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KICKING EMPLOYERS WHILE THEY ARE DOWN: VICARIOUS LIABILITY UNDER THE ANTI-KICKBACK ACT

Daniel Horner[+]

"'Defense contractors cannot take advantage of the ongoing war effort by accepting unlawful kickbacks,' said Tony West, Assistant Attorney General of the Civil Division of the United States Department of Justice."[1] Kickbacks are defined under federal law as any "thing of value or compensation of any kind that is provided to . . . improperly obtain or reward favorable treatment."[2] Subcontractors often use kickbacks to obtain favor in the award of contracts by prime contractors.[3] This conduct led to the creation of the National Procurement Fraud Task Force in 2006 to help eliminate the perceived corrupt practice of kickbacks in government procurement.[4] The Task Force was comprised of many individuals, representing, *inter alia*, the United States Attorneys' Office, the Federal Bureau of Investigation, and the United States Inspectors General Office.[5] Through the task force and other efforts, the U.S. Government has been successful in prosecuting numerous kickback schemes, ranging from fraudulent charges for non existent air shipments to Iraq to overcharged rent payments on shipping containers sent to Kuwait.[6] Recently, the Government filed civil claims against contractors who allegedly inflated bills to the U.S. Government for work done by Kuwaiti companies, a contractor who subcontracted "to supply fuel tankers for more than triple the tankers' value," and a contractor who made lease payments "for trucks that had already been returned to the subcontractor."[7]

Historically, according to at least one source, the degree of procurement fraud in government contracting fluctuated with the level of defense spending in

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1. *See* Press Release, Dep't of Justice, Office of Public Affairs, U.S. Intervenes in Suit Against KBR and Panalpina Alleging Kickbacks Under the False Claims Act (May 5, 2010), http://www.justice.gov/opa/pr/2010/May/10-civ-529.html.
2. 41 U.S.C. § 8701(2) (2012).
3. *See* H.R. REP. NO. 99-964, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5960, 5962.
4. *See* Dep't of Justice, *supra* note 1.
5. *Id.*
6. *Id.*
7. *See* Greg Farrell, *U.S. Sues Kellogg, Brown & Root Over Iraq Kickbacks Claims (1)*, BUSINESSWEEK.COM (Jan. 23, 2014), http://www.businessweek.com/news/2014-01-23/u-dot-s-dot-sues-kellogg-brown-and-root-over-claims-of-iraq-kickbacks.

America.[8] In a typical scenario, after being awarded a contract, a prime contractor often subcontracts parts of the work.[9] Subcontractors may be tempted to offer kickbacks to reward or to incentivize preferred treatment by the prime contractor.[10] Such schemes date back to the Civil War, and reportedly spike coinciding with defense spending during times of armed conflict.[11] In 1946, Congress enacted the federal Anti-Kickback Act ("the Act" or "AKA") in response to the perceived increase in kickbacks during World War II.[12]

Congress strengthened the Anti-Kickback Act in 1986.[13] The amended Act has reportedly been successful in helping the government recover money lost through procurement fraud.[14] For the fiscal years 2005 and 2006, the Department of Justice reported that the United States recovered more than 4.5 billion dollars in settlements and judgments from the pursuit of fraud, including an unspecified number of kickback cases.[15]

The Anti-Kickback Act, as amended and codified at 41 U.S.C. §§ 8701 *et seq*., imposes both criminal and civil liability on violators.[16] The civil suit provision has two components.[17] Subsection (a)(1) states that the government may recover double the amount of money involved from a violator of the Act who *knowingly* accepts a kickback, as well as an additional $10,000, or less, per occurrence.[18] Subsection (a)(2) states that, regardless of knowledge, any employer whose employee violates the Act is subject to a civil penalty equal to the amount of the kickback accepted.[19]

8. *See* Sandy Keeney, *The Foundations of Government Contracting*, J. CONT. MGMT. 16–18 (2007), http://www.ago.noaa.gov/acquisition/docs/Foundations_of_contracting_with_the_federal_government.pdf. "Between 2000 and 2005, procurement spending rose 86%, twice as fast as other discretionary spending, which rose 43%. Indeed, federal contract expenditures now consume almost 40 cents of every dollar of discretionary spending." Gerald H. Lander et al., *Government Procurement Fraud: Could SOX Be Used to Hold Contractors Accountable?*, CPA J. (Feb. 2008), http://www.nysscpa.org/cpajournal/2008/208/infocus/p16.htm.

9. H.R. REP. NO. 99-964, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5960, 5962.

10. David W. Burgett, *Vicarious Corporate Liability for Double Damages Under the AKA—Fifth Circuit Opens the Door to Punishing the Employer When Its Employees Self-Deal*, GOV'T CONTRACTOR (Thompson Reuters), Aug. 7, 2013, ¶ 240, at 1.

11. *See* Keeney, *supra* note 8, at 16–18.

12. *See* Margaret Schulenberger, Annotation, *Validity, Construction, and Application of Federal Anti-Kickback Act (41 U.S.C.S. §§ 51–54)*, 19 A.L.R. 545, 548 (1974); *see also* H.R. REP. NO. 99-964, at 3–4, *reprinted in* 1986 U.S.C.C.A.N. at 5960 ("The bill . . . prohibit[s] the acceptance of a kickback, or the inclusion of its cost in a contract, as well as its payment.").

13. *See* H.R. REP. NO. 99-964, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 5960.

14. *See* Lander et al., *supra* note 8.

15. *See id.*

16. *See* 41 U.S.C. §§ 8706–07 (2012).

17. *Id.* § 8706(a)(1)–(2).

18. *Id.* § 8706(a)(1).

19. *See id.* § 8706(a)(2).

A recent decision of the United States Court of Appeals for the Fifth Circuit, *United States* ex rel. *Vavra v. Kellogg Brown & Root, Inc.*,[20] potentially expanded the exposure of government contractors under the Anti-Kickback Act by introducing a theory of vicarious liability under subsection (a)(1), previously thought to be available only under subsection (a)(2).[21] In *Vavra*, an employee of Kellogg Brown & Root accepted kickbacks on ninety-three occasions, which led to a *qui tam*[22] action under the federal False Claims Act and the Anti-Kickback Act.[23] The government intervened and filed its own complaint, alleging that the defendant-employer was vicariously liable for its employee's actions under subsection (a)(1), as well as strictly liable under subsection (a)(2).[24] The United States District Court for the Eastern District of Texas dismissed that component of the claim, holding that subsection (a)(1) did not create a cause of action for vicarious liability against employers.[25]

The Fifth Circuit reversed and remanded, holding that employers may be vicariously liable under (a)(1) for acts of employees.[26] The imposition of vicarious liability substantially increases the government contractors' potential exposure for acts of their employees, including acts unknown to and unauthorized by such contractors, because subsection (a)(1) provides for double damages.[27] This ruling holds employers accountable twice for the same acts of their employees under both subsections (a)(1) and (a)(2).[28] In addition, and even more troubling, the Fifth Circuit suggested that an employee may only need "apparent" authority to support a cause of action for vicarious liability.[29] Apparent authority has little to do with the actual authority of an employee and may be beyond the power of an employer to regulate.[30] Moreover, the Fifth Circuit imposed neither a requirement that the employer have actual knowledge of the employee's illegal conduct, nor a requirement that the employer receive

20. 727 F.3d 343 (5th Cir. 2013).

21. *See id.* at 352–53.

22. *Qui tam* actions are "action[s] brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." BLACK'S LAW DICTIONARY 619 (9th ed. 2009).

23. *Vavra*, 727 F.3d at 345.

24. *Id.*

25. *Id.*

26. *Id.* at 343.

27. *See* Burgett, *supra* note 10, at 1 (stating that the Fifth Circuit's decision in *Vavra* "raise[d] the stakes for contractors who fail to monitor their employees . . . . [I]llustrat[ing] that contractors' potential exposure is great").

28. *Vavra*, 727 F.3d at 348.

29. *See id.* at 351–52.

30. *See* Charles Davant IV, *Employer Liability for Employee Fraud: Apparent Authority or Respondeat Superior?*, 47 S.D. L. REV. 554, 573 (2002) ("[A]pparent authority may apply even though no relationship exists between the principal and the apparent agent.").

any benefit from the conduct, thereby increasing the likelihood that employers may be found liable under subsection (a)(1) in the absence of any fault.[31]

This Note discusses why the majority and concurring opinions in *Vavra* were incorrect in concluding that employers should be vicariously liable under subsection (a)(1) of the civil penalty provision of the Anti-Kickback Act, without also requiring some form of knowledge or intent of the employee to benefit the employer. The Note reviews the Anti-Kickback Act's history and the development of the pertinent law. Then, this Note discusses vicarious liability generally. Next, this Note analyzes the Fifth Circuit's decision to hold employers vicariously liable under section 8706(a)(1), despite the strict liability provision of subsection (a)(2), as well as the Court's holding that an employee need only act with apparent authority to make the employer liable for his or her acts. After discussing *Vavra*, and its imposition of liability on employers for employees' actions, including actions of which the employers were unaware, this Note will explore the impact that the decision could have on government contracting. To redress the unfortunate situation created by *Vavra*, this Note proposes an elevated standard—a showing of an employee's intent to benefit the employer —to justify imputing employees' knowledge to employers for vicarious liability purposes.

I. THE ANTI-KICKBACK ACT'S FORMATION AND EARLY CASES

A. The Anti-Kickback Act

Kickbacks exist as "a form of commercial bribery."[32] Specifically, kickbacks are defined as:

> [A]ny 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 improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract.[33]

The Act forbids any person or business from "[p]roviding[,] . . . accepting, or attempting to accept any kickback; and . . . including . . . the amount of any prohibited kickback in the price charged by a subcontractor to a prime contractor or higher-tier subcontractor, or in the price charged by the prime contractor to the government."[34]

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31. *See Vavra*, 727 F.3d, at 350 (disagreeing with KBR's arguments that there should be an "intent-to-benefit requirement" and knowledge standard).

32. H.R. REP. NO. 99-964, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5960, 5962. ("Bribes made to employees of a company with a contractual relationship to the government (either directly as a prime contractor, or indirectly as a subcontractor) are termed kickback and governed by the Anti-Kickback Act . . . .").

33. 41 U.S.C. § 8701(2) (2012).

34. STEVEN FELDMAN & W. NOEL KEYES, GOVERNMENT CONTRACTS IN A NUTSHELL 35 (5th ed. 2011).

The government found kickbacks were prevalent during World War II, leading to the passage of the first version of the Act.[35] The costs of such kickbacks were built into subcontract prices and passed through the prime contract to the government.[36] The Act attempted to control the practice, preventing the expense from ultimately falling on the taxpayer.[37] Although it is difficult to determine the government's actual contract damages from a kickback scheme, the harm may often be significant.[38] The government also incurs costs for investigating and prosecuting these schemes.[39]

1. The 1986 Amendments to the AKA

Prior to 1986, the Anti-Kickback Act was characterized as an "extraordinarily ambiguous statute" because of the wording of the statute, "an inconclusive legislative history," and a lack of definitive precedent.[40] Congress amended the AKA in 1986 to make it more effective in preventing and punishing government contractors' kickback practices.[41] According to the House Committee on Government Operations, kickbacks "ha[d] become a pervasive problem in Federal procurement."[42] The Committee found that the taxpayers bore the burden of the kickback because the cost was built into the subcontract price and included in the prime contract to the government.[43] Consequently, the kickbacks burdened the taxpayers.[44]

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35. *See* Shulenberger, *supra* note 12, at 548–49 (explaining that the General Accounting Office began discovering kickbacks while auditing "cost-plus-a-fixed-fee contracts" during World War II).

36. *See id. See also* United States v. Acme Process Equip. Co., 385 U.S. 138, 143 (1967) (explaining how the cost of kickbacks are passed on to the government).

37. *See* H.R. REP. NO. 99-964, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 5962 ("In most cases, the kickback cost is included in the subcontract price and passed along in the prime contract to the government and, therefore, ultimately to the taxpayer.").

38. *See* United States v. Kruse, 101 F. Supp. 2d 410, 414 (E.D. Va. 2000) (citing United States v. Lippert, 148 F.3d 974, 977 (8th Cir. 1998)). "[T]he government must incur additional investigative and enforcement costs to ferret out and stop . . . abusive schemes," and "Congress stated that it established the penalty as 'an amount which reasonably relates to the actual costs the government suffers when kickbacks occur.'" *Id.* (quoting *Lippert*, 148 F.3d at 977).

39. *Id.*

40. United States v. Perry, 431 F.2d 1020, 1023 (9th Cir. 1970).

41. United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 903 F. Supp. 2d 473, 490 (E.D. Tex. 2011), *rev'd* 727 F.3d 343 (5th Cir. 2013) ("The AKA was amended in 1986 'to enhance the government's ability to prevent and prosecute kickback practices' in connection with contracts of the federal government." (quoting H.R. REP. NO. 99-964, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5961)).

42. H.R. REP. NO. 99-964, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5961.

43. *Id.* at 5, *reprinted in* 1986 U.S.C.C.A.N. at 5962.

44. *Id.*

By 1986, the problem was so widespread that a senator described it as "nationwide" and "well-entrenched."[45] Congress perceived the AKA's existing criminal and civil penalties as insufficient to deter misconduct.[46] Furthermore, the Act was limited in the scope of what it could punish.[47] In response, Congress broadened, strengthened, and clarified the Act by "rais[ing] the civil penalties, for knowing violations, to twice the amount of the kickback involved and up to $10,000 in fines."[48] Additionally, Congress' amendments imposed "vicarious civil liability, without regard to fault, on the Federal prime contractor and all higher tier subcontractors for any kickbacks made by their subcontractors," for the amount of the kickback.[49]

2. *The Courts' Interpretation of the AKA*

i. *Defining "Knowingly"*

The AKA does not define the term "knowingly,"[50] and few cases have analyzed this element, especially since the 1986 amendments.[51] The term "knowingly" generally requires a showing that the defendant was aware of the facts constituting the offense, but not "proof that [the defendant] knew his acts violated the law."[52] When the Act was amended, Senator Levin, the Chairman and Ranking Member of the Subcommittee on Oversight of Government

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45. *Id.* at 6, *reprinted in* U.S.C.C.A.N. at 5963 (internal quotation marks omitted). Additionally, Congressman John Bryant testified that "despite the pervasiveness of kickback activity in Federal government subcontracting, there have been only eight convictions under [the] Anti-Kickback Act during the past five years." *Id.* (internal quotation marks omitted).

46. *Id.* at 8 ("The provisions of the Anti-Kickback Act are too narrow in scope and its sanctions too weak, for the Act to be effectively used in deterring and prosecuting kickback practices.").

47. *See id.* at 8–9.

> The first and foremost limitation on enforcement of the Act is the requirement that the payment of a kickback be made to induce the award of a subcontract or order, or as an acknowledgement of a subcontract order previously awarded . . . . A second major limitation in the Act is its restriction to kickbacks made in relation to negotiated contracts.

Id.

48. *Id.* at 10.

49. *Id.*

50. *See* 41 U.S.C. §§ 8701, 8706 (2012). The civil suit provision of the AKA now reads:

> The Federal Government in a civil action may recover from a person—(1) that knowingly engages in conduct prohibited by section 8702 of this title a civil penalty equal to—(A) twice the amount of each kickback involved in the violation; and (B) not more than $10,000 for each occurrence of prohibited conduct; and (2) whose employee, subcontractor, or subcontractor employee violates section 8702 of this title by providing, accepting, or charging a kickback a civil penalty equal to the amount of that kickback.

Id. § 8706(a).

51. *See* 3 KAREN L. MANOS, GOVERNMENT CONTRACTS COSTS & PRICING, § 91.24 (2d ed. 2014).

52. *See id.* ("However, the Supreme Court has construed the mens rea term 'willfully' to require proof that the defendant voluntarily and intentionally violated a 'known legal duty.'").

Management of the Senate Governmental Affairs Committee, stated, "[t]he knowing . . . standard requires the Government to prove that the alleged wrongdoer knew what he or she was doing and was not acting through mistake, inadvertence or mere negligence."[53]

One way to attempt to discern Congress' intended interpretation of the AKA's language is to analyze the meaning of the same terms in similar statutes. Both the federal False Claims Act (FCA)[54] and federal Medicare Anti-Kickback Statute (AKS)[55] contain the word "knowingly."[56] Under the FCA, "knowingly" is defined as having actual knowledge,[57] deliberate ignorance, or reckless disregard.[58] In the AKS, the standard required is "knowingly and willfully," a higher bar than the "knowingly" standard in the FCA.[59]

These terms have been well defined by case law.[60] At the least, these statutes have used "knowingly" to describe a showing of a reckless failure to learn the

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53. 132 Cong. Rec. 31,239, 31,299 (1986) (statement of Sen. Levin).

54. 31 U.S.C. §§ 3729–33 (2012).

55. 42 U.S.C. § 1320a-7b (2012).

56. *See* 31 U.S.C. § 3729(b) (imposing, in the FCA, liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval"); 42 U.S.C. § 1320a-7b(b) (outlining, in the AKS, criminal penalties for a person who "knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate)").

57. *See, e.g.*, United States v. Advance Tool Co., 902 F. Supp. 1011, 1016 (D. Mo. 1995), *aff'd*, 86 F.3d 1159 (8th Cir. 1996) (presenting invoices for tools that were reverse engineered to satisfy contract with government constituted actual knowledge). "[A]ctual knowledge . . . may be demonstrated through circumstantial evidence." CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 4:37 (2d ed. 2014). *See* United States v. Aerodex, Inc., 469 F.2d 1003, 1008 (5th Cir. 1972) (holding that the failure to disclose information may indicate actual knowledge of falsity).

58. *See* 31 U.S.C. § 3729. Deliberate ignorance and reckless disregard are generally considered together. *See* SYLVIA, *supra* note 57, § 4:38. The U.S. Senate described the standard as a "refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know." S. REP. NO. 99-345, at 15 (1986). *See* United States *ex rel.* Farmer v. City of Hous., 523 F.3d 333, 348 (5th Cir. 2008) (deciding reckless disregard under the FCA applies to government contractors who claim that they were unaware of overcharges); United States v. Krizek, 111 F.3d 934, 942 (D.C. Cir. 1997) (describing reckless disregard as extreme gross negligence); United States v. Sci. Applications Int'l Corp., 555 F. Supp. 2d 40, 55 (D.D.C. 2008) (explaining reckless disregard is as "an extension of gross negligence, or gross-negligence-plus, and is not merely a proxy for subjective intent"); UMC Elec. Co. v. United States, 43 Fed. Cl. 776, 792 n.15 (1999), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001) (describing reckless disregard as "gross negligence-plus" (quoting United States *ex rel.* Aakhus v. Dyncorp, Inc., 136 F.3d 676, 682 (1998) (internal quotation marks omitted)).

59. *Compare* 42 U.S.C. § 1320a-7b(b) ("Whoever knowingly and willfully offers or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind [is guilty of a felony]."), *with* 31 U.S.C. § 3729 (allowing actual knowledge, deliberate ignorance, or reckless disregard to prove a violation of the FCA). The AKS covers any agreement "where one purpose of the remuneration was to obtain money for the referral of services or to induce further referrals." United States *ex rel.* Westmoreland v. Amgen, Inc., 812 F. Supp. 2d 39, 47 (D. Mass. 2011) (citing United States v. Kats, 871 F.2d 105, 108 (9th Cir.1989); United States v. Greber, 760 F.2d 68, 69 (3d Cir.1985)).

60. *See supra* notes 57–58 and accompanying text.

truth about an arrangement.[61] These definitions of "knowingly" shed light on the definition of the term in the AKA, and suggest that a level of culpability beyond mere mistake or negligence, as proposed by Senator Levin, is needed to prove a violation.[62]

ii. Damages Under the AKA

The damages outlined in the Anti-Kickback Act are both remedial and punitive, with civil damages aimed at recovering the costs of the kickback borne by the taxpayer.[63] However, "the [AKA] calls the recovery a 'penalty' and it permits a per occurrence penalty, which resembles a punitive fine."[64] A review of the legislative history revealed that Congress intended to create both remedial damages, aimed to compensate the government for expenses, and punitive damages, meant to deter kickback practices.[65] Even in the face of Eighth Amendment challenges that the punitive damages are excessive, the courts have been willing to uphold their use.[66]

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61. *See, e.g.*, *Farmer*, 523 F.3d at 348.

62. 132 Cong. Rec. 31,239, 31,299 (1986) (statement of Sen. Levin).

63. *See* United States v. Kruse, 101 F. Supp. 2d 410, 413 (E.D. Va. 2000) ("The [AKA] itself manifests both remedial and punitive intent. With its emphasis on the civil nature of this recovery, the statute appears to establish remedial damages.").

64. *Id.*

65. *Id.* at 413–14. The Act penalizes for "an amount which reasonably relates to the actual costs the government suffers when kickbacks occur." *Id.* (internal citations omitted). Kickbacks usually cost the government more than the amount of the kickback itself, through "increased costs from the delivery of substandard goods or by poor performance under the contract," as well as the "expenses [of] investigating and prosecuting kickback cases." H.R. REP. NO. 99-964, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5960, 5972. Consequently, "[d]oubling the kickback payment compensates [the government] for these greater costs." *Id.* By allowing for an added recovery under the Act of up to $10,000, the court can exercise its discretion to provide greater damages for grievous offenses. *Id.* When the kickback itself is an insignificant amount, this added penalty can serve as a deterrent. *Id.* The Committee believed that the additional damages were reasonable to help the government recover from the harm suffered and to discourage the use of kickbacks. *See id.*

66. *Kruse*, 101 F. Supp. 2d at 414 ("Even if the Eighth Amendment is triggered by the Anti-Kickback statute, the penalties as applied in this case are not unconstitutionally excessive with respect to either the gravity of the offense or the damages suffered by the government.") In *Kruse*, the defendants argued that the kickbacks at issue "came out of the profits paid to the government contractor and that the government would have paid the same amount for the contract whether there had been kickbacks or not." *Id.* at 415. Applying a rational basis standard and examining the legislative history, the court held that the Act was related to the government's purpose of preventing kickbacks, and found a "rational relationship between the amount of losses and the amount sought." *Id.* The court also found that the Act did not violate the Fifth Amendment, stating that, "[p]rocedurally, Kruse has had several opportunities to contest the amount of the kickbacks . . . Accordingly, the Court f[ound] that the Anti-Kickback statute does not violate the defendants' Fifth Amendment right to due process." *Id.*

B. Vicarious Liability

To understand the Fifth Circuit's questionable interpretation of subsection (a)(1), a review of vicarious liability is necessary. Vicarious liability, simply stated, is liability for another person's tort.[67] Most commonly, vicarious liability occurs in an employer-employee relationship, also known as *respondeat superior*.[68] This doctrine holds employers jointly liable, alongside the tortfeasor, and severally liable, or individually responsible, for any torts that occurred while the employee was acting within the scope of his or her employment.[69] In some cases, the employee can serve as an agent of the employer, and bind the employer to his or her actions.[70] In government contracting, this occurs when the employee of a prime contractor contracts with a subcontractor.

Generally, an employee's actions are not considered within the scope of employment unless the actions were specifically authorized or expected by the employer.[71] Therefore, the level of authority, and the scope of that authority,

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67. *See* DAN B. DOBBS, THE LAW OF TORTS § 333, at 905 (2000). This exception to the notion that each person is accountable for his or her own actions is important for the recovery of victims and outweighs the effect of punishing a person for actions in which he or she has no legal fault. *See id.*

68. *Id.* "The most common kind of vicarious liability is based upon the principle of respondeat superior. Under that principle, private and public employers are generally jointly and severally liable along with the tortfeasor employee for the torts of employees committed within the scope of employment." *Id.* (footnote omitted). Some scholars have doubted whether *respondeat superior* can be justified as a doctrine because it goes against common sense to punish one man for another's wrongdoing. *Id.* § 334, at 908 (citing Oliver Wendell Holmes, Jr., *Agency, II*, 5 HARV. L. REV. 1, 14 (1891)). Others have criticized the doctrine as a method of reaching deeper pockets than those of the person who committed the harmful action. *Id.* (citing T. BATY, VICARIOUS LIABILITY 154 (1916)). Dobbs argued that courts have provided safeguards requiring a showing of either formal control over the employee by the employer, or that the employer benefits from the employee's work. *See id.* § 335, at 910. These safeguards, along with the selective application of vicarious liability to tort law, protect employers from any potential abuse of the doctrine. *Id.* Selective applications means that "[w]hen the tort becomes uncharacteristic of the business, liability is not imposed. Legal analysis of this idea is expressed as the rule that the master is liable for the torts of his servants only if those torts are committed within the scope of the servant's employment." *Id.*

69. *Id.* § 333, at 905.

70. *See id.*

71. *Id.* § 335, at 910. "Under the traditional rules, a servant's conduct is not within the scope of his employment unless it is of the same general kind as authorized or expected, or incidental to such conduct, and the servant was acting within the authorized time and space limits." *Id.* Some jurisdictions require that the agent's conduct have the purpose to serve the principal in order to be considered within the scope of his employment. *See id.*; *see, e.g.*, Papa John's Int'l, Inc. v. McCoy, 244 S.W.3d 44, 52 (Ky. 2008) (holding that the proper way to determine scope of employment is to focus on the employee's intent to further the employer's business). Other courts have expressly rejected this test for scope of employment. *See, e.g.*, Melin-Schilling v. Imm, 205 P.3d 905, 907–09 (Wash. App. 2009) (stating that the scope of employment should be determined by examining whether the employer should have foreseen the tortious conduct given the duties imposed by the job itself).

held by an employee is crucial to determining whether imposition of vicarious liability is appropriate.[72]

1. Actual and Apparent Authority

As the *Restatement (Third) of Agency* states, an agent possesses actual authority when the agent acts with the express direction of the principal.[73] Actual authority may also refer to implied authority, which is the authority to do anything:

> necessary, usual, and proper to accomplish or perform an agent's express responsibilities or . . . to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.[74]

The agent's interpretation is reasonable if it reflects the principal's express wishes or if, in the absence of clear directions, a reasonable person in the agent's position would interpret the principal's wishes in that manner.[75]

In some instances an agent acts without actual authority, but is said to have apparent authority.[76] According to the authors of the *Restatement (Third) of Agency*, "[a]pparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal."[77] Because it is difficult for a third party to distinguish between an agent's actual and apparent authority, apparent authority "trumps restrictions that the principal has privately imposed on the agent."[78] In order for a third party to establish apparent authority, it is not necessary to find any fault on the part of the principal, but only for the third party to show that the representations of the agent under the circumstances make it fair to impose liability on the principal.[79] In such cases,

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72. *See* RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).

73. *See id.* "Express authority" is a phrase used alongside actual authority to describe "authority that a principal has stated in very specific or detailed language." *Id.* § 2.01 cmt. b. Essential to "determining whether an agent acted with actual authority is the agent's reasonable understanding at the time the agent takes action." *Id.* § 2.01 cmt. c. The principal's initial grant of authority may be modified during the course of performance either through subsequent manifestations or developments that the agent reasonably takes into consideration when determining the principal's wishes. *Id.*

74. *Id.* § 2.01 cmt. b.

75. *See id.* § 2.02(2).

76. *Id.* § 2.03.

77. *Id.* § 2.03 cmt. c.

78. *Id.*

79. *Id.* § 2.03 cmt. e; *see* RESTATEMENT (SECOND) OF AGENCY § 267 cmt. a, illus. 1 (1958). "[A]pparent authority usually refers to a situation where an employer puts an employee, who lacks actual authority, in a situation that makes it inequitable for the employer to deny relief to a third party who reasonably relies on the acts of the employee." John S. Pachter, *Fifth Circuit Holds Contractors Subject to Vicarious Liability for Employees Engaged in Kickbacks*, SMITH PACHTER

the employer may be held vicariously liable for the acts of its agents.[80] However, some jurisdictions have sought to limit the use of vicarious liability for the imposition of damages on principals in certain circumstances.[81]

2. Limiting Vicarious Liability for Punitive Damages

Disagreement exists between jurisdictions "over whether and how to limit vicarious liability for punitive damages."[82] The *Restatement (Second) of Agency* states that punitive damages can only be awarded if the employee was acting in the scope of his or her employment.[83] In contrast, the *Restatement (Third) of Agency* proposes that an employee's conduct be intended to benefit the employer in some way before vicarious liability may attach.[84]

When determining whether vicarious liability applies in cases involving punitive damages "the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished."[85] However, the Supreme Court has stated that these *Restatement* rules do not apply to special statutes, such as antitrust laws, which are designed to deter future violations and compensate victims.[86] The Supreme Court also specified that to hold employers vicariously liable, the employee should be in the upper hierarchy of the company, but not necessarily the top management, officers, or directors.[87]

MCWHORTER PLC (Aug. 5, 2013), http://www.smithpachter.com/post-detail.php?id=10152. *See also* RESTATEMENT (THIRD) OF AGENCY § 7.08 cmt. b (apparent authority doctrine is based on the reasonable expectations of a third party). "Apparent authority . . . is operative in explaining a principal's vicarious liability when a third party's reasonable belief in an agent's authority to speak or deal on behalf of a principal stems from a manifestation made by the principal . . . ." *Id.*

80. 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 35:11, at 289–91 (Richard A. Lord ed., 4th ed. 2007). If an injury would not have occurred but for the third party's reliance on the apparent authority of the agent, it is well-settled that tort liability exists. *Id.*

81. *See infra* Part II.B.2.

82. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 542 (1999).

83. RESTATEMENT (SECOND) OF AGENCY § 217 C.

84. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07(2) ("An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."). *See e.g.*, Crouch v. J.C. Penney Corp., Inc., 562 F. Supp. 2d 833, 842 (E.D. Tex. 2007) (holding that statements made with intent to improve the workplace are attributable to the employer due to the advancement of the employer's purpose).

85. LINDA SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 4.4(B)(2)(a), at 186 (4th ed. 2000).

86. Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575–76 (1982) ("Since treble damages serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold [a party] liable for the acts of agents committed with apparent authority.")

87. *Kolstad*, 527 U.S. at 543 (holding that employer could not be liable for punitive damages for the discriminatory employment actions of managerial agents where the decisions were contrary to the good faith efforts of the employer to comply with Title VII).

Vicarious liability has been applied to causes of action under the FCA in contexts similar to those under the AKA.[88] In one FCA action, the court stated that when the employee:

> use[s] his knowledge and position of trust to take from the government and the employer. . . . the "scope of the employment" test . . . is excessively punitive to corporations victimized by the criminal acts of their employees. Rather, the addition of requiring the government to prove that the actions were for the purpose of benefitting the corporation ensures that the FCA is not merely an effective weapon against government fraud, but a just one as well.[89]

FCA actions are often litigated in conjunction with AKA actions, and it follows that the statutes should be interpreted similarly.[90] However, in *Vavra*, the Fifth Circuit distinguished the AKA from the FCA, and held that the FCA's elevated standard was not applicable.[91]

III. U.S. EX REL. VAVRA V. KELLOGG BROWN & ROOT, INC.: THE FIFTH CIRCUIT IMPOSES VICARIOUS LIABILITY ON EMPLOYERS UNDER SUBSECTION (A)(1)

In 2001, Kellogg Brown and Root, Inc. ("KBR")[92] contracted with the United States Army "to provide global logistical services . . . [under the] Logistics Civil Augmentation Program III."[93] This contract allowed the Army to issue tasks to KBR on an on-going basis.[94] KBR subcontracted some of its work to two companies—EGL, Inc. and Panalpina, Inc.—to transport military equipment and supplies to the Middle East.[95]

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88. *See, e.g.*, United States v. Gen. Dynamics Corp., 19 F.3d 770, 777 (2d Cir. 1994) (holding that action under the AKA does not preempt action under the False Claims Act or federal common law).

89. United States *ex rel.* Baker v. Rehab. Specialists of Livingston Cnty, Inc., No. 00-74410, 2008 WL 3834106, at *3 (E.D. Mich. Aug. 13, 2008).

90. *See, e.g.*, Morse Diesel Int'l, Inc. v. United States, 79 Fed. Cl. 116, 117, 121–22 (holding a government contractor liable for maximum penalties and damages under both the AKA and the FCA).

91. *See* United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 353 (5th Cir. 2013).

92. KBR is an engineering, procurement, and construction company that works heavily in energy, petrochemicals, government services, and civil infrastructure projects. *Company Profile*, KELLOGG BROWN & ROOT, http://www.kbr.com/About/Company-Profile/ (last visited Oct. 11, 2013). The company employs approximately 27,000 people spread throughout seventy countries across five continents. *Id.* KBR separated from Halliburton in 2006 and became publicly traded on the New York Stock Exchange. *History*, KELLOGG BROWN & ROOT, http://www.kbr.com/about/history/ (last visited Oct. 11, 2013).

93. *Vavra*, 727 F.3d at 344–45.

94. *Id.* at 345

95. *Id.*

During the course of the contract, KBR's Corporate Traffic Supervisor, Robert Bennett, along with others in the transportation department, accepted kickbacks from subcontractors, offered to make up for service failures on behalf of the subcontractors, and ensured that the subcontractors continued to receive work despite poor performance.[96] These kickbacks included barbecues, meals and drinks, golf outings, tickets to rodeo events, baseball games, football games, and other sporting events.[97] Bennett and the subcontractor who provided the kickbacks pleaded guilty under the criminal provision of the AKA.[98]

Two relators,[99] David Vavra and Jerry Hyatt, brought a *qui tam*[100] suit against KBR, the employee who accepted the kickbacks, and the subcontractors who provided them under the FCA.[101] The government intervened, as allowed under the FCA, filed its own complaint in the matter replacing the relators' claim, and also brought a claim under 41 U.S.C. § 8706(a)(1) of the AKA.[102] KBR filed a 12(b) motion to dismiss the government's AKA claim, arguing that (a)(1) did not provide for vicarious liability, and, furthermore, that because the employee who accepted kickbacks was not acting to benefit the corporation, vicarious liability would not be appropriate even if (a)(1) allowed for it.[103]

A. The District Court Decision

The United States District Court for the Eastern District of Texas granted KBR's motion to dismiss the AKA claim, finding that the statute did not provide for vicarious liability under subsection (a)(1).[104] The court examined subsection (a)(2), which states that "[t]he Federal Government in a civil action may recover from a person . . . whose employee, subcontractor, or subcontractor employee violates section 8702 of this title by providing, accepting, or charging a kickback a civil penalty equal to the amount of that kickback."[105] In undertaking its statutory interpretation, the court sought "'to give each word . . . [its] operative

96. *See id.*

97. *Id.*

98. Memorandum of Points & Authorities in Support of Defendant Kellogg Brown & Root, Inc.'s Motion to Dismiss the Complaint of the United States of America, at 7, United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 903 F. Supp. 2d 473, 482 (E.D. Tex. 2011), *rev'd and remanded*, 727 F.3d 343 (5th Cir. 2013) (No. 1:04-cv-00042-MAC).

99. A relator is the name of a plaintiff who brings a *qui tam* action and files a public lawsuit on behalf of the government. BLACK'S LAW DICTIONARY 1292 (9th ed. 2009).

100. A *qui tam* action is one in which "a statute . . . allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." *Id.* at 1262. The *qui tam* action in this case was initiated under the FCA. *Vavra*, 903 F. Supp. 2d at 478–79. The government intervened and brought the AKA action against KBR alongside the FCA claim. *Id.*

101. *Vavra*, 727 F.3d at 345.

102. *See id.*

103. *Vavra*, 903 F. Supp. 2d at 479.

104. *Id.* at 488.

105. 41 U.S.C. § 8706(a)(2) (2012); *Vavra*, 903 F. Supp. 2d at 490.

effect' and to render none superfluous."[106] Subsection (a)(2) provides for strict liability any time an employee commits a violation of the Act.[107] The court held that subsection (a)(1), which states "[t]he Federal Government in a civil action may recover from a person . . . that knowingly engages in conduct prohibited by [the Act],"[108] would render subsection (a)(2) superfluous if vicarious liability also existed under subsection (a)(1).[109] To support its interpretation, the court examined the legislative history of the Act.[110]

Moreover, the district court held that dismissal was appropriate because the government had not alleged in its complaint that the KBR employees who accepted kickbacks did so with the intent to benefit their employer.[111] Central to this assertion was the court's interpretation of two Fifth Circuit decisions: *United States v. Hangar One, Inc.*,[112] and *United States v. Ridglea State Bank.*[113] *Hangar One* involved the employee of a defense contractor who knowingly submitted defective artillery shells to the government.[114] *Ridglea* involved two banks and a loan officer who fraudulently approved loan applications in the course of his employment.[115] In both of these cases, the Fifth Circuit held that knowledge of an employee acting in violation of the law would not be imputed to the employer unless the employee acted to benefit the employer.[116]

B. Vavra *On Appeal: The Fifth Circuit's Current Opinion on the AKA's Vicarious Liability*

In reversing the district court's decision, the Fifth Circuit first analyzed the definition of "person" as it appears in 41 U.S.C. § 8706(a)(1).[117] The court noted that the Act "defines 'person' to include both an 'individual' and 'a corporation,

106. *Vavra*, 903 F. Supp. 2d at 490 (quoting United States v. Vargas-Duran, 356 F.3d 598, 603 (5th Cir. 2004)).

107. *See* 41 U.S.C. § 8706(a)(2).

108. *Id.* § 8706(a)(1).

109. *Vavra*, 903 F. Supp. 2d at 490–91.

110. *Id.* at 491. The court reasoned that "[p]rior to the AKA's amendment in 1986, the statute authorized a penalty only against subcontractors and individual recipients of kickbacks, rather than prime contractors." *Id.* According to the court, "[t]he statute's amendment, in part, was designed to enable the government to sue a prime contractor or a 'higher tier subcontractor' for a 'lower tier subcontractor's' AKA violation under a theory of vicarious liability." *Id.* However, the court also stated that "[t]he penalty for such vicarious liability is expressly limited to the amount of the kickback." *Id.*

111. *Id.*

112. 563 F.2d 1155, 1158 (5th Cir. 1977) ("[L]iability of a corporation for a False Claims Act violation may arise from the conduct of employees other than those with 'substantial authority and broad responsibility.'").

113. 357 F.2d 495 (5th Cir. 1966), *superseded by statute*, 31 U.S.C. § 3729 (2012).

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

115. *Ridglea*, 357 F.2d at 496.

116. *See Hangar One*, 563 F.2d at 1158; *Ridglea*, 357 F.2d at 499–500.

117. United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 346–47 (5th Cir. 2013).

partnership, business association of any kind, trust, [and] joint-stock company.'"[118] Consequently, the court defined KBR as a person under subsection (a)(1).[119] The court then turned to a textual and structural analysis of 41 U.S.C. § 8706(a)(1) to determine whether it provides for vicarious liability.[120]

Ultimately, the court disagreed with the district court's reading, which limited employers' responsibility for their employees to damages under subsection (a)(2).[121] The majority, considering the broad definition of the term "person," held that "[s]ince [s]ection [(a)(1)] makes corporations liable for kickback activity, it requires attributing liability to corporate entities for that activity under a rule of vicarious liability."[122] The court did not believe that its decision rendered subsection (a)(2) superfluous, and opined that the difference between the subsections was the punishment of a "knowing" violation under subsection (a)(1) versus the strict civil penalty under subsection (a)(2).[123] The majority declined to define "knowingly" as it appears in (a)(1), instead, stating that the determination of a knowing violation was a "nuanced, fact-reliant question [under the AKA] unsuited for resolution at the motion to dismiss stage."[124] The court cited to its decision in *Hangar One*, which held that under FCA, "liability of a corporation . . . may arise from the conduct of employees other than those with substantial authority and broad responsibility."[125]

The appellate court also disagreed with KBR's second argument—that heightened pleading standards should be applied if vicarious liability is available under (a)(1) and that the government's complaint did not meet that standard.[126] Instead, the Fifth Circuit suggested that an employer is responsible for an employee's acts when they are performed within the scope of his or her employment, when an employee acted with apparent authority, or when an employee's knowledge can be imputed to the employer because of the rank he or she holds within the company.[127]

The majority distinguished this case from its decision in *Ridglea*, where the Fifth Circuit held that knowledge of an employee acting in violation of the law would not be imputed to the employer unless the employee acted to benefit the employer.[128] KBR sought to have the *Ridglea* standard extended to its case but

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118. *Id.* (quoting 41 U.S.C. § 8701(3) (2012)).

119. *Id.*

120. *Id.* at 348.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 349.

125. *Id.* (alteration in original) (internal quotation marks omitted) (quoting United States v. Hangar One, Inc., 563 F.2d 1155, 1158 (5th Cir. 1977)).

126. *See id.* at 350.

127. *Id.* 350–53.

128. *Vavra*, 727 F.3d at 352. This argument is similar to the adverse interest exception that is invoked when the agent's interests and the principal's interests are at odds. *See* Martin Marietta Corp. v. Gould, Inc., 70 F.3d 768, 773 (4th Cir. 1995). In these circumstances, the agent's

the court refused, holding that 41 U.S.C. § 8706(a)(1) was "meaningfully distinct" from the provisions of the FCA that the court analyzed in *Ridglea*.[129] In the majority's opinion, the distinction between the two acts was the type of damages—damages under the AKA are compensatory, whereas the damages under the FCA are punitive.[130] However, the Fifth Circuit determined, with little elaboration, that 41 U.S.C. § 8706(a)(1)'s damages were solely compensatory.[131]

To further justify its reasoning for not extending the holding in *Ridglea*,[132] the court pointed to the U.S. Supreme Court's decision in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* (*ASME*).[133] In *ASME*, the Court stated that "under general rules of agency law, principals are liable when their agents act with apparent authority" even when "the agent acts solely to benefit himself."[134]

C. The Vavra *Concurring Opinion: A Focus on Statutory Analysis*

Judge Jolly, in his concurring opinion, criticized the majority's statutory analysis and considered the broader context in which the term "person" was used in 41 U.S.C. § 8706.[135] While the majority turned to the statute's definition section to conclude that "person" includes both individuals and corporations, Judge Jolly found it necessary to analyze the term "person" as it was modified in the statute under subsection (a)(1) by the word "knowingly."[136] Judge Jolly noted that "when a corporation is being sued, the corporation (i.e. the person) itself must have knowledge of the kickback before liability may arise."[137]

For corporations, the knowledge of higher-level employees is "imputable to the corporation."[138] Judge Jolly concluded that, in cases where acts of officers or directors of a company led to suit under the AKA, the punishment would be direct liability as opposed to vicarious liability.[139] Under Judge Jolly's reasoning, vicarious liability would be reserved for circumstances under

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knowledge should not be imputed to the principal. *See id.* (explaining that knowledge is not imputed when an agent acts outside the scope of his employment and when the employer and employee interest are adverse because the employee will probably not perform his proper duty or tell the employer what he is doing).

129. *Vavra*, 727 F.3d at 352.

130. *See id.* at 351–52.

131. *See id.* at 353.

132. *See id.* at 350. "We have elaborated little on the holding in *Ridglea* nor have we applied it to any other civil statute. In *Ridglea* itself, we acknowledged the outcome was in tension with precedent generally construing FCA double damages and forfeiture provisions." *Id.* (footnote omitted).

133. 456 U.S. 556 (1982); *Vavra*, 727 F.3d at 350–51.

134. Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp. (ASME), 456 U.S. 556, 565–66 (1982).

135. *Vavra*, 727 F.3d at 354 (Jolly, J., concurring).

136. *See id.*

137. *Id.*

138. *Id.* at 354–55.

139. *Id.*

subsection (a)(1) when knowledge of the employee is imputable—a highly fact-intensive question.[140]

Judge Jolly opined that vicarious liability under subsection (a)(1) was consistent with the purpose of the statute because it punished *knowing* violations, which was distinct from violations creating strict liability under subsection (a)(2).[141] He agreed with the majority that knowing violations deserved harsher punishments, but only in instances where the knowledge of the employee was clearly imputable.[142] Subsequently, the U.S. Court of Appeals for the Federal Circuit endorsed Judge Jolly's arguments in a similar case also involving KBR.[143]

D. The Federal Circuit Weighs In

In *Kellogg Brown & Root Services, Inc. v. United States*,[144] another AKA action against KBR, the United States Court of Federal Claims found that a corporation could be vicariously liable under both subsections (a)(1) and (a)(2); however, the particular KBR employees who accepted kickbacks were not senior enough to trigger vicarious liability.[145] On appeal, the Federal Circuit overturned the lower court's decision, holding, in accordance with the Fifth Circuit's decision, that the employee's knowledge was imputable when the employee acted with apparent authority.[146]

The Federal Circuit noted that the difference between the two subsections was the degree of knowledge required, and, while acknowledging that there was confusion in the wording, the legislative history made it clear that subsection (a)(1) was intended to impose vicarious liability.[147] The court then addressed under what circumstances it would be appropriate for imputing knowledge to the corporation, pursuant to subsection (a)(1).[148]

The court stated that an agent's knowledge is imputed to the principal in cases where the employee acts within the scope of his or her employment, but noted that courts have recognized a narrow exception in cases when the employee has

140. *Id.*

141. *See id.*

142. *See id.* at 356 ("[A]s the majority notes, '[i]t is entirely consistent for the statute to punish knowing violations more severely than those of which the corporation was unaware.'" (alteration in original)).

143. *See* Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1367–70 (Fed. Cir. 2013), *cert. denied*, 135 S. Ct. 167 (2014) ("The difference between [subsection(a)(1)] and [subsection (a)(2)] is the degree of knowledge that must be proven. The former provision—which carries a higher penalty—applies if the person knowingly engages in prohibited conduct. The latter provides for strict liability against a 'person' who engages in prohibited conduct.").

144. 728 F.3d 1348 (Fed. Cir. 2013), *cert. denied*, 135 S. Ct. 167 (2014).

145. *Id.* at 1368–69.

146. *Id.* at 1370 & n.25

147. *Id.* at 1368–70.

148. *Id.* at 1369–70 (citing Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234, 1249–50 (Fed. Cir. 2007)).

an adverse interest.[149] The exception applies "when the agent's conduct is 'entirely' in the agent's interest without even incidental benefit to the principal."[150] However, the court found that KBR did receive a benefit from the agent's actions and, consequently, imputed his knowledge to the company.[151]

Concurring in part and dissenting in part, Judge Newman did not believe that KBR received a benefit.[152] Specifically, Judge Newman suggested that a clear benefit had to be shown to hold KBR vicariously liable under subsection (a)(1) before elevating the violation from one that "invoke[s] only the single strict liability provision of [subsection] (a)(2)."[153]

Ultimately, the Federal Circuit dismissed the argument that common law agency principles placed limits on vicarious liability when punitive damages were involved.[154] The court found that "these limits do not apply to 'the interpretation of special statutes' like those giving 'triple damages.'"[155] Moreover, the majority stated, without explanation, that "[t]he 'special statute' here, the AKA, with its double damage provision, does not involve punitive damages . . . [and] is [therefore] outside the scope of . . . the Restatement's heightened standard for vicarious liability."[156]

E. Impact of Imputing Liability to Employers Under Subsection (a)(1)

The consequences of the Fifth's Circuit *Vavra* decision will depend on how the district court, on remand, applies the knowledge standard to a violation under subsection (a)(1).[157] The broad standard endorsed by the Fifth Circuit that imputes knowledge of lower-level employees with apparent authority to the corporation could have a significant impact on the way corporations specify and police internal anti-kickback practices; regardless of the result, *Vavra* could cause an increase in litigation.[158] The fact-intensive question of when

149. *Id.* at 1369–70.

150. *Id.* at 1369. *See also* Grassmueck v. Am. Shorthorn Ass'n, 402 F.3d 833, 837 (8th Cir. 2005) ("The refusal to impute knowledge to the principal of an agent who is acting adversely to the principal is an acknowledgment that the usual legal fiction of complete agent-principal communication is unjustified where the agent is acting adversely." (citing Martin Marietta Corp. v. Gould, Inc., 70 F.3d 768, 773 (4th Cir. 1995)); *In re* Scott Acquisition Corp. 364 B.R. 562, 568 (Bankr. D. Del 2007) ("Th[e] [adverse interest] exception is only applicable when the agent is acting entirely adverse to the principal, and the principal is in no way benefitting from the agent's actions." (citing Beck v. Deloitte & Touche, Deloitte, Haskins & Sells, Ernest & Young, L.L.P., 144 F.3d 732, 736 (11th Cir. 1998))).

151. *Id.* at 1372.

152. *Id.* at 1373 (Newman, J., dissenting in part and concurring in part).

153. *Id.* at 1374.

154. *Id.* at 1370 (majority opinion).

155. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY 6 § 217 C, cmt. c (1958)).

156. *Id.*

157. *See* Pachter, *supra* note 79.

158. *See* United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 353 n.14 (5th Cir. 2013) (noting that the lower court, on remand, must consider that "[u]nder that standard .

knowledge may be imputed will increase litigation costs and risks, which, in turn, could promote more early settlements, even in cases where, on the merits, the contractor is not vicariously liable.[159] Moreover, contractors could face an increased risk of debarment[160] if it is found that the contractor took inadequate corporate measures to detect and prevent kickbacks.[161]

Therefore, employers must closely monitor the actions of their employees to deter, detect, and stop kickback activity in its infancy.[162] The *Vavra* decision will impose "pressure on compliance and ethics . . . programs," and result in a "nearly impossible risk management environment," especially given the absence of a requirement that an employer authorize an employee's conduct outside the scope of his or her employment, or have any knowledge of it.[163] One observer

. . KBR cannot be exposed to an unexpected flood of liability for nefarious acts of any and every member of its worldwide workforce"); Burgett, *supra* note 10, at 4 (discussing the impact of the court's decision). *But see* Pachter, *supra* note 79 ("[T]he Court's assurance against the floodgate [of litigation] seems hardly sufficient to calm the fears of corporate risk-assessment specialists.").

159. Burgett, *supra* note 10, at 4 ("Because the questions of knowledge and attribution of knowledge are highly fact-intensive, they are likely to survive dispositive pretrial motions. This increases litigation expense and litigation risk for the defendant corporation, and thereby may tend to increase the likelihood and amount of settlements . . . .").

160. "'Debarment' means action taken by [an agency head or designee] to exclude a contractor from government contracting and government approved subcontracting for a reasonable, specified period." FELDMAN & KEYES, *supra* note 34, at 159.

161. *See* John S. Pachter, *2 KBR Cases Illuminate Kickback Risks For Contractors*, LAW360 (Dec. 3, 2013, 8:04 PM), http://www.law360.com/articles/491501/2-kbr-cases-illuminate-kickback-risks-for-contractors.

162. Pachter, *supra* note 79 (advocating ethics and compliance programs, warning not to engage in kickbacks, and describing penalties of immediate dismissal). In the wake of the *Vavra* decision, government contractors may be compelled to become better versed in the Anti-Kickback Act to ensure that their employees do not bring harm to the company through their own self-dealing. Through training and compliance programs, the constant monitoring of employees actions, and prompt investigations, companies will best be able to protect themselves from facing increased situations of vicarious liability under the Anti-Kickback Act. Stephen R. Spivack et al., *Fifth Circuit's Ruling On Anti-Kickback Act May Generate More Lawsuits Against Federal Contractors*, BRADLEY ARANT BOULT CUMMINGS LLP (July 26, 2013), http://www.babc.com/fifth-circuits-ruling-on-anti-kickback-act-may-generate-more-lawsuits-against-federal-contractors-07-26-2013/.

> The KBR decision charges corporate entities with the difficult task of monitoring third-party views of employees' 'apparent authority' or face potential liability for those employees' actions. To limit this risk, government contractors and other corporate entities should evaluate their current compliance and oversight measures to ensure that they are adequate.

The Fifth Circuit Weighs in on Vicarious Liability Under the Anti-Kickback Act, ROPES & GRAY 3 (Oct. 22, 2013), http://www.ropesgray.com/~/media/Files/alerts/2013/10/20131022_FCA_Alert.pdf.

163. Gregory A. Brower & Brett W. Johnson, *When Enough Is Not Enough: Two Court Rulings Complicate Corporate Compliance Efforts*, LEGAL BACKGROUNDER, Oct. 11, 2013, at 2, *available at* http://www.wlf.org/upload/legalstudies/legalbackgrounder/10-11-13BrowerJohnson_LB.pdf.

asserted that there is "no amount of hiring screening, training, auditing, or internal control [that] can adequately control [this] risk."[164]

IV. Resolving Vavra's Shortfalls: Requiring an Intent to Benefit

The Fifth Circuit interpreted the Anti-Kickback Act to make employers vicariously liable simply because the employee was cloaked with apparent authority.[165] This kind of liability was already clearly contemplated under subsection (a)(2), but not under subsection (a)(1).[166] The *Vavra* court's decision renders it unnecessary for the employee to act with intent to benefit the employer in order for vicarious liability to apply.[167] The court declining to limit damages for vicarious liability is applied,[168] held that damages under the Anti-Kickback Act are different from punitive damages under the FCA and distinguished the case from the Fifth Circuit's previous decision in *Ridglea*.[169]

A. The Fifth Circuit Questionably Declined to Extend Ridglea*'s Holding to* Vavra

By holding that damages under the AKA are compensatory rather than punitive, the Fifth Circuit declined to apply the "act-to-benefit" standard it had previously endorsed in *Ridglea*.[170] Specifically, the Fifth Circuit distinguished a civil action under the AKA to recover actual losses caused by an employee from an FCA action designed to recover forfeitures and apply "double damages far in excess of the actual loss."[171]

The court's view of damages as solely compensatory does not square with other courts' interpretations, which have designated the damages under subsection (a)(1) as punitive.[172] While there is no consensus among jurisdictions, the double damages of the "knowing" violation under subsection

164. *Id.* at 2–3.

165. United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 352 (5th Cir. 2013).

166. *See id.* at 348 (discussing the district court's interpretation of the statute).

167. *See id.* at 353.

168. *Id.* at 352–53.

169. *Id.* at 350–51.

170. *Id.* at 353.

171. *Id.* at 350 (citing United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966), *superseded by statute*, 31 U.S.C. § 3729 (2012)).

172. *See, e.g.*, United States v. Kruse, 101 F. Supp. 2d 410, 414 (E.D. Va. 2000) ("At least part of the purpose of the Anti–Kickback statute, then, is punitive, and the [c]ourt must continue its inquiry by determining whether the penalties set by the statute are grossly disproportionate to the offenses the statute proscribes."); Morse Diesel Int'l, Inc. v. United States, 79 Fed. Cl. 116, 118 n.3 (2005) ("As discussed further herein, since the Anti–Kickback Act is both remedial and punitive, the court's determination was made under a clear and convincing standard rather than the preponderance of evidence standard typically utilized in civil cases."); *but see* United States v. Lippert, 148 F.3d 974, 977 (8th Cir. 1998) ("[T]he penalty in [subsection (a)(1)(A)] of twice the amount of each kickback is primarily remedial in purpose and not punitive in effect.").

(a)(1) appear to be designed to punish what the drafters of the Act viewed as more egregious behavior—a motive akin to the idea behind punitive damages.[173] In other cases of vicarious liability involving punitive damages, the Supreme Court has stated that for knowledge to be imputed, the employee should be "'important,' but perhaps need not be the employer's 'top management, officers, or directors,' . . . acting 'in a managerial capacity.'"[174] If the Fifth Circuit had properly determined that the Act provided for punitive damages, then it would not have followed that the knowledge of any low-level agent with apparent authority could be imputed to the corporation. Because the damages under the AKA are, at the very least, quasi-punitive, the Fifth Circuit should have held, like in *Ridglea*, that the agent must be in an "important" position to the company, or that he or she at least acted to benefit the company before the employer could be found vicariously liable.

To further justify its refusal to extend *Ridglea*, the Fifth Circuit questionably relied on the Supreme Court's decision in *ASME*.[175] *ASME* involved an antitrust violation in which an agent, cloaked with apparent authority, defrauded a third party.[176] The agent, an employee of Hydrolevel's competitor, McDonnell & Miller (M&M), wrote a letter to the American Society of Mechanical Engineers (ASME) on letterhead containing his employer's vice president's name, prompting a public inquiry into the effectiveness of Hydrolevel's boiler product.[177] As a result of the agent's showing of apparent authority, "Hydrolevel . . . suffer[ed] from market resistance."[178]

The actions in *ASME* differ significantly from violations of the AKA. In *ASME*, M&M's agent, acting with apparent authority, used his position in the company to deceive the ASME into questioning Hydrolevel, a competing company.[179] Unlike in *ASME*, in which the ASME was unaware of the fraud of M&M's apparent agent and Hydrolevel was harmed by his actions, the subcontractor involved in an AKA violation is typically not harmed.[180] Rather, the subcontractor is arguably in a better position because it should be in line to receive preferential treatment. The real victim is the prime contractor whose

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173. *See supra* note 172; BLACK'S LAW DICTIONARY 474 (10th ed. 2009) (defining punitive damages).

174. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 543 (1999).

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

176. Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp. (ASME), 456 U.S. 556, 558–59 (1982).

177. *Id.* at 561–62.

178. *Id.* at 563.

179. *Id.* at 577.

180. *See supra* notes 33–34 and accompanying text (describing common violations of the AKA).

agent accepted kickbacks and opened the prime contractor to liability under the AKA.[181]

In general, a subcontractor is not concerned with the authority of the agent who accepts the offered kickback.[182] There is not an AKA violation when the authority of the agent is used as leverage to fool a subcontractor and, thus, as Judge Jolly stated, apparent authority has no place in the discussion of when to impute knowledge to the employer.[183] Because the employer is the potential victim, it is more appropriate for the court to look at whether or not the agent acted to benefit the principal, instead of whether the agent had apparent authority, before deciding to impute knowledge to the employer and hold them accountable through vicarious liability.

To prevent the employer from being unfairly punished for the self-dealing of its employees without its knowledge, the Fifth Circuit should have extended *Ridglea*'s "act-to-benefit" standard. Without any such requirement, violations of the AKA, when the agent had apparent authority, could increase vicarious liability litigation.[184]

B. The Fifth Circuit's Decision Does Not Comport with Other Federal Statutes' Scienter Requirements

In *Vavra*, the Fifth Circuit viewed AKA's subsection (a)(1) as an action grounded in tort law rather than a form of contract fraud.[185] Statutes similar to the AKA, such as the FCA and AKS, punish conduct similar to that punished under the AKA, but do so in terms of contract fraud.[186] Despite this notable difference, the AKA and FCA are often litigated together, as was the case in *Vavra*.[187] The Fifth Circuit's failure to view the AKA in the same light as these other statutes has led to an inconsistent and confusing interpretation of the scienter in subsection (a)(1) that requires no actual showing of employer knowledge.

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181. *See* Schulenberger, *supra* note 12, at 558 (explaining that the AKA prohibits payments to agents of prime contractors).

182. *See* Pachter, *supra* note 161.

183. United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 355 (5th Cir. 2013) (Jolly, J., concurring).

184. *See supra* note 158 and accompanying text.

185. *See Vavra*, 727 F.3d at 348 (acknowledging the presumption that Congress intended to incorporate ordinary vicarious liability rules when it creates tort actions).

186. *See* United States v. Gen. Dynamics Corp., 19 F.3d 770, 776 (2d Cir. 1994) (explaining the FCA's application to "contracts that are tainted by kickbacks").

187. United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 903 F. Supp. 2d 473, 479 (E.D. Tex. 2011), *rev'd* 727 F.3d 343 (5th Cir. 2013). *See also* United States v. Lippert, 148 F.3d 974, 977 (8th Cir.1998) (explaining that the government filed an action seeking penalties under the AKA and the FCA); *Gen. Dynamics Corp.*, 19 F.3d at 777 (holding that "the AKA does not preempt remedies of the United States under the FCA and federal common law"); Morse Diesel Int'l, Inc. v. United States, 79 Fed. Cl. 116, 117 (Fed. Cl. 2005) (stating that the government brought counterclaims under the AKA, the FCA, and the Contract Disputes Act among others).

Because knowledge is not defined in the AKA, this issue may be resolved by adopting a definition similar to that in the FCA, given that the statutes have a common objective. The FCA defines "knowingly" as actual knowledge, deliberate ignorance, or reckless disregard.[188] Deliberate ignorance, a form of willful misconduct, arises when one purposefully refuses to acknowledge the existence of illegal activity.[189] Reckless disregard presents a slightly more lenient standard, addressing grossly negligent conduct, that is not necessarily intentional, in situations where violations were so apparent that they should have been known.[190]

The FCA requires, minimally, a showing of reckless disregard before imputing knowledge, and the AKA should be no different. The Fifth Circuit's interpretation of the AKA makes knowledge of the corporation a foregone conclusion through its apparent authority analysis.[191] By imposing vicarious liability for "knowing" violations of employees with apparent authority, a standard so low that almost every interaction between an agent and subcontractor could be imputable, without any showing of knowledge on part of the employer, the court wrote the scienter out of subsection (a)(1). As it stands, "knowingly" under subsection (a)(1) requires no greater showing of culpability than the strict liability standard set forth in subsection (a)(2).

The *Vavra* decision has rendered subsection (a)(2) superfluous, accomplishing what the district court sought to prevent.[192] The conduct constituting a strict liability violation under subsection (a)(2) is now all that is necessary to establish vicarious liability under (a)(1). The government has no need to bring a subsection (a)(2) claim against the employer, when a subsection (a)(1) violation yields twice the damages. A showing of at least gross negligence or reckless disregard, as is required under the FCA in place of actual knowledge, should be required to distinguish the two subsections of the AKA.

V. CONCLUSION

The Fifth Circuit confusingly determined that the same unwitting behavior of an employer that is strictly punished under subsection (a)(2), regardless of the employee's intent, will be punished as more egregious behavior under subsection (a)(1). If employers are likely to be found vicariously liable under subsection (a)(1) for violations unknown to them, government contractors will be forced to take additional precautions to prevent AKA violations. Employers will likely need to institute extensive new controls to ensure that employees are not engaging in conduct that is detrimental to the employer. Such controls are

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188. *See supra* note 57–58 and accompanying text.
189. *See supra* note 58 and accompanying text.
190. *See supra* note 58 and accompanying text.
191. United States *ex rel.* Vavra v. Kellogg Brown & Root, Inc., 727 F.3d 343, 351–52 (5th Cir. 2013)
192. *See supra* notes 109–10 and accompanying text.

both costly and far from foolproof. The costs will ultimately be passed on to the taxpayers because they are allowable costs under government contracts.

The *Vavra* decision should either be reviewed by the Supreme Court or used as the catalyst for appropriate legislative changes to the AKA. The Fifth Circuit has blurred the distinction between subsections (a)(1) and (a)(2), opening the door for innocent employer conduct to constitute a knowing violation of the AKA. The court exceeded the proper limits of judicial interpretation by determining that an employee's apparent authority is sufficient to impute knowledge to create vicarious liability under subsection (a)(1). Even if no showing of knowledge on the employer's part is required, intent of the employee to benefit the employer should be the minimal standard required to attribute liability to the company under subsection (a)(1). A showing of gross negligence or reckless disregard by the employer to learn the employee's actions would be even more appropriate. Without such a limitation, the court may have opened the door for increased litigation under subsection (a)(1), which raises costs to government contractors, and, ultimately, harms the procurement process with the statute that Congress intended to protect it, the Anti-Kickback Act.