GUEST APPEARANCE

¶ 67 THE SMALL BUSINESS JOBS ACT'S PRESUMPTION OF LOSS: It's Rebuttable On The Basis Of Value Received By The Government

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Section 1341 of the Small Business Jobs Act (SBJA) of 2010, Pub. L. No. 111-240, amended § 3 of the Small Business Act, 15 USCA § 632(w)(1), to create a ''presumption of loss'' to the Government equal to the entire value of a contract whenever it is established that a contractor that is ''other than small'' ''willfully sought and received'' a small business set-aside contract by misrepresenting its size. Several commentators appear to have seriously misinterpreted this rule, stating that the only way a contractor can rebut the presumption of loss is by demonstrating that it did not willfully misrepresent its size. See 15 USCA § 632(w)(4) (presumption of loss rule does not apply if the misrepresentation was the result of ''unintentional errors, technical malfunctions, and other similar situations''). Under this interpretation, if the Government establishes liability under the False Claims Act, 31 USCA § 3729 et seq., it is automatically entitled to damages equal to three times the total value of the contracts at issue unless the contractor demonstrates that the misrepresentation was not willful. This interpretation ignores the plain language of the statute and the legal definition of a presumption. As the case law and Federal Rules of Evidence make clear, presumptions are rebuttable. And here, the presumption is that the Government suffered a loss, not that the contractor acted willfully. Thus, as senior Government officials have concluded and as supported by well-established case law, the presumption of loss may be rebutted by producing evidence of the value of the goods or services that the contractor provided to the Government. Misguided acquiescence to this erroneous interpretation has, in some cases, emboldened the Government to take unfair advantage of contractors that are alleged to have willfully misrepresented themselves as small businesses. And, it is not only businesses that directly represent themselves as being small that are at risk. Large businesses that provide enough assistance to small businesses to be considered ''affiliated'' under the Small Business Administration's regulations are at risk as well. Given the potential for substantial damages and penalties, as well as other ramifications, it is essential for contractors, Government officials, and judges to understand the correct interpretation of the presumption of loss rule.

Pre-Small Business Jobs Act Damages

In an action brought under the FCA, the Government is ''required to prove all essential elements of the cause of action, *including damages*, by a preponderance of the evidence.'' 31 USCA § 3731(d) (emphasis added). In *U.S. v. Bornstein*, 423 U.S. 303, 316 n.13 (1976), the Supreme Court held that under the FCA, ''[t]he Government's actual damages are equal to the difference between the market value of the [products] it received and retained and the market value that the [products] would have had if they had been of the specified quality'' Accordingly, the Government is only entitled to damages, in addition to costs and statutory penalties, if it proves by a preponderance of the evidence that ''the United States did not get what it paid for.'' *U.S. ex rel. Feldman v. van Gorp*, 697 F.3d 78, 92 (2d Cir. 2012), 55 GC ¶ 19. See also *Blusal Meats, Inc. v. U.S.*, 638 F. Supp. 824, 827 (S.D.N.Y. 1986) (''[T]he United States may recover costs and a [ ] civil penalty for each FCA violation in the absence of proof of damage to the United States.''), *aff'd*, 817 F.2d 1007 (2d Cir. 1987). As a result, in FCA cases involving small business size or status fraud arising out of contracts entered into prior to the SBJA's September 27, 2010 enactment, the Government has been able to recover statutory penalties, but not damages. See *Ab-Tech Construction, Inc. v. U.S.*, 31 Fed. Cl. 429 (1994), 36 GC ¶ 384, *aff'd mem.*, 57 F.3d 1084 (Fed. Cir. 1995).

For certain categories of cases, the measure of damages is equal to the entire amount expended by the Government. This measure of damages applies, for example, ''where 'the defendant fraudulently sought payments for participating in programs

designed to benefit third-parties rather than the government itself' *and* the government received nothing of tangible value from the defendant.'' *van Gorp*, 697 F.3d at 88 (quoting *U.S. v. Science Applications International Corp.*, 626 F.3d 1257, 1279 (D.C. Cir. 2010), 53 GC ¶ 25) (emphasis added). This method of calculating the Government's damages is only used where the contract in question was a grant or where the goods or services were provided to third parties, and not to the Government itself. In the context of grants, this approach to damages—

> rests on the notion that the government receives nothing of measurable value when the third-party to whom the benefits of a governmental grant flow uses the grant for activities other than those for which funding was approved. In other words, when a third-party successfully uses a false claim regarding how a grant will be used in order to obtain the grant, the government has entirely lost its opportunity to award the grant money to a recipient who would have used the money as the government intended.

van Gorp, 697 F.3d at 88.

In this regard, the U.S. Court of Appeals for the Fifth Circuit in *U.S. ex rel. Longhi v. Lithium Power Technologies, Inc.*, 575 F.3d 458, 472 (5th Cir. 2009), 51 GC ¶ 277, held that an awardee of a Small Business Innovation Research grant violated the FCA by falsely asserting that it had cooperative arrangements with a university and a laboratory in order to obtain the grant. The court held that the Government suffered damages equal to the amount it paid to the grantee because the SBIR program is intended to assist small business in developing and commercially marketing products. The Government's ''benefit of the bargain'' in providing the grant therefore was not the development of a new product. It was the ''award [of] money to eligible deserving small businesses.'' This ''intangible benefit...was lost as a result of the Defendants' fraud.'' Because the value of the intangible benefit was impossible to calculate, damages were equal to the amount paid by the Government.

Significantly, *Longhi* involved *grants*, not contracts for goods or services. Although some language in *Longhi* suggests that this measure of damages could apply outside the context of SBIR grants, the Fifth Circuit made clear that the SBIR grants were ''not...standard procurement contracts where the government ordered a specific product or good. The end product did not belong to'' the Government. Thus, the court concluded that the Government's damages were equal to the entire value of the contract because the Government received nothing of tangible value in exchange for providing the grant funds, not because the purpose of the grant was to provide assistance to small businesses.

Courts have reached the same result in other FCA cases where services or products are provided solely for the benefit of others, and not directly for the benefit of Government. See, e.g., *U.S. v. TDC Management Corp.*, 288 F.3d 421, 428 (D.C. Cir. 2002) (where ''[t]he Program at issue'' called for the contractor to assist minority business enterprises and ''did not call for [the contractor] to produce a tangible structure or asset of ascertainable value'' for the Government, damages were equal to the entire amount expended on the contract); *U.S. v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008) (for FCA violation involving Medicare, damages were equal to the entire amount paid to health care provider because the provider ''did not furnish any medical service to the United States,'' only to Medicare beneficiaries).

In contrast, ''when the government has paid for goods or services that return a tangible benefit to the government'' itself, rather than to third parties, ''damages are measured...using a 'benefit-of-the-bargain' calculation in which a determination is made of the difference between the value that the government received and the amount that it paid.'' In such cases, the Government must prove by a preponderance of evidence that it ''did not get what it paid for.'' *van Gorp*, 697 F.3d at 87–92. See also *U.S. ex rel. Davis v. District of Columbia*, 679 F.3d 832, 839 (D.C. Cir. 2012), 54 GC ¶ 177 (''[T]o establish damages, the government must show not only that the defendant's false claims caused the government to make payments that it would have otherwise withheld, but also that the performance the government received was worth less than what it believed it had purchased.'') (citation omitted); *Science Applications International Corp.*, 626 F.3d at 1279 (while ''the government will sometimes be able to recover the full value of payments made to the defendant,'' it will only be able to do so ''where the government proves that it received no value from the product delivered'').

The Sixth Circuit has correctly observed that ''[w]hen the government gets what it paid for despite a contractor's misstatements, it has suffered no 'actual damages.' That is not just the law of the False Claims Act; it is also the black-letter law of fraud and restitution[.]'' *U.S. v. United Technologies Corp.*, 782 F.3d 718, 731 (6th Cir. 2015), 57 GC ¶ 115 (citations omitted). See also *Davis*, 679 F.3d at 840 (''The government got what it paid for and there are no damages.''); *U.S. ex rel.*

Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 923 (4th Cir. 2003), 46 GC ¶ 24 (where relator ''presented no evidence that the government did not get what it paid for or that another firm could have performed the work for less,'' relator could obtain penalties, but not damages).

This measure of damages was applied in the small business context in *Ab-Tech Construction*. In that case, the Court of Federal Claims concluded that, by submitting false claims, the contractor had ''caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the 8(a) program,'' i.e., ''assist[ing] minority-owned enterprises in gaining the managerial skills and business experience necessary to compete in the marketplace.'' 31 Fed. Cl. at 432, 434. Nonetheless, the court held that Government was only entitled to statutory penalties, and not damages because ''no proof ha[d] been offered to show that the Government suffered any detriment to its contract interest because of [the contractor's] falsehoods. Rather, viewed strictly as a capital investment, the Government got essentially what it paid for—an automated data processing facility built in accordance with the contract drawings and specifications.'' Accordingly, because the Government failed to prove, by a preponderance of the evidence, that it suffered a loss, it was not entitled to any damages.

The Presumption Of Loss Rule

The SBJA changes the *Ab-Tech* rule only insofar as it creates ''a presumption of loss to the United States based on the total amount expended on the contract...whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.'' 15 USCA § 632(w)(1). As discussed, under the FCA, the Government is only entitled to damages if it proves, by a preponderance of the evidence, that ''the United States did not get what it paid for.'' *van Gorp*, 697 F.3d at 92; 31 USCA § 3731(d). Under the presumption of loss rule, however, the Government is not required, in the first instance, to prove damages. Instead, where a business that is ''other than small'' willfully seeks and receives a contract by misrepresenting its size, the Government is entitled to a presumption that damages are equal to the entire value of the contract. The contractor may rebut this presumption by producing evidence that shows the value of the products or services provided by the contractor. See, e.g., *Closing the Gap: Exploring Minority Access to Capital & Contracting Opportunities: Roundtable Before the S. Comm. on Small Bus. & Entrepreneurship*, 112th Cong. 83 (2011) (statement of SBA Inspector General Peggy Gustafson). Thus, the effect of the presumption of loss rule is to shift the initial burden of producing evidence with respect to damages to the contractor (to, e.g., show that the Government suffered no or limited damages).

● *Purpose of the Presumption of Loss Rule*. The Report of the Senate Committee on Small Business and Entrepreneurship indicates that the purpose of the presumption of loss rule is to increase civil and criminal prosecutions of small business size and status misrepresentations by increasing the amount the Government can recover in such cases. See S. Rep. No. 111-343 at 8 (2010). Specifically, the Report states that, in order to increase such prosecutions, ''the bill creates an *irrefutable* statutory presumption that small business size or status fraud constitutes a loss to the government of contracting dollars diverted to large firms on a dollar-for-dollar basis.'' (Emphasis added.) Notably, this Senate Report accompanied a bill that was never passed, S. 2989, 111th Cong. (2010). However, S. 2989 contained the presumption of loss rule as enacted in the SBJA verbatim. The bill that ultimately became the final version of the SBJA was first passed in the House of Representatives and did not include the presumption of loss rule. See Small Business Jobs & Credit Act of 2010, H.R. 5297, 111th Cong. (passed by House June 17, 2010). The presumption of loss rule was subsequently incorporated into the version of H.R. 5297 that was passed in the Senate, see H.R. 5297, 111th Cong. (passed by Senate Sept. 16, 2010), and the amendment was agreed to by the House. See 156 Cong. Rec. H6,905-39 (daily ed. Sept. 23, 2010). There does not appear to be any substantive legislative history on the rule from the House.

Contrary to the Report's assertion, the presumption of loss rule does not create an ''irrefutable'' presumption. The presumption can be rebutted. Significantly, the SBA's proposed rule implementing the SBJA's provisions provided that the presumption would be irrefutable based on the above-quoted language. 76 Fed. Reg. 62,313, 62314 (Oct. 7, 2011). However, the SBA received comments on the proposed rule noting that: ''(1) Irrefutable presumptions deny due process of law; and (2) Senate Report language does not possess statutory authority.'' As a result, in the final rule, ''[u]pon additional reflection, SBA...decided to remove the term 'irrefutable' from the regulations, rendering the presumption rebuttable.'' 78 Fed. Reg. 38,811, 38,812 (June 28, 2013).

● *Interpreting the Presumption of Loss Rule*. Some observers appear to have interpreted the presumption of loss rule as

overturning *Ab-Tech* and automatically permitting the Government to recover damages equal to the entire amount expended by the Government in cases of size misrepresentation. See, e.g., Billings, *Heightened Penalties for Small Business Size/Status Misrepresentation Now in Place*, 100 Fed. Cont. Rep . 226 (BNA) (Sept. 10, 2013); Krachman, *Game Changer: The Presumed Loss Rule And Mis-Certification Of Small Business Status*, MONDAQ (Mar. 22, 2011); Ford, *Mitigating Risk After SBA's New Presumed Loss Rule*, LAW360 (Aug. 29, 2013); Prosen, *Government Contractors Beware: Small and Large Businesses Have New Potential Exposures for ''Affirmative, Willful, and Intentional'' False Small Business Certifications*, 100 Fed. Cont. Rep. 133 (BNA) (Jul. 30, 2013); see also Manuel, Cong. Research Serv., R42390, *Federal Contracting and Subcontracting With Small Businesses: Issues in the 112th Congress* 33 n.214 (2012). These observers seem to have interpreted the statute's use of the word ''presumption'' as modifying the word ''willfully,'' suggesting that the only way to rebut the presumption of loss is by showing that a misrepresentation of a business' size was not willful. In other words, they apparently interpret the statute and its implementing regulations as creating a presumption of willfulness.

This interpretation is only partially correct. The SBJA does contain a provision that provides that a contractor will be deemed to have willfully certified its size by (1) submitting a bid or proposal for a small business set-aside contract, (2) submitting a bid or proposal that ''in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern,'' or (3) registering on any federal electronic database (e.g., System for Award Management) for the purpose of being considered for contract awards as a small business, 15 USCA § 632(w)(2). This presumption that a misrepresentation of size was willful may be rebutted by demonstrating that the misrepresentation was the result of ''unintentional errors, technical malfunctions, and other similar situations.'' 15 USCA § 632(w)(4); 13 C.F.R. § 121.108(d). In other words, a contractor may rebut the presumption that any of the acts noted above constitutes a willful misrepresentation of the contractor's size by demonstrating that the misrepresentation, in fact, was not willful.

Interpreting the statute to mean that the presumption of loss may only be rebutted by demonstrating that a contractor's misrepresentation of its size was not willful, however, ignores its plain language. The statute creates a presumption of *loss*, not a presumption of willfulness. See 15 USCA § 632(w)(1) (''In every contract...which is set aside...for award to small business concerns, there shall be a *presumption of loss* to the United States based on the total amount expended on the contract...whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.'') (emphasis added). Thus, the better (and correct) view is that, while the Government is entitled to a presumption that it suffered a loss equal to the amount expended on a contract, the contractor may rebut this presumption by presenting evidence of the value conferred by the contractor on the Government. The presumption does not automatically entitle the Government to damages equal to the entire value of the contract. It merely shifts the burden to the contractor to prove that the Government suffered no actual damages.

This interpretation comports with interpretations of the presumption of loss rule adopted by the SBA Inspector General, the General Services Administration Inspector General, and proponents of the presumption of loss rule in the Senate shortly after the SBJA was enacted. For example, at a hearing before the Senate Committee on Small Business and Entrepreneurship on March 3, 2011, SBA IG Peggy Gustafson ''thank[ed] the committee for their hard work in getting the presumption of loss language'' into the SBJA, but nonetheless testified that the SBA Office of Inspector General had—

> legislative proposals that we hope the committee is able to take that would go even further and would actually make it—would statutorily mandate that when a contract is awarded to a company that has gotten that under false pretenses, the amount of loss is not just presumed to be the amount of the contract, which is sometimes rebuttable. They can come back and say, well, no, you got services in return....[The SBA IG's legislative proposals] define[ ] it as the loss and it takes away their ability to rebut that presumption.

Similarly, on October 27, 2011, GSA IG Brian D. Miller submitted a written statement to a House subcommittee observing that the presumption of loss rule was ineffective.

> The Small Business Jobs Act of 2010 did create a ''rebuttable presumption'' that the loss to the United States was the value of the contract. However, a contractor could overcome the presumption by showing the United States received what it paid for, which would put us right back where we started—with no monetary loss to the United States.

Misrepresentation & Fraud: Bad Actors in the Small Bus. Procurement Programs: Hearing Before the Subcomm. on Investigations, Oversight & Regulations of the H. Comm. on Small Bus., 112th Cong. 4 (2011).

The concerns expressed by the SBA and GSA IGs were apparently shared by members of the Senate Committee on Small Business and Entrepreneurship. On March 17, 2011, Senator Olympia Snowe (R-Me.) introduced the Small Business Contracting Fraud Prevention Act of 2011, S.633, 112th Cong. (2011). Section 3 of the bill would have amended the prohibition on misrepresentations of small business size or status in 15 USCA § 645(d) to provide that, for any such misrepresentation, ''the amount of the loss to the Federal Government or the damages sustained by the Federal Government, as applicable, *shall* be an amount equal to the amount that the Federal Government paid to the person that received a contract.'' (Emphasis added.) The bill further provided that in any proceeding for such misrepresentation, under the FCA or otherwise, ''no credit shall be applied against any loss or damages to the Federal Government for the fair market value of the property or services provided to the Federal Government.'' If this bill had been enacted, unlike under the SBJA, the Government would have been automatically entitled to damages equal to the entire value of the contract in cases of size misrepresentation, and contractors would have had no opportunity to prove that the Government suffered no actual loss.

The Small Business Contracting Fraud Prevention Act of 2011 passed in the Senate on September 21, 2011. Although the bill was never passed in the House, the same language quoted above was reintroduced on July 25, 2012 by Senator Mary L. Landrieu (D-La.), as part of the SUCCESS Act of 2012, S.3442, 112th Cong. § 523 (2012), and again by Senator Snowe on September 19, 2012, as part of the Restoring Tax and Regulatory Certainty to Small Businesses Act of 2012, S. 3572, 112th Cong. § 523 (2012). These bills, however, were never passed.

While ''failed legislative proposals'' lack ''persuasive significance'' in interpreting a statute, and therefore ''deserve little weight in the interpretive process,'' *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994), the discussion above demonstrates that individuals who played a significant role in the presumption of loss rule's creation recognized the statute's plain meaning shortly after it was enacted. However, it is unnecessary to consult extrinsic sources to determine the statute's meaning where, as here, the meaning of the statutory text is clear. See *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408, 423 (2d Cir. 2005) (''If the meaning is plain, we inquire no further.'').

● *Rebutting the Presumption of Loss*. Federal Rule of Evidence 301 provides the default rule for rebutting a presumption in a civil case. *Cappuccio v. Prime Capital Funding LLC*, 649 F.3d 180, 189 (3d Cir. 2011); *Marr v. Bank of America, N.A.*, 662 F.3d 963, 967 (7th Cir. 2011). Rule 301 provides:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

''[A] statute 'otherwise provides' only when it explicitly provides for some effect other than that specified by Rule 301.'' 21B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5123.1, at 483 (2d ed. 2005). The presumption of loss rule applies in civil cases, 78 Fed. Reg. 38,811, 38,812 (''SBA notes that the presumption of loss provisions will be utilized in civil... proceedings, where due process will be provided.''), and does not indicate that the presumption of loss is to have an effect other than that specified in Rule 301. See 15 USCA § 632(w). Rule 301 therefore governs the role of the presumption of loss rule in establishing damages.

A ''presumption affords a party, for whose benefit the presumption runs, the luxury of not having to produce specific evidence to establish the point at issue. When the predicate evidence is established that triggers the presumption, the further evidentiary gap is filled by the presumption.'' *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998) (citations omitted). By way of example, a ''presumption of receipt'' arises ''where a piece of mail is properly addressed and mailed in accordance with regular office procedures.'' Thus, if a party establishes that a ''notice was accurately addressed and mailed in accordance with normal office procedures,'' that party is entitled to a presumption that the notice was received by the party to whom it was addressed. *Lopes v. Gonzales*, 468 F.3d 81, 85 (2d Cir. 2006); *Savitz v. Peake*, 519 F.3d 1312, 1315 (Fed. Cir. 2008). Another example is under the Lanham Act, 15 USCA § 1127, where if a defendant in a trademark infringement action establishes nonuse of a mark for three consecutive years, the defendant is entitled to a presumption that the mark has been abandoned by its owner. See *Crash Dummy Movie, LLC v. Mattel, Inc.*, 601 F.3d 1387, 1391 (Fed. Cir. 2010); *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 147–48 (2d Cir. 2007).

Once the basic facts giving rise to a presumption are established, the burden of production shifts to the party against whom

the presumption is directed. See *ITC Ltd.*, 482 F.3d at 148. The burden of persuasion, however ''remains on the party who had it originally.'' Fed. R. Evid. 301; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (although establishment of a prima facie case giving rise to a presumption of employment discrimination ''shifts the burden of production to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' In this regard it operates like all presumptions, as described in Federal Rule of Evidence 301[.]'') (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)); *ITC Ltd.*, 482 F.3d at 148; see also *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 288 (3d Cir. 2006); *Keeler Brass Co. v. Continental Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988).

''Courts and commentators are in general agreement that proffered evidence is 'sufficient' to rebut a presumption as long as the evidence could support a reasonable jury finding of 'the nonexistence of the presumed fact.' '' *ITC Ltd.*, 482 F.3d at 149 (quoting *Wanlass v. Fedders Corp.*, 145 F.3d 1461, 1464 (Fed. Cir. 1998)); *Marr*, 662 F.3d at 967 (same); 21B WRIGHT & GRAHAM, JR., § 5126, at 555 n.86 (collecting cases). The type and amount of evidence that will be considered sufficient to rebut a presumption varies depending on the nature of the presumption and the evidence available to the party against whom the presumption is directed, 21B WRIGHT & GRAHAM, JR., § 5126, at 557. For example, to rebut the presumption of abandonment under the Lanham Act, the trademark owner must come forward with evidence of events from which an intent to resume use of the mark may be reasonably inferred. *ITC Ltd.*, 482 F.3d at 151 (citing *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 1581 (Fed. Cir. 1990)). In immigration cases, the presumption that a notice to appear sent by certified mail to an alien was received may be rebutted by producing ''documentary evidence from the Postal Service, third party affidavits, or other similar evidence demonstrating there was improper delivery.'' Where a notice to appear is sent by regular mail, and documentary evidence is therefore unavailable, the alien may rebut the presumption of receipt using circumstantial evidence suggesting non-receipt. *Silva-Carvalho Lopes v. Mukasey*, 517 F.3d 156, 159 (2d Cir. 2008).

If the party against whom the presumption is directed produces sufficient evidence to rebut the presumed fact, the presumption ''ceases to operate.'' *ITC Ltd.*, 482 F.3d at 148 (citing *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992)); see *McCann*, 458 F.3d at 288 (collecting cases); *In re Mid-South Towing Co.*, 418 F.3d 526, 531 (5th Cir. 2005) (''Evidentiary presumptions...are designed to fill a factual vacuum. Once evidence is presented . . . presumptions become superfluous because the parties have introduced evidence to dispel the mysteries that gave rise to the presumptions.'') (internal quotes and citation omitted). Once the presumption ''disappears,'' all relevant evidence must be weighed to determine whether the party with the burden of persuasion has carried its burden of proving the presumed fact. See *U.S. v. City of New York,* 717 F.3d 72, 87 (2d Cir. 2013); *Cappuccio*, 649 F.3d at 189 (''[T]he introduction of evidence to rebut a presumption destroys that presumption, leaving only that evidence and its inferences to be judged against the competing evidence and its inferences to determine the ultimate question at issue.'') (citation omitted).

Like the various presumptions discussed above, the presumption of loss rule provides that proof of certain basic facts, i.e., that a contractor that (1) is not a small business, (2) sought and received, (3) a small business set-aside contract, (4) by misrepresenting its size, and (5) such misrepresentation was willful, gives rise to a presumption that the Government's damages are equal to the entire amount expended on the contract. See 15 USCA 632(w)(1). Once these basic facts are established, the burden shifts to the contractor to come forward with evidence sufficient to ''support a reasonable jury finding of the nonexistence of the presumed fact,'' *ITC Ltd.*, 482 F.3d at 149, i.e., evidence sufficient to support a finding that the Government's damages are not equal to the entire value of the contract. If the contractor meets its burden of coming forward with evidence demonstrating that the Government got the tangible goods or services for which it contracted, the presumption of loss ''ceases to operate,'' *ITC Ltd.*, 482 F.3d at 148, and all relevant evidence must be considered to determine whether the Government has carried its burden of proving damages by a preponderance of the evidence. See 31 USCA § 3731(d); *City of New York*, 717 F.3d at 87.

Conclusion

The presumption of loss rule eases the Government's burden of proving damages in FCA cases by giving the Government the benefit of a presumption that it suffered a loss equal to the entire value of a contract if the Government proves, by a preponderance of the evidence, that a contractor that is ''other than small'' received a set-aside contract by willfully

misrepresenting its size. This does not mean, however, that the Government is automatically entitled to damages equal to the entire value of the contract, even in cases where contractors are found to have willfully misrepresented their size. On the contrary, the presumption of loss rule is no different from any other presumption; it may be rebutted by producing evidence of the value received by the Government. Any other interpretation ignores the plain language of the statute and the meaning of a presumption.

The Government is sometimes willing to take advantage of contractors that fail to challenge the erroneous conclusion that the presumption of loss may only be rebutted by demonstrating that a contractor's size misrepresentation was not willful. The risk of being subjected to these tactics falls not only on contractors that directly represent themselves as small, but also on businesses that could be considered ''affiliated'' with small businesses. In light of the complexities of SBA's affiliation rules and the high stakes created by the FCA's treble damages provision, contractors would be well advised to familiarize themselves with the correct interpretation of the presumption of loss rule. *Mike Schaengold and Melissa Prusock*