

MUST THE CORPORATION PAY FOR THE SINS OF THE EMPLOYEE AFTER *UNITED STATES EX REL. VAVRA V. KELLOGG BROWN & ROOT, INC.*, 727 F.3D 343 (5TH CIR. 2013)?

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I. INTRODUCTION

The Federal Government spends approximately \$500 billion per year on procurement actions to support government work, including contracts for products and services.¹ Roughly eighty percent of those contracts are awarded to small businesses.² With the rise of the Internet, initiating a contract with the Federal Government has become easier than ever through the use of on-line electronic portals, known as e-tools,³ that provide efficient and cost-effective means to do business with the government.⁴ Despite the ease of access, the execution of a government contract is a complicated process.⁵ Businesses who choose to engage in government contracts become subject to federal statutes and regulations, including the Anti-Kickback Act (Act), 41 U.S.C. §§ 51-55 (1986), that may be new or foreign to the normal course of business and may leave small businesses with the burden of compliance that is excessive and beyond its functional capabilities.⁶

Even though an individual contract may set out penalties for the violation of its terms, many times the incorporated regulations include civil penalties beyond the parameters of the contract.⁷ Civil penalties clauses, like the one in the Act, set forth monetary damages that the government may recover from violators under two conditions: 1) outright violations,

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1. *For Vendors—Getting on Schedule*, U.S. GEN. SERVICES ADMIN., <http://gsa.gov/portal/content/198473> (last updated Jan. 7, 2015).

2. *Id.*

3. Some examples of e-tools include: GSA *Advantage!*, eBuy, eOffer/eMod, FedBizOpps, Schedule Sales Query, GSA Global Supply, and GSA Reverse Auctions. *e-Tools Overview*, U.S. GEN. SERVICES ADMIN., <http://www.gsa.gov/portal/content/104555?> (last update Mar. 3, 2015).

4. *See Resources, Training and Tools*, U.S. GEN. SERVICES ADMIN., <http://gsa.gov/portal/content/203017> (last updated Jan. 12, 2015).

5. *See generally* Federal Acquisition Regulation, 48 C.F.R. §§ 1.000-1.707 (2013).

6. The precise regulations that apply to each contract are specified within the terms and conditions of the contract. *Id.* Because each contract is different, the applicable regulations vary. *Id.*

7. *See* 41 U.S.C. § 55 (1986), *amended by* 41 U.S.C. § 8706 (2011).

and 2) knowing violations of the statute.⁸ The civil penalty provision at § 55 of the Act states:

(a) Amount.—The Federal Government in a civil action may recover from a person—
that knowingly engages in conduct prohibited by section [53]⁹ of this title a civil penalty equal to—
twice the amount of each kickback involved in the violation; and
not more than \$10,000 for each occurrence of prohibited conduct; and
whose employee, subcontractor, or subcontractor employee violates section [53] of this title by providing, accepting, or charging a kickback a civil penalty equal to the amount of that kickback.¹⁰

Section 55(a)(2) imposes a civil penalty in the amount of the kickback for *outright* violations of the Act.¹¹ Section 55(a)(1) imposes a higher penalty of twice the amount of the kickback plus additional per-occurrence forfeitures for *knowing* violations.¹² Knowing violations of a statute are typically penalized more harshly because they involve a *scienter*¹³ requirement that is typically reserved for criminal punishments.¹⁴ The *scienter* analysis is complicated for a corporate violator because the court must determine what the corporation “knows.”¹⁵

In order to hold a corporation liable for “knowing” violations, the Fifth Circuit and other courts have historically applied common law rules of agency and have held employers liable for the torts of employees who act within the scope of their employment or for the benefit of the employer.¹⁶ However, in *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, a case of first impression in the Fifth Circuit, the Circuit Court held that liability could be imputed upon a corporation for knowing violations of the Anti-Kickback Act regardless of whether the violating employee was acting

8. *Id.*

9. 41 U.S.C. § 53 (1986), *amended by* 41 U.S.C. § 8702 (2011) (prohibiting any person from providing, attempting or offering to provide, soliciting, accepting, or attempting to accept a kickback or charging the amount of the kickback to any government contractor or subcontractor).

10. *Id.* § 55, *amended by* 41 U.S.C. § 8706.

11. *Id.*

12. *Id.*

13. *Scienter* is defined as “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act’s having been done knowingly” BLACK’S LAW DICTIONARY 1373 (9th ed. 2009).

14. 41 U.S.C. § 55(a)(1), *amended by* 41 U.S.C. § 8706.

15. *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 727 F.3d 343, 354 (5th Cir. 2013) (Jolly, J., concurring).

16. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958); *see also* *United States v. Ridgley State Bank*, 357 F.2d 495 (5th Cir. 1966); *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962).

within the scope of his employment or for the benefit of the corporation.¹⁷ This holding opens the door for excessive corporate liability for the actions of employees at all levels of the corporate ladder.¹⁸

This Note argues that, in *Kellogg*, the United States Court of Appeals for the Fifth Circuit inappropriately determined that vicarious liability could be imputed to a corporation under § 55(a)(1) of the Act by dismissing its punitive characteristics and disregarding the application of the act-for-the-benefit-of-the-principal rule of agency. Section II provides a background of the treatment of punitive damages and the application of vicarious liability under similar federal statutes. Section III discusses the facts and findings of the Fifth Circuit in *Kellogg*. Finally, Section IV argues why the court inappropriately applied vicarious liability under § 55(a)(1) of the Act by dismissing its punitive characteristics and disregarding the application of the act-for-the-benefit-of-the-principal doctrine.

II. LEGAL BACKGROUND

The U.S. Government contracts with commercial entities¹⁹ to fulfill its requirements for services and supplies.²⁰ These contracts must conform to the rules of the Federal Acquisition Regulations.²¹ Depending on the services or supplies being acquired, government contracts vary from simple acquisitions to complex contracts.²² Each contract has a different structure and cost scheme.²³ Requirements contracts are those established to fulfill the requirements of a government entity when those future needs cannot be clearly defined.²⁴ One type of requirements contract is an indefinite delivery/indefinite quantity (IDIQ) contract.²⁵

IDIQ contracts provide for an indefinite quantity of services or goods over a fixed period of time.²⁶ These contracts are used when the Government cannot determine the precise quantities or timing of supplies or

17. *Kellogg*, 727 F.3d at 348–49.

18. *Ridglea*, 357 F.2d at 498.

19. Once a contract is formed, the commercial firm is known as a “prime contractor” because they hold the prime contract with the government. Federal Acquisition Regulation, 48 C.F.R. § 3.502-1 (2014).

20. *Getting Started with GSA Purchasing Programs*, U.S. GEN. SERVICES ADMIN., http://www.gsa.gov/portal/content/105347?utm_source=FAS&utm_medium=print-radio&utm_term=HDR_4_Prchsng_gettingstarted&utm_campaign=shortcuts (last visited Feb. 2, 2015).

21. *See generally* 48 C.F.R. §§ 1.000-1.707.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* § 16.504.

26. *Id.*

services that are needed.²⁷ Once the need is determined, the Government issues discrete task orders under the contract for contractor execution.²⁸ Although cost structures of IDIQ contracts differ, one common type of cost structure is “cost-plus.”²⁹ Under a cost-plus contract, the contractor receives its cost of performance plus a predetermined markup, which is typically a percentage of cost.³⁰ Under this type of cost structure, the Government bears the burden of shifting requirements or changes in market prices.³¹ In addition to the markup cost, the contractor also receives a fee for its services.³² This fee may be based on a sliding scale or be predetermined, depending on the terms of the contract.³³

No matter the type of contract awarded, the Government must include any applicable laws that affect the performance of the contract within the terms of the contract.³⁴ These laws, known as “flow downs,” may be incorporated in full text within the contract or may only be incorporated by reference.³⁵ As the term implies, these requirements must also “flow down” to any subcontractors acquired to assist in performance of the work.³⁶ The Anti-Kickback Act must be included in every contract with a value exceeding \$150,000.³⁷

The Anti-Kickback Act originated in 1946 in response to private companies paying government contractors kickbacks to gain valuable military subcontracts during World War II (WWII).³⁸ A kickback is a type of commercial bribe where “a percentage of income is given to a person in a position of power or influence as payment for having made the income possible.”³⁹ The Government, and ultimately the taxpayers, bore the burden of these WWII kickbacks because the subcontractor would include the amount in its invoice to the prime contractor, who would then up-charge the fee, in addition to any markups and award fees, to the Government.⁴⁰

27. *Id.*

28. *Id.*

29. *Id.*

30. *See Id.* § 16.304-.306.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* §§ 52.200-.253-1.

35. *Id.* Incorporation is a method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one. Laws incorporated by reference are still in full force and effect under the contract. BLACK’S LAW DICTIONARY 781 (9th ed. 2009).

36. 48 C.F.R. § 52.203-6.

37. *Id.* § 3.502-3.

38. S. REP. NO. 99-435, at 3 (1986).

39. *Kickback*, DICTIONARY.COM, <http://dictionary.reference.com/browse/kickback?s=t> (last visited Feb. 2, 2015).

40. *United States v. Acme Process Equip. Co.*, 385 U.S. 138, 143 (1966); *United States v. Purdy*, 144 F.3d 241, 242-43 (2d Cir. 1998).

Realizing the improper and unethical nature of these bribes, Congress passed the Act to prevent government contractors and subcontractors from accepting them.⁴¹

The Act was amended in 1986 by the Anti-Kickback Enforcement Act, which was intended to strengthen the prohibition of kickbacks relating to government contracts.⁴² Before this amendment, when a contractor was found in violation of the statute, the Government was only allowed to collect the amount of the kickback.⁴³ The amendments added a provision in the civil liability clause that allowed the Government to recover damages in the amount equal to double the value of the kickback plus \$10,000 per occurrence, for *knowing* violations of the Act.⁴⁴ The provision that addressed damages in the amount of the kickback was expanded from a single entity, individual, or corporation, to include any kickback received by an employee or subcontractor of that entity.⁴⁵ The divergence of the original provision is the subject of *Kellogg*.⁴⁶

The relevant language found in § 55 of the Act at the time of the alleged violation is as follows:

- (a) Amount.—The Federal Government in a civil action may recover from a person—
that knowingly engages in conduct prohibited by section 53⁴⁷ of this title a civil penalty equal to—
twice the amount of each kickback involved in the violation; and
not more than \$10,000 for each occurrence of prohibited conduct; and
(2) whose employee, subcontractor, or subcontractor employee violates section 53 of this title by providing, accepting, or charging a kickback a civil penalty equal to the amount of that kickback.⁴⁸

Because *Kellogg* was a case of first impression for the Fifth Circuit, no precedent existed to address the treatment of these two clauses with respect to the imposition of vicarious liability on a corporation whose employee violated the Act.⁴⁹ Consequentially, the court examined the

41. *Purdy*, 144 F.3d at 242–43.

42. Anti-Kickback Enforcement Act of 1986, Pub. L. No. 99-634, 100 Stat. 3523.

43. 41 U.S.C. § 51 (1982), *repealed by* Anti-Kickback Enforcement Act of 1986, Pub. L. No. 99-634, 100 Stat. 3523.

44. Act of Nov. 7, 1986, Pub. L. No. 99-634, § 5, 100 Stat. 3523 (1986); H.R. REP. NO. 99-964, at 10 (1986).

45. Act of Nov. 7, 1986 § 5; H.R. REP. NO. 99-964, *supra* note 44.

46. *See United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 727 F.3d 343 (5th Cir. 2013).

47. 41 U.S.C. § 53 (1986), *amended by* 41 U.S.C. § 8702 (2011) (prohibiting any person from providing, attempting or offering to provide, soliciting, accepting, or attempting to accept a kickbacks or charging the amount of the kickback to any government contractor or subcontractor).

48. *Id.* § 55, *amended by* 41 U.S.C. § 8706.

49. *Kellogg*, 727 F.3d at 344.

application of vicarious liability in federal statutes similar to the Anti-Kickback Act.⁵⁰

A. Vicarious Liability

Under § 55(a)(1) of the Anti-Kickback Act, the corporation must knowingly violate the Act in order to be liable for double damages and the per occurrence penalty.⁵¹ Because a corporation is a legal entity, it cannot of itself possess a mental state.⁵² History has shown that the acts and mental states of a corporation's employees may be imputed upon the corporation if those employees acted to benefit the corporation.⁵³ However, in cases where the damages sought are punitive in nature, the requisite mental state (*scienter*) cannot be imputed to a corporation.⁵⁴

1. Act-for-the-benefit-of-the-principal

The act-for-the-benefit-of-the-principal doctrine states that an agent is only authorized to act for the benefit of the principal, and he may not seek personal advantage through his actions as an agent.⁵⁵ Based on Fifth Circuit precedent, vicarious liability may be imputed to a corporation when the employee is acting within the scope of his employment or for the benefit of the corporation.⁵⁶ Historically, the Fifth Circuit has applied the act-to-benefit analysis to show that vicarious liability does not *automatically* arise under an employer/employee relationship.⁵⁷ To satisfy the analysis, the corporation need not *actually* benefit from the actions of the employee, but the employee must have acted with the *intent* to benefit the corporation.⁵⁸

When evaluating whether a corporation could be held criminally liable for the unauthorized actions of its employees, the Fifth Circuit stated in *Standard Oil Co. of Texas v. United States* that the employee's *purpose* to benefit the corporation is decisive to equate the employee's actions with that of the corporation.⁵⁹ If the act was performed with a view of furthering

50. *Id.* at 345.

51. 42 U.S.C. § 55(a)(1), *amended by* 41 U.S.C. § 8706.

52. *See* 10 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4877 (perm. ed., rev. vol. 2012).

53. *Id.*

54. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 528 (1999).

55. RESTATEMENT (SECOND) OF AGENCY § 39 cmt. a (1958).

56. *United States v. Ridglea State Bank*, 357 F.2d 495, 500 (5th Cir. 1966).

57. *Id.* at 498-99; *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962).

58. *Standard Oil*, 307 F.2d at 128.

59. *Id.*

the corporation's business, then the expectation of benefit makes the act that of the principal.⁶⁰

Even though *Standard Oil* involved imputing criminal liability, the Fifth Circuit has extended its holding to civil actions based on statutory provisions that carry punitive penalties.⁶¹ In *United States v. Ridglea*, the court opined that a corporation could not acquire a specific wrongful intent through the actions of unfaithful servants who acted to advance the interests of parties other than their employer.⁶² In *Ridglea*, the executive vice president of a bank knowingly approved fraudulent Federal Housing Administration loans for which he received a percentage of the proceeds.⁶³ The court held that civil liability for the acts of the vice president could not be imputed to the bank because he was clearly acting to benefit himself.⁶⁴ The vice president's approval of loans he knew would default was actually detrimental to the bank.⁶⁵ Because he was not acting to benefit the bank, his actions and personal knowledge of his misdeeds were not imputed to the bank.⁶⁶

During the Vietnam War, the Fifth Circuit declined to hold a corporation liable in *United States v. Hangar One, Inc.*, a case similar to *Kellogg*.⁶⁷ In *Hanger One*, the defendant corporation held a contract with the Government to provide ammunition to support the Vietnam War.⁶⁸ While performing the contract, some of the corporation's employees overlooked defects in the ammunition on the production line and allowed defective ammunition to be sold to the Government.⁶⁹ Because there was no benefit in providing defective products to the Government, the circuit court held that the corporation was not liable for the actions of its employees because they were not acting to benefit the corporation.⁷⁰

2. Damages

Although courts are still divided as to whether statutory clauses allowing the government to recover "double damages" are punitive or remedial, the trend is moving toward considering these provisions

60. *Id.*

61. *Ridglea*, 357 F.2d at 498.

62. *Id.* (citing *Standard Oil*, 307 F.2d at 129); see also RESTATEMENT (SECOND) OF AGENCY §§ 217D cmt. d, 235 (1958).

63. *Ridglea*, 357 F.2d at 498.

64. *Id.*

65. *Id.*

66. *Id.*

67. *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1158 (5th Cir. 1977).

68. *Id.* at 1156.

69. *Id.*

70. *Id.* at 1158.

punitive.⁷¹ Once a clause is declared punitive, it should be strictly construed to only impute the requisite scienter to a corporation when the authority of the actor is clear.⁷²

Dating back to 1818, the U.S. Supreme Court has held that a principal cannot be held liable for punitive damages imposed due to the unauthorized misdeeds of its agents.⁷³ Courts have consistently applied this doctrine over time in cases concerning general punitive damages and statutory clauses with punitive penalties.⁷⁴

In *Hyslop v. United States*, the Court held that statutory clauses that are punitive must be strictly construed to limit the imposition of vicarious liability upon a corporation.⁷⁵ The policy behind such application is that punitive penalties are intended to punish the offender.⁷⁶ As a result, it would be improper to punish a corporation for the actions of an employee that was not clearly acting on behalf of the corporation.⁷⁷

III. EXPOSITION OF THE CASE

In *Kellogg*, the United States Court of Appeals for the Fifth Circuit considered two questions: 1) whether 41 U.S.C. § 55(a)(2) extended vicarious liability to an employer for the acts of its employees and 2) if vicarious liability did apply, whether the Government adequately imputed that liability on Kellogg Brown & Root, Inc. (“KBR”).⁷⁸ In response to the first issue, the Fifth Circuit Court held that an employer could be held vicariously liable for the actions of its employees under 41 U.S.C. § 55 (a)(2).⁷⁹ As to the second issue, the court remanded to the trial court to determine whether the facts of this case justify imputed liability.⁸⁰ This Note is limited to the first issue in *Kellogg*.

71. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 532–33 (1999); *see also* *United States v. Halper*, 490 U.S. 435, 447–49 (1989); *Hudson v. United States*, 522 U.S. 93, 93 (1997).

72. *Kolstad*, 527 U.S. at 532–33.

73. *The Amiable Nancy*, 16 U.S. 546, 558-59 (1818) (holding that actual wrongdoers in marine trespass are responsible for exemplary damages, but the owners of the privateers are not responsible beyond the actual loss or injury sustained).

74. *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 114-15 (1893); *Dudley v. Wal-mart Stores, Inc.*, 166 F.3d 1317, 1322–23 (11th Cir. 1999); *Harris v. L&L Wings, Inc.*, 132 F.3d 978, 983-85 (4th Cir. 1997); *Hyslop v. United States*, 261 F.2d 786, 792 (8th Cir. 1958).

75. *Hyslop*, 261 F.2d at 792.

76. *Id.*

77. *Kolstad*, 527 U.S. at 544.

78. *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 727 F.3d 343, 348 (5th Cir. 2013).

79. *Id.* at 348–49.

80. *Id.* at 351.

A. Facts and Procedural Posture

KBR was a prime contractor who provided global logistical services to Army installations across the globe for the U.S. Department of Defense.⁸¹ KBR's agreement with the government, known as the Logistics Civil Augmentation Program III (LOGCAP III), was structured as an IDIQ contract.⁸² The terms of LOGCAP III allowed KBR to bill the Army its cost of performance, including the cost of subcontractors, plus a one percent markup and an award fee of up to two percent.⁸³ Under LOGCAP III, the Army would issue discrete task orders to KBR, which KBR could self-perform or perform through retention of subcontractors.⁸⁴ KBR engaged two subcontractors, EGL, Inc. (EGL) and Panalpina, Inc. (Panalpina), to assist in the execution of task orders issued between 2002 and 2006 for the transportation of military equipment and supplies in Iraq, Afghanistan, and Kuwait.⁸⁵

According to the Government, KBR accepted kickbacks from both EGL and Panalpina in exchange for favorable treatment, including "overlooking service failures and continuing to award new subcontracts . . . despite such failures."⁸⁶ The allegations focus on KBR's Corporate Traffic Supervisor for LOGCAP III, Robert Bennett.⁸⁷ As the Corporate Traffic Supervisor, Bennett was responsible for the oversight of EGL and Panalpina and for approving invoices submitted by the two subcontractors.⁸⁸ From 2002 to 2006, Bennett and four of his colleagues, who also worked in the transportation department, accepted kickbacks on at least ninety-three occasions from Kevin Smoot, managing director of EGL's freight forwarding station, and other EGL employees who were acting under Smoot's direction.⁸⁹ These kickbacks included meals, drinks, golf outings, tickets to rodeo events, baseball games, football games, and other gifts and entertainment.⁹⁰ From 2003 to 2006, Bennett accepted kickbacks from Panalpina through its account representative, Grant Wattman, and other employees acting under Wattman's direction on at least

81. *Id.* at 344–45.

82. *Id.* at 345.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (quoting Complaint of United States at 27–28, *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 727 F.3d 343 (5th Cir. 2013) (No. 1:04CV00042), 2010 WL 3198716, at *27–28).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

fifty-five occasions.⁹¹ Like the EGL kickbacks, the Panalpina kickbacks included “meals, drinks, golf outings, and other gifts and entertainment.”⁹²

This action commenced when two individuals brought a qui tam action⁹³ against KBR, Bennett, and others for the kickback scheme.⁹⁴ In this case, the Government intervened and filed its own complaint alleging a violation of the Act under 41 U.S.C. § 55(a)(1), among other claims.⁹⁵ KBR moved to dismiss the Government’s complaint on the ground that it failed to state a claim for civil liability because 41 U.S.C. § 55(a)(1) does not permit vicarious liability.⁹⁶ The trial court agreed and granted KBR’s motion to dismiss stating that the plain language of § 55(a)(1) does not allow for vicarious liability, and the Government had not sufficiently alleged that KBR employees were acting for the company’s benefit.⁹⁷ Subsequently, the Government voluntarily dismissed all other claims and proceeded in this appeal solely on the § 55(a) claim.⁹⁸

B. Majority Opinion

Keeping in mind the procedural posture of this case, the Fifth Circuit Court only considered whether the district court properly granted KBR’s motion to dismiss.⁹⁹ The entire premise of this suit lies within the language of the Act¹⁰⁰ as it appeared during the term of KBR’s contract with the Department of Defense.¹⁰¹ Section 52(2) defined a “kickback” as:

any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to

91. *Id.*

92. *Id.*

93. A qui tam suit is,

a lawsuit that is brought by a private citizen against a person or company who is believed to have violated the law during performance under a government contract or in violation of a government regulation that allows for such suits. In a qui tam suit, the private citizen is allowed to participate in the suit and receive a portion or all of the proceeds received as a result. Modernly, this type of suit is more commonly referred to as a “whistle blower” case. In certain cases, the Government may intervene and bring an action on its own right.

Qui Tam Action, LEGALDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/qui+tam+action> (last visited Nov. 11, 2014).

94. *Kellogg*, 727 F.3d at 345.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 346.

99. *Id.*

100. 41 U.S.C. §§ 51-56 (1986), amended by 41 U.S.C. § 8702 (2011).

101. *Kellogg*, 727 F.3d at 346.

improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract.¹⁰²

Section 53 stated that:

A person may not—

- (1) provide, attempt to provide, or offer to provide a kickback;
- (2) solicit, accept, or attempt to accept a kickback; or
- (3) include the amount of a kickback prohibited by paragraph (1) or (2) in the contract price—
 - (A) a subcontractor charges a prime contractor or a higher tier subcontractor; or
 - (B) a prime contractor charges the Federal Government.¹⁰³

Section 52(3) defined “person” to include an “individual” and a “corporation, partnership, business association of any kind, trust, [or] joint-stock company.”¹⁰⁴ Section 55(a), the civil liability clause in question, stated:

- (a) Amount.—The Federal Government in a civil action may recover from a person—
 - (1) that knowingly engages in conduct prohibited by section 53 of this title a civil penalty equal to—

twice the amount of each kickback involved in the violation; and not more than [\$11,000]¹⁰⁵ for each occurrence of prohibited conduct; and
 - (2) whose employee, subcontractor, or subcontractor employee violates section 53 of this title by providing, accepting, or charging a kickback a civil penalty equal to the amount of that kickback.¹⁰⁶

The majority began its opinion with the statute’s legislative history and the 1986 amendments to the Act.¹⁰⁷ In those amendments, Congress added civil damages remedies in § 55(a)(1) by permitting recovery of double damages and per occurrence penalties from prime contractors who knowingly violate the Act.¹⁰⁸ In § 55(a)(2), Congress added recovery of the value of the kickback from prime contractors and higher tier subcontractors

102. *Id.* (quoting 41 U.S.C. § 52(2), amended by 41 U.S.C. § 8702).

103. *Id.* at 348 (quoting 41 U.S.C. § 53, amended by 41 U.S.C. § 8702).

104. *Id.* at 346 (quoting 41 U.S.C. § 52(3), amended by 41 U.S.C. § 8702).

105. “Acting under the authority of the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 (2006), the Department of Justice increased the amount of the penalty in § 55(a)(1)(B) from \$10,000, its original statutory amount, to \$11,000. 28 C.F.R. § 85.3(a)(13).” *Id.* at 347 n.6.

106. *Id.* at 346 (quoting 41 U.S.C. § 55(a), amended by 41 U.S.C. § 8706).

107. *Id.* at 347.

108. *Id.*

for violations of their employees.¹⁰⁹ Because the Government was only seeking damages under § 55(a)(1), the court only addressed the “double damages” portion of the statute.¹¹⁰

1. Does the Act extend vicarious liability to an employer for the acts of its employees?

To interpret the language of the statute, the majority began with its plain meaning.¹¹¹ The district court held that if vicarious liability were to apply to a corporation in § 55(a)(1), then it would render § 55(a)(2) superfluous. However, the Fifth Circuit Court of Appeals rejected that assertion, distinguishing the double damages plus a per occurrence penalty for *knowing* violations of the Act, from the strict liability penalty for outright violations.¹¹² As written, a corporation is strictly liable for the kickbacks accepted by its employees under § 55(a)(2), but also may be held liable for additional damages under § 55(a)(1) for *knowing* violations of the Act.¹¹³ The majority reasoned that it is entirely consistent for the statute to punish knowing violations more severely than those of which the corporation was unaware.¹¹⁴ As a result, the court held that § 55(a)(2) of the statute allows for imputation of vicarious liability to a corporation for knowing violations of the Act.¹¹⁵

In consideration of the second issue in the case, the court examined KBR’s arguments regarding the act-for-the-benefit-of-the-principal doctrine and the punitive nature of the damages sought by the Government in this case.¹¹⁶

2. Did the Government properly impute liability on KBR?

The majority looked to the *Restatement (Second) of Agency* and case law to determine whether liability was properly imputed on KBR.¹¹⁷ Generally, an employer is subject to liability for a tort committed by its employee who was acting within the scope of his employment.¹¹⁸ If the employee acted outside of his scope of employment, the principal may still be liable if the employee purported to act or to speak on behalf of the

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 348–49.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 349–54.

117. *Id.* at 349.

118. *Id.*

principal, and the third party relied on the employee's apparent authority.¹¹⁹ In this case, the Government did not dispute that the employee was acting outside of his employment.¹²⁰ Consequentially, KBR asserted that because the damages in § 55(a)(1) of the statute were punitive, the statute required a narrow application of liability imposed only by those employees who were acting for the benefit of the corporation.¹²¹

a. Act-for-the-Benefit-of-the-Principal

The district court in *Kellogg* relied on the act-for-the-benefit-of-the-principal analysis in *United States v. Ridglea State Bank*.¹²² In *Ridglea*, the Government was seeking double damages of \$25,500 that were grossly disproportionate to its actual loss of \$2,040.¹²³ Because the offending employees could be criminally punished individually for their wrongful acts, the court held that punishing the corporation for the same misdeeds would offend the idea of double jeopardy¹²⁴ because it would punish twice for the same wrongs.¹²⁵ Subsequently, the *Ridglea* court borrowed the criminal law standard for vicarious liability under the double jeopardy theory and held that the knowledge of the agent not acting with a purpose to benefit the employer could be imputed to the employer when the individual is liable under another statute requiring knowledge or guilty intent.¹²⁶ Essentially, the knowledge of the employee could not, at the same time, be his individual knowledge and that of the corporation.¹²⁷

Refusing to adopt the act-for-the-benefit-of-the-principal test, the *Kellogg* majority reasoned that *Ridglea* was an isolated case that has not been followed in any other civil action.¹²⁸ As an exception to the rule, the *Kellogg* majority held that *Ridglea* stood only to show that the court must examine the facts of the case to determine whether the remedy is proper.¹²⁹

119. *Id.* at 349–50.

120. *Id.* at 350.

121. *Id.* at 345.

122. *Id.* at 350 (citing *United States v. Ridglea State Bank*, 357 F.2d 495, 498 (5th Cir. 1966) (a False Claims Act action seeking double damages)).

123. *Id.* (citing *Ridglea*, 357 F.2d at 498).

124. Double jeopardy is a term used in criminal cases to indicate that a person may not be prosecuted or sentenced twice for the same offense. BLACK'S LAW DICTIONARY 528 (9th ed. 2009). In this case, the court was concerned that the corporation was being punished multiple times for the same offense because it would be forced to pay back the actual damages more than twelve times under the automatic forfeiture clause of the False Claims Act. *Ridglea*, 357 F.2d at 499–500.

125. *Kellogg*, 727 F.3d at 350–51 (citing *Ridglea*, 357 F.2d at 499–500).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 351.

b. Damages

The majority distinguished the present case from *Ridglea* by pointing out that the False Claims Act applicable to that case contained a provision of a *mandatory* \$2000 forfeiture.¹³⁰ The court did not have the option to impose a lesser penalty.¹³¹ In this case, the Act allowed some flexibility where the court *may* impose *up to* the \$11,000¹³² per occurrence penalty, but is not *required* to impose the entire penalty amount.¹³³ As a result, the court found that the penalty available in the present case was not *per se* excessive in comparison to the actual kickbacks received because the court could tailor the penalty to the violation.¹³⁴

KBR claimed the damages available in § 55(a)(2) were punitive and therefore demanded a narrow application of vicarious liability.¹³⁵ The majority disagreed and cited *Cook County v. United States ex rel. Chandler*¹³⁶ which held that damages set forth by Congress in statutes such as these do not equate to classic punitive damages because they are limited to the maximum amounts set forth by statute.¹³⁷ Contrarily, classic punitive damages leave the jury to decide the amount to be imposed.¹³⁸ Therefore, the majority held that the restrictive view of vicarious liability was not proper in this case because the damages contained in the Act were not punitive in nature.¹³⁹

c. Apparent Authority

After rejecting the act-for-the-benefit-of-the-principal test and dismissing the punitive penalty of the Act, the majority turned to the decision in *Association of Mechanical Engineers v. Hydrolevel Corp. (ASME)*, which set out the elements required to assert vicarious liability under federal civil provisions.¹⁴⁰ In *ASME*, the Court considered whether a non-profit organization could be held liable for its members' violations of

130. *Id.* at 352.

131. *Id.*

132. "Acting under the authority of the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 (2006), the Department of Justice increased the amount of the penalty in § 55(a)(1)(B) from \$10,000, its original statutory amount, to \$11,000. 28 C.F.R. § 85.3(a)(13)." *Id.* at 347 n.6.

133. *Id.* at 352.

134. *Id.*

135. *Id.* at 353.

136. *Cook Cnty. v. United States ex rel. Chandler*, 538 U.S. 119 (2003) (involving a False Claims Act violation).

137. *Kellogg*, 727 F.3d at 353.

138. *Id.*

139. *Id.*

140. *Id.* at 349; *see also* *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

the Sherman Antitrust Act.¹⁴¹ The Court stated that principals are liable for the torts of their agents when the agent acted with apparent authority even when the agent acted only to benefit himself.¹⁴² Further, the Court stipulated that the damages afforded under the Sherman Antitrust Act were not punitive in such a way that they would trigger a more restrictive rule on liability.¹⁴³ Instead, the damages were primarily intended as a remedy for the victim and as a deterrent for future violations, not as punishment for the violator.¹⁴⁴ Accordingly, the Court held the American Society of Mechanical Engineers liable for the indiscretions of its members.¹⁴⁵ Applying the same standard to this case, the Fifth Circuit Court of Appeals held that the Government properly imputed liability on KBR based on an employee's apparent authority; however, the case was remanded for trial to determine whether that liability extended to include the particular employee in question in this case.¹⁴⁶

C. Judge Jolly's Concurrence

Judge E. Grady Jolly agreed that the case should be remanded, but disagreed with the majority's approach.¹⁴⁷ Judge Jolly claimed that the majority engaged in a poor attempt of statutory interpretation without considering the meaning of words in the statute.¹⁴⁸

The case centered around the language contained in § 55(a)(1) which stated that any "person" that knowingly violates the Act is subject to the penalties contained in this section.¹⁴⁹ The majority quickly determined that because "person" was defined to include any "corporation," vicarious liability could be imputed upon a corporation under § 55(a)(1).¹⁵⁰ However, the analysis of the text should not have ended there.¹⁵¹ According to Judge Jolly, it is important to take the totality of the clause into account when determining its meaning.¹⁵²

When reading § 55(a) of the Act, it is apparent the word "person" applies not only to § 55(a)(1), but also § 55(a)(2).¹⁵³ Therefore, § 55(a) applies to a person (1) who knowingly violates the Act *and* a person (2)

141. *Kellogg*, 727 F.3d at 349.

142. *Id.* at 350.

143. *Id.*

144. *Id.* at 351.

145. *Id.*

146. *Id.* at 353–54.

147. *Id.* (Jolly, J., concurring).

148. *Id.* at 354.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

whose employee violates the Act.¹⁵⁴ There is no dispute that the word “person” includes corporations.¹⁵⁵ If the interpretation of the text was to end at the word “person,” it must be assumed that it would apply to employees of a corporation.¹⁵⁶ However, taking the language of § 55(a) as a whole, the question then becomes: *which* employees?¹⁵⁷

Section 55(a)(1) contains language that requires the “person” to have knowledge of the violation.¹⁵⁸ Due to the nature of a corporation, the requisite knowledge must be drawn from the knowledge of an individual because corporations cannot in and of themselves possess knowledge of any kind.¹⁵⁹ Judge Jolly cited *Fletcher’s Cyclopaedia of Corporations* section 790, which states, “[A] court may deem only the knowledge of officers and employees at a certain level of responsibility imputable to the corporation.”¹⁶⁰ Knowledge of a lower level employee is ordinarily not imputed upon a corporation.¹⁶¹ Applying these rules to the text, § 55(a)(1) only allows for vicarious liability where the employee’s authority, responsibility, or managerial role within the corporation allows for their knowledge to be imputed to the corporation.¹⁶² “The acts of a corporation’s vice-principals are considered to be the acts of the corporation itself,”¹⁶³ therefore, the knowledge is not vicarious, but direct.¹⁶⁴ If the court were to adopt this standard, then *vicarious* liability may not apply because the requisite knowledge may be satisfied by the *direct* knowledge of the corporation.¹⁶⁵

In order to impute an employee’s knowledge to a corporation, the employee must not only have apparent authority, but must also have sufficient responsibility or authority within the company to attribute his knowledge to the corporation itself.¹⁶⁶ As a result, the issue of whether § 55(a)(1) allows for vicarious liability and whether the specific employee in this case has the apparent authority to bind the corporation are not

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 355 (quoting 10 FLETCHER, *supra* note 52, § 790).

161. *Id.*; 10 FLETCHER, *supra* note 52, § 807; *F.D.I.C. v. Ernst & Young*, 967 F.2d 166, 171 (5th Cir. 1992).

162. *Kellogg*, 727 F.3d at 355.

163. 10 FLETCHER, *supra* note 52, § 4877.

164. *Kellogg*, 727 F.3d at 355.

165. *Id.*

166. *Id.*

exclusive.¹⁶⁷ In fact, it is the same set of questions that must be answered by a consideration of the facts of the case.¹⁶⁸

Judge Jolly also distinguished that § 55(a)(2) of the statute imposed strict liability on corporations whether or not the violation was known because corporations are typically held liable for the torts of employees who act within the scope of their employment.¹⁶⁹ Therefore, if the “scope of employment” or “apparent authority” tests were applied to § 55(a)(2), the analysis would be identical and hold a corporation redundantly liable under both sections for any violations.¹⁷⁰ However, because § 55(a)(1) included the scienter requirement, the analysis should not be the same.¹⁷¹ Without knowing more facts of the case, it is impossible to say that the knowledge of the specific employee in this case was sufficient to impose vicarious liability upon the corporation.¹⁷² As a result, Judge Jolly agreed that the case should be reversed and remanded for trial.¹⁷³

IV. ANALYSIS

In this case, the majority inappropriately determined that vicarious liability could be imputed to a corporation under § 55(a)(1) of the Act. Part A of this section argues why the majority’s dismissal of the punitive characteristics of the damages clause was a determining factor in its application of vicarious liability. Part B argues why the majority’s disregard of the act-for-the-benefit-of-the-principal rule of agency was overly dismissive.

A. The majority’s dismissal of the punitive characteristics of the penalties in the Act was a determining factor in its application of vicarious liability.

In this case, the majority concluded early that § 55(a)(1) of the Act allowed the application of vicarious liability to a corporation by simply substituting “corporation” for “person” without considering the meaning of the clause in its entirety.¹⁷⁴ With that simple substitution, § 55(a)(1) states, “the Federal Government . . . may recover from a [corporation] that knowingly engages in [prohibited conduct]”¹⁷⁵ However, ending the

167. *Id.*

168. *Id.*

169. *Id.* at 356 (citing RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 354 (majority opinion).

175. 41 U.S.C. § 55(a)(1) (1986), amended by 41 U.S.C. § 8706 (2011).

interpretation here would not fully answer the question at hand.¹⁷⁶ As Judge Jolly explained in his concurrence, the determination of whether vicarious liability could be applied to this clause does not end at the substitution of the word “person” for “corporation.”¹⁷⁷ The majority should have continued its analysis to determine whether the *knowledge* of an individual could be imputed upon a corporation to hold that corporation liable for *knowing* violations of the Act.¹⁷⁸ The exercise of statutory interpretation is more complex than the simple substitution the majority applied.¹⁷⁹

In this case, the majority failed to recognize that the nature of the damages recoverable under the clause is determinative as to the application of imputed knowledge of a corporation.¹⁸⁰ The court should have determined whether § 55(a)(1) was punitive or remedial prior to deciding whether vicarious liability could be imposed upon a corporation.¹⁸¹

1. It is not clear whether the damages contained in § 55(a)(1) of the Act are punitive or remedial.

Because this is a case of first impression regarding the Act, the court should look to the interpretation of similar statutes, such as the False Claims Act¹⁸², for guidance.¹⁸³ The False Claims Act contains a “double damages” penalty clause that compares to the Anti-Kickback Act.¹⁸⁴ Under the False Claims Act, a person or corporation who

knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, plus 3 times

176. *Kellogg*, 727 F.3d at 354.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 562, 544 (1999).

181. *Id.*; *see also* *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 114–15 (1893); *see also* *Hyslop v. United States*, 261 F.2d 786, 792 (8th Cir. 1958); *United States v. Ridgela State Bank*, 357 F.2d 497, 499–500 (5th Cir. 1966).

182. *See* 31 U.S.C. § 3729 (2009).

183. *Kellogg*, 727 F.3d at 345.

184. *See* 41 U.S.C. § 55(a)(1) (1986), *amended by* 41 U.S.C. § 8706 (2011); *Id.* § 55, *amended by* 41 U.S.C. § 8706.

the amount of the damages which the Government sustains because of the act of that person.¹⁸⁵

In *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, the Second Circuit Court of Appeals held that the forfeiture and damage provisions of the False Claim Act were “not only penal, but drastically penal. . . [and f]or this reason, it has been strictly construed.”¹⁸⁶ In *Hyslop v. United States*, the Eighth Circuit likewise held this forfeiture clause penal in nature.¹⁸⁷ Contrarily, in a split decision in *United States ex rel. Marcus v. Hess*, the Supreme Court held that the “double damages” clause of the False Claims Act was “remedial” because it merely “afford[ed] the Government complete indemnity for the injuries done to it.”¹⁸⁸ The Third and Fourth Circuits agreed with this holding, and found that the clause was remedial in nature and imposed only restitutionary damages.¹⁸⁹ In more recent cases, it seems the U.S. Supreme Court has shifted its view from *Hess* and has held that the forfeiture provisions of the False Claims Act are, indeed, punitive and not merely compensatory, especially in cases where the Government seeks to recover damages that exceedingly outweigh its actual loss.¹⁹⁰ The D.C. and Fifth Circuits have applied the same standard in *United States ex rel. Long v. SCS Business & Technical Institute, Inc.* and *United States v. Ridglea State Bank*.¹⁹¹

Although courts, including the Supreme Court, are divided about whether similar statutory clauses are punitive, the trend is shifting toward considering “double damages” clauses punitive.¹⁹² If it is determined to be punitive, then the clause should be strictly construed to only impute the requisite intent or knowledge of the actor to a corporation when the authority of the actor is clear: typically, when the corporation either expressly authorized or ratified the actions.¹⁹³

185. 31 U.S.C. § 3729(a)(1)(G) (2009).

186. *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942).

187. *Hyslop v. United States*, 261 F.2d 786, 792 (8th Cir. 1958).

188. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943) (explaining that a violator could be punished both criminally and civilly without violating double jeopardy).

189. *United States v. Granni*, 172 F.2d 507, 514–15 (4th Cir. 1949); *United States v. Posner*, 269 F.2d 742, 745 (3d Cir. 1959).

190. *United States v. Halper*, 490 U.S. 435, 447–49 (1989); *Hudson v. United States*, 522 U.S. 93, 93 (1997).

191. *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 877–78 (D.C. Cir. 1999) (holding FCA damages are “punitive” and not merely compensatory); *United States v. Ridglea State Bank*, 357 F.2d 495, 499–500 (5th Cir. 1966) (holding FCA damages were punitive based, at least in part, on the disparity between the recovery demanded and the Government’s actual losses).

192. *Halper*, 490 U.S. at 447–49; *Hudson*, 522 U.S. at 93; *SCS Business*, 173 F.3d at 877–78; *Ridglea*, 357 F.2d at 499–500.

193. *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 542–43 (1999).

2. *The principal cannot be held vicariously liable for punitive damages for the unauthorized misdeeds of its agent.*

Historically, courts have been divided as to whether statutory clauses like the one in § 55(a)(1) of the Act are punitive or remedial; however, it is imperative that a court evaluate the nature of the clause before considering whether a corporation may be held vicariously liable. When a clause has been determined to be punitive, courts have consistently held that an employer cannot be held liable for the unauthorized misdeeds of its employees.¹⁹⁴ As a result, if the clause does impose punitive damages, then it must be strictly construed to apply only to corporations that have ratified or otherwise authorized the Act.¹⁹⁵

In *Lake Shore & Michigan Southern Railroad Co. v. Prentice*, the Court held that a principal could not be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the agent.¹⁹⁶ In *Hyslop*, the Court opined that the punitive clause must be strictly construed, limiting the scope of vicarious liability against government prime contractors to cases where authorization was clear.¹⁹⁷ In 1999, the Court reaffirmed the limited application of vicarious liability for punitive damages saying that it was improper to punish someone (e.g., a corporation) for the acts of another.¹⁹⁸ The Fifth Circuit Court of Appeals agreed in *Ridglea* saying it was against established agency-law principles and unjust to hold an employer liable for the unauthorized, illegal acts of the employee.¹⁹⁹

Title VII of the Civil Rights Act, which deals with employment discrimination, was amended in 1991 to include punitive penalties against corporations or individuals who intentionally violate Title VII.²⁰⁰ Because of the punitive nature of the penalties, courts have held that the statute must be strictly construed.²⁰¹ The Fourth Circuit addressed a Title VII Civil Rights case in *Harris v. L&L Wings, Inc.* and explained at great length that punitive damages should only be awarded in cases of egregious conduct.²⁰² In 1999, the Eleventh Circuit agreed in *Dudley v. Wal-mart Stores, Inc.*, and

194. *The Amiable Nancy*, 16 U.S. 546, 558–59 (1818) (holding that actual wrongdoers in marine trespass are responsible for exemplary damages, but the owners of the privateers are not responsible beyond the actual loss or injury sustained).

195. *Kolstad*, 527 U.S. at 530.

196. *Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 114–15 (1893).

197. *Hyslop v. United States*, 261 F.2d 786, 792 (8th Cir. 1958).

198. *Kolstad*, 527 U.S. at 544.

199. *United States v. Ridglea State Bank*, 357 F.2d 495, 499–500 (5th Cir. 1966).

200. Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (1991)).

201. *Harris v. L&L Wings, Inc.*, 132 F.3d 978, 983–85 (4th Cir. 1997); *Dudley v. Wal-mart Stores, Inc.*, 166 F.3d 1317, 1322–23 (11th Cir. 1999); *Kolstad*, 527 U.S. at 528.

202. *Harris*, 132 F.3d at 983–85.

held that punitive damages, under Title VII, should be reserved for egregious cases.²⁰³ In *Kolstad v. American Dental Ass'n*, the U.S. Supreme Court applied the *Restatement (Second) of Torts* section 909 approach in conjunction with the *Restatement of Agency's* "scope of employment" rule stating that holding an employer vicariously liable for punitive damages as a result of the actions of any of its employees was improper because it would punish a party who was personally innocent.²⁰⁴ The Court explained that a corporation may be held liable for punitive damages as a result of the actions of its employees only in the limited circumstances where the corporation authorized or ratified the wrongful acts.²⁰⁵

In *Kolstad*, the U.S. Supreme Court applied strict scrutiny to a Title VII Civil Rights case and articulated that the policy behind applying such scrutiny to punitive clauses is that it would be improper to punish a person or corporation for the acts of another.²⁰⁶ The Fifth Circuit previously applied the same standard in *Ridglea*.²⁰⁷

In *Ridglea*, the court opined that an employer could not be held liable for double damages under the False Claims Act's "double damages" clause because the award sought by the Government was grossly disproportionate to the damages incurred.²⁰⁸ In that case, the False Claims Act provided for the Government to receive double the amount of actual losses plus an automatic forfeiture of \$2,000 per occurrence.²⁰⁹ Even though the Government's actual losses totaled \$2,038.62, it sought damages totaling \$23,591.14, including the automatic forfeitures.²¹⁰ Section 55(a)(1) of the Anti-Kickback Act nearly mirrors the language of the False Claims Act by allowing the Government to receive double the amount of the kickback plus \$11,000²¹¹ for each occurrence.²¹² Because the statutes are so similar, the court should consistently interpret their meanings.²¹³ To do otherwise would leave government contractors without clear guidance or expectations concerning their conduct under the Acts.²¹⁴

203. *Dudley*, 166 F.3d at 1322–23.

204. *Kolstad*, 527 U.S. at 528.

205. *Id.* at 526.

206. *Id.*

207. *United States v. Ridglea State Bank*, 357 F.2d 495, 500 (5th Cir. 1966).

208. *Id.*

209. *Id.* at 499.

210. *Id.*

211. "Acting under the authority of the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 (2006), the Department of Justice increased the amount of the penalty in §55(a)(1)(B) from \$10,000, its original statutory amount, to \$11,000. 28 C.F.R. § 85.3(a)(13)." *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 727 F.3d 343, 347 n.6 (5th Cir. 2013).

212. *See* 31 U.S.C. § 3729 (2009); *see also* 41 U.S.C. § 55 (1986), *amended by* 41 U.S.C. § 8706 (2011).

213. 2B SUTHERLAND STAT. CONST. § 53:3 (7th ed. 2013).

214. *Id.*

Because of the obvious discrepancy in the court's rulings in these cases, the majority reconciled its holding with its earlier ruling in *Ridglea* by distinguishing the specific language of the clauses.²¹⁵ The False Claims Act contains language that mandates an *automatic* forfeiture of \$2,000 per occurrence, and the court does not have discretion to award a lesser amount.²¹⁶ This Act, on the other hand, contains language that allows the government to recover *up to* \$11,000 per occurrence.²¹⁷ Because the court may decide the amount of damages actually awarded, the majority explained, the clause of this Act is unique from the False Claims Act and may be interpreted differently.²¹⁸

The majority's minimalist approach to statutory interpretation in this case is not persuasive. Even though the language of the clauses may be distinguished, the effect is the same. In *Kellogg*, the violating employees received nominal kickbacks including golf outings, sports tickets, drinks, and meals.²¹⁹ The value of these kickbacks in total was inconsequential compared to the amount of damages sought by the Government.²²⁰ In *Ridglea*, the court applied a strict standard because the damages the Government was seeking were grossly disproportionate to the actual loss.²²¹ The same is true here. As the majority has applied the statute, the Government is entitled to receive double the value of the kickbacks plus \$11,000 for every occurrence.²²² As the government has alleged in this case, those damages could total more than \$1,700,000.²²³ The kickbacks actually received by KBR employees for which the government may have been charged pale in comparison to such a staggering penalty.²²⁴

In *Ridglea*, the same Fifth Circuit Court of Appeals found that it was against established agency-law principles and unjust to hold an employer liable for the unauthorized, illegal acts of the employee.²²⁵ Because the statutory language from *Kellogg* relates so closely to the language in *Ridglea*, the court should have applied the same reasoning in this case.²²⁶

215. *Kellogg*, 727 F.3d at 352.

216. *Id.*

217. *Id.*

218. *Id.* at 348.

219. *Id.* at 345.

220. *Id.*

221. *United States v. Ridglea State Bank*, 357 F.2d 495, 500 (5th Cir. 1966).

222. *Kellogg*, 727 F.3d at 345.

223. This estimate was calculated by including 148 occurrences (93 kickbacks from EGL and 55 kickbacks from Panalpina) at \$11,000 per occurrence = \$1,628,000. Amount was rounded up to \$1,700,000 to include estimates of actual losses of total kickbacks received, up-charges, and fees.
Id.

224. Actual kickbacks included meals, drinks, golf outings, sports events, and other gifts and entertainment. *Id.*

225. *Ridglea*, 357 F.2d at 498.

226. 2B SUTHERLAND STAT. CONST., *supra* note 213.

B. The majority's disregard of the act-for-the-benefit-of-the-principal rule of agency was overly dismissive.

Traditionally, the Fifth Circuit has conservatively imputed vicarious liability to a corporation in limited circumstances where the employee was acting within the scope of his employment or acting for the benefit of his employer.²²⁷ This application has been extended to cases where the employee acted with the *purpose* to benefit the employer even if the employer did not actually receive a benefit.²²⁸ On the other hand, the court has declined to apply vicarious liability in cases where the employee acted for his own benefit and *not* for the benefit of the employer.²²⁹ Nevertheless, the majority in this case rejected the act-for-the-benefit-of-the-principal doctrine and downplayed its importance by burying the issue in its discussion of the punitive damages question addressed in Part A. In cases like the one at bar, the act-for-the-benefit-of-the-principal doctrine is inextricably intertwined with the application of punitive damages, but the test and its effects are independent and distinct.

Two decisions from the Fifth District are on point with the issue in *Kellogg: Ridglea*²³⁰ and *Hangar One*.²³¹ In *Ridglea*, a bank vice president approved false loan documents for submission to the Federal Housing Administration knowing the loans would default.²³² The court found that the employee knew the loans would default and the bank would not benefit from them; contrarily, the bank would lose money on the transaction.²³³ Therefore, the bank could not be held liable for his misdeeds.²³⁴ In *Hangar One*, the corporation was a prime contractor for the U.S. Department of Defense that provided ammunition during the Vietnam War.²³⁵ Some of the corporation's employees were overlooking defects in the ammunition on the production lines and allowing defective ammunition to be sold to the Government.²³⁶ Because there was no benefit in providing defecting ammunition to the Government, the court held that the corporation could not be held liable for the actions of its employees because the employees were not acting to benefit the corporation.²³⁷

227. See *Ridglea*, 357 F.2d at 500; see also *Standard Oil Co. of Tex. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962).

228. *Standard Oil*, 307 F.2d at 128.

229. *Ridglea*, 357 F.2d at 500.

230. *Id.*

231. *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1155 (5th Cir. 1977).

232. *Ridglea*, 357 F.2d at 498.

233. *Id.*

234. *Id.*

235. *Hangar One*, 563 F.2d at 1157.

236. *Id.*

237. *Id.* at 1158.

Standard Oil was a case involving criminal liability under the Hot Oil Act.²³⁸ The court held that the employer, Standard Oil, was not criminally liable because vicarious liability did not apply in cases where the employee did not act for the benefit of the employer.²³⁹ In *Ridglea*, the Fifth Circuit affirmed *Standard Oil* by applying the same test to a civil statutory violation.²⁴⁰ However, in *Kellogg*, the majority declined to apply such a test.²⁴¹ Utilizing the same rationale as discussed in Part A *supra*, the majority reasoned that the statutory penalty in the Anti-Kickback Act did not impose *mandatory* punitive damages as in the False Claims Act; therefore, the employee need not have acted for the benefit of the employer in order for the Government to recover.²⁴² This disregard of the act-for-the-benefit-of-the-principal was incorrect.

In *Kellogg*, the employees were not accepting kickbacks from subcontractors for the benefit of the corporation.²⁴³ They were accepting the kickbacks for their own benefit.²⁴⁴ The Government could hardly contend that golf outings and sports tickets furthered the mission of the corporation. Consequentially, if the majority had applied the act-for-the-benefit-of-the-principal standard to this case, it would have found that vicarious liability could not be imputed to the corporation under § 55(a)(1) of the Act.

V. CONCLUSION

The Fifth District Court of Appeals incorrectly decided that § 55(a)(1) of the Anti-Kickback Act allows vicarious liability to be imputed to a corporation for the acts of its employees. Its limited statutory interpretation left the clause no more “interpreted” after its evaluation than before. The issue of whether “person” included “corporation” was not in dispute. The deciding factor was whether the corporation had the requisite knowledge to satisfy the clause. Even though there are many tests to determine whether vicarious liability applies, and subsequently what “knowledge” may be imputed to the corporation, this court failed to consider the punitive nature of the damages sought and rejected its own precedent by refusing to apply the act-for-the-benefit-of-the-principal doctrine. Had the majority followed its own precedent, the decision to apply vicarious liability would have been quite different. In this case, the majority turned a blind eye to the

238. *See generally* Standard Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962).

239. *Id.* at 129.

240. United States v. Ridglea State Bank, 357 F.2d 495, 500 (5th Cir. 1966).

241. United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 350–52 (5th Cir. 2013).

242. *Id.*

243. *Id.* at 345.

244. *Id.*

similarities between its prior decisions and the case at hand and subsequently failed to consistently apply vicarious liability to corporate defendants.

