and a unanimous jury verdict. *See* Justice Souter's concurrence in *Hudson*, 522 U.S. at 112 ("there is obvious sense in employing common criteria to point up the criminal nature of a statute for purposes of both the *Fifth* and *Sixth Amendments*").

VII. FATA CONTAINS A MANDATORY SEVERANCE CLAUSE, WHICH THE LOWER COURTS REFUSED TO ENFORCE.

Section 15 of FATA itself explicitly requires severance. For some reason, the compilers of the statute books noted § 15 but did not print its text. Here is the statutory text:

§ 44-9-15. Severability.

> If any part or application of this act is held invalid, the remainder of the act and its application to other persons or situations shall not be affected.

This is an extremely broad severance clause, because it applies to any part of the statute, and also to any application of the statute.

In addition to FATA, the Legislature has also enacted a general statute that mandates severance. *See* NMSA 1978, § 12-2A-9:

> If a provision of a statute or rule or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute or rule that can be given effect without the invalid provision or application, and to this end the provisions of the statute or rule are severable.

In the present case, the only colorable questions about retroactivity involve the treble damage provision. FATA damages up to 2X are not affected by the constitutional debate, see *Marcus, supra*. Nor are any of the other parts of the statute. So, giving effect to the mandatory severance statutes, the rest of FATA can be applied before July 1, 2007, even if Judge Pfeffer were correct.

The purpose of a severability clause is not to thwart or nullify the statute, but to save as much of the statute as possible "without impairing the

force and effect of the remaining parts." *Bradbury & Stamm Constr. Co. v. Bureau of Revenue*, 70 N.M. 226, 230-31, 372 P.2d 808, 811 (1962); *State v. Frawley*, 2007-NMSC-057, ¶ 30, 143 N.M. 7, 172 P.3d 144. Furthermore, the obligation to employ severance is particularly strong in the constitutional arena. *Bradbury & Stamm*, 70 N.M. at 231, 372 P.2d at 812.

Judge Pfeffer refused to apply severance, saying that he would not rewrite the statute. [RP 3172] This is plain error. Judge Pfeffer was not being asked to rewrite the statute; he was being asked to enforce the statute as the Legislature wrote it.

CONCLUSION

The District Court ruling must be reversed, and the case remanded for further proceedings to enforce FATA, regardless of the dates when defendants committed their wrongful acts. The reasoning of the lower court is contrary to dozens of cases, both state and federal, reaching as far back as 1798. The result reached by the lower court is also contrary to numerous precedents. Neither Judge Pfeffer nor the defendants have been able to cite any case which requires the court to strike down an purely civil statute like FATA. FATA does not violate the *ex post facto* clause. The statute is constitutional as written – carefully written – by the Legislature.

REQUEST FOR ORAL ARGUMENT

The plaintiffs State of New Mexico and Frank and Suzanne Foy respectfully request oral argument in this interlocutory appeal, for the following reasons:

1. This case presents important constitutional issues, because the District Court struck down part of the Fraud Against Taxpayers Act as unconstitutional. NMSA 1978, §§ 44-9-1 to -16.

2. This case presents potential recoveries for the State of New Mexico which could amount to several hundred million dollars, depending upon this Court's ruling on the appeal.

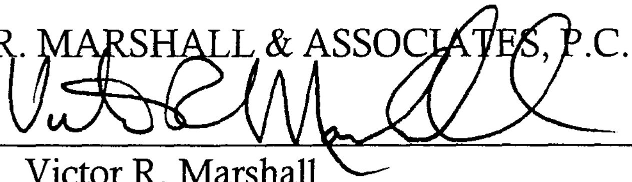
3. Likewise, a single day of delay in prosecuting this case to judgment could cost the State more than $100,000 – per day – in foregone interest alone, under NMSA 1978, § 56-8-4(A)(2).

4. The lower courts did not hear oral argument on the constitutional questions, so this would be the plaintiffs' first opportunity to explain why the Fraud Against Taxpayers Act is constitutional.

Briefing on this case should be completed around February 13, 2012, and plaintiffs respectfully ask that oral argument be set as soon thereafter as practicable.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.



By________________________

Victor R. Marshall
Attorneys for Plaintiff State of New Mexico and
Qui Tam Plaintiffs Frank Foy and Suzanne Foy
12509 Oakland NE
Albuquerque, New Mexico
505/332-9400 505/332-3793 FAX

I hereby certify that a true and correct copy of the foregoing was emailed to all counsel of record and the Honorable John Pope this 7th day of December, 2011.