

How the False Claims Act Impacts Municipalities

Webinar for the

International Municipal Lawyers Association (IMLA)

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Lourdes Sanchez Ridge, Esq.
LSR1@Pietragallo.com



Michael A. Morse, Esq., CHC
MAM@Pietragallo.com

AGENDA

- FCA Overview
  - Elements of the FCA
  - Qui Tam Whistleblower Provisions
  - FCA Recovery Statistics
- State and Municipal FCAs
- Use of the FCA Against Municipalities
- City of Pittsburgh FCA Case
- Use of the FCA By Municipalities
- Impact of COVID-19 on Future FCA Cases

False Claims Act Overview

False Claims Act, 31 U.S.C. § 3729

- Primary civil (*i.e.*, non-criminal) tool for DOJ recovering federal health care dollars
- Creates civil liability for:
  - (1) knowingly submitting a false claim for payment to the government, or
  - (2) causing another to submit the false claim
- Damages can include:
  - Treble/3x the government's damages
  - Penalty of $11,181 to $22,383 **for each claim**

False Claims Act, 31 U.S.C. § 3729

- *Qui Tam*: allows third parties to file lawsuit under seal (*i.e.*, not public) to recover federal funds
- Allows for investigation without filing of lawsuit
- Authorizes the use of "CID's" to require the production of documents, answers to interrogatories, and testimony

False Claims Act: What is Prohibited

- § 3729(a)(1)(A): presenting or causing to be presented a false claim to government
- § 3729(a)(1)(B): making or using a false record or statement material to a false claim
- § 3729(a)(1)(C): conspiring to violate any part of 3729(a)(1)
- § 3729(a)(1)(G): "reverse false claims" provision; using false record or statement to reduce or avoid an obligation to the government, or improperly avoiding or reducing an obligation to pay or transmit money to the government

False Claims Act
What's a Claim? What's False?

- **Claim:** any request or demand for money or property made to a contractor, grantee, or other recipient if the U.S. provides or reimburses any portion of the money or property
- A claim can be "**False**" in 2 ways:
  1. Factually False Claim: A claim is factually false when the claimant misrepresents what goods or services that it provided to the U.S.
  2. Legally False Claim: A claim is legally false when the claimant knowingly falsely certifies that it has complied with a statute or regulation the compliance with which is a condition for U.S. payment.

False Claims Act
Knowledge Requirement

1. Actual knowledge of the information
2. Acts in deliberate ignorance of the truth or falsity of the information; or
3. Acts in reckless disregard of the truth or falsity of the information

**No proof of specific intent to defraud is required

False Claims Act, 31 U.S.C. § 3729

- Statute of Limitations: § 3731(b)
  - 6 years after the date of the violation, or
  - 3 years after the date when the facts material to action are known or reasonably should have been known by the official of the United States … but in no event more than 10 years after
  - 3 year SOL now applies to declined *qui tam* cases

FCA Basics: Damages/Penalties/Limitations

- Damages can be **Trebled**
- Civil Monetary Penalties: $11,181 to $22,383 **for each claim**
  - More than doubling previous CMPs of between $5,500 to $11,000 per false claim
  - Potential for constitutional excessive fines challenges
- Statute of Limitations: § 3731(b)
  - 6 years after the date of the violation, or
  - 3 years after the date when the facts material to action are known or reasonably should have been known by the official of the United States … but in no event more than 10 years after

False Claims Act Recoveries

- More than **$62.1 Billion** in recoveries under the FCA since 1986
  - $3.05 Billion in FY 2019
- $41.4 Billion in Health Care FCA cases
- $6.1 Billion in Defense Contracting FCA cases
- $14.5 Billion in FCA cases in other programs
- More than 19,500 FCA cases filed since 1986
  - 780+ filed in FY 2019 alone
- More than 13,000 of those FCA cases were filed by qui tam relators

History of Supreme Court FCA Decision

- 18 FCA Cases have been decided by the Supreme Court since 1953
  - 1950's – 2
  - 1960's – 1
  - 1970's – 1
  - 1980's – 1
  - 1990's – 1
  - 2000's – 6
  - 2010 – present – 6
- Last 4 FCA decisions have all been unanimous decisions

FCA cases Against Municipalities

- FCA can be used against any municipal program that receives federal funding, including:
  - County Hospitals
  - Ambulance/emergency services
  - Water treatment facilities
  - Municipal owned utilities
  - Schools
  - Community Colleges
  - Library systems
  - Transit Authorities
  - Sanitary Districts
  - Airports

FCA cases Against Municipalities

- *Cook County, Illinois v. United States ex rel. Chandler*, (2003)
  - Chandler case involved a municipally owned hospital and an affiliated nonprofit research institute that had received a federal grant for a study related to the treatment of drug-addicted pregnant women. F
  - Former study director filed an FCA suit alleging that hospital had submitted false claims including, for example, claims for the treatment of "ghost" patients.
  - Supreme Court ruled that municipalities are liable under the FCA
  - Court explained: "[i]t is simply not plausible that Congress intended to repeal municipal liability sib silentio by the very Act it passed to strengthen the Government's hand in fighting false claims."

FCA cases Against Municipalities

- *U.S. v. City of New York*, (SDNY), settled 2019
  - In October 2011, NYC paid $70 million in connection with the City's operation of the Personal Care Services (PCS) program - a Medicaid funded program designed to provide cleaning, shopping, grooming, and basic aid services to eligible Medicaid beneficiaries.
  - Complaint alleged that for 10 years, NYC improperly overcharged the Medicaid program for the provision of 24-hour personal care services by routinely re-authorizing 24-hour continuous PCS for applicants without the required local medical director assessment; that in some cases, City administrators overruled the findings of the local medical director that PCS services were inappropriate for the patient; and that the City knowingly re-authorized 24-hour care for patients where the nursing and social worker assessments were missing or were not reviewed by the City.

FCA cases Against Municipalities

- *U.S. ex rel. Ling, et al. v. City of Los Angeles, settled 2/6/20*
  - CRA/LA agreed to pay $3.1 million to resolve allegations that it violated FCA by failing to comply with federal accessibility laws when it financed and assisted in the development of affordable housing in the City of Los Angeles supported by federal funds
  - CRA/LA is the successor of the Community Redevelopment Agency of the City of Los Angeles, a local redevelopment agency that financed and assisted in the development of multifamily affordable housing using local tax monies and federal community development grants.
  - Examples of alleged defects included:
    - slopes and ramps too steep for people in wheelchairs;
    - tall thresholds restricting wheelchair access;
    - kitchen cabinets, shelves outside the accessible reach range of people in wheelchairs;
    - sinks, grab bars, and mailboxes mounted outside the accessible reach range of people in wheelchairs;
    - uninsulated pipes below sinks and lavatories;
    - a lack of accessible parking spaces; and
    - insufficient visual alarms and tactile signs for people with impairments.

FCA cases Against Municipalities

- *U.S. v. City of New York*, (SDNY), settled 2019
  - New York City paid $5.3 million to the United States to settle FCA case alleging that NYC fraudulently obtained FEMA funds related to Superstorm Sandy
  - The NYC DOT sought reimbursement from FEMA for 132 vehicles it certified had been directly damages by Sandy.

- NYC admitted to fraudulent conduct, including:
  - NYC DOT failed to sufficiently review whether the vehicles were operational or in use prior to Sandy;
  - NYC official signing the certification did not have personal knowledge and failed to direct a proper investigation before signing the certification;
  - Shortly after the certification, a NYC DOT employee sent an e-mail to the certifying official that certain vehicles were "junk for years;"
  - NYC did not take steps to notify FEMA that it was not entitled to certain of the requested funds until after it became aware of the SDNY investigation.

FCA cases Against Municipalities

- *U.S. v. City of New York*, (SDNY), settled 2019
  - New York City paid $4.3 million to the United States to settle FCA case alleging that NYC Fire Department, for 4 years, fraudulently received reimbursements for claims for emergency ambulance services that did not meet Medicare's medical necessity requirement
  - FDNY provides emergency ambulance services throughout the City, including to patients eligible for Medicare. FDNY ambulances are dispatched in response to 9-1-1 calls for emergency medical assistance. To receive payment for emergency ambulance services provided to patients eligible for Medicare, the FDNY, through its ambulance billing contractor, submits claims to Medicare containing required information about each service. Emergency ambulance services are only reimbursable from Medicare if those services meet Medicare's medical necessity requirement.
  - Case was brought to through a voluntary disclosure by the City

U.S. EX. REL., Freedom Unlimited v City of Pittsburgh

728 Fed.Appx. 101 (3rd Cir., 2018)

- Relators alleged that City falsely certified that it complied with the conditions required to apply to HUD's CDBG and HOME programs. City falsely certified that it:
  - furthered fair housing when, in fact, it failed to analyze impediments to fair housing and provide adequate funding
  - implemented a citizen participation plan
  - spent CDBG funds on eligible activities
- *U.S. v Escobar* rejected the distinction between conditions of payment of funds and conditions of participation in a federal program.
  - Test: the defendant's compliance or noncompliance with a condition, regardless whether of participation or payment, would have been material to the government's decision to make payment to the defendant.
- U.S. did not intervene but filed an amicus brief

Affirmative litigation

- Municipalities become the plaintiffs instead of the defendants
- Advantages:
  - Municipalities enact legislation with appropriate remedies pertinent to its residents
  - Affirmative Litigation recovers revenue from wrongdoer
- Examples of Affirmative Litigation
  - Predatory Lending
  - Antitrust laws – since municipalities are market participants
  - Tortious misconduct
  - False Claims Act

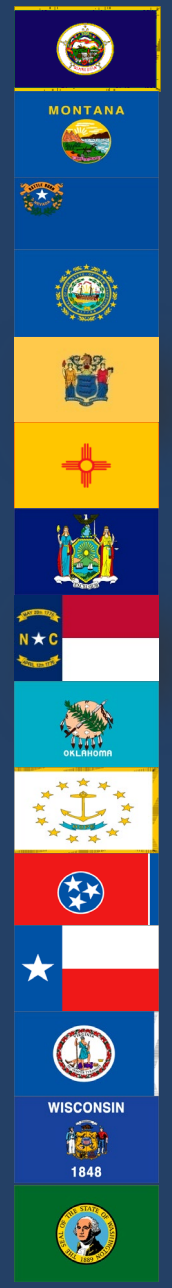
States' false claims act

- States' FCA affects political subdivisions
- Increase in states enacting FCA statutes since 2006
  - States have a financial incentive to enact FCA statutes
    - In 2006, Congress passed the Deficit Reduction Act ("DRA") granting fiscal incentives to states who enact false claims act legislation.
    - Purpose of DRA is to prevent fraud in Medicaid programs
    - Federal Government funds between 50% - 76% of states' Medicaid programs
    - DRA increases the states' percentage of FCA recoveries by 10%
    - States' FCA statutes must mirror the federal FCA in key elements including the qui tam and whistleblower's anti-retaliation provisions and treble damages

State False Claims Act



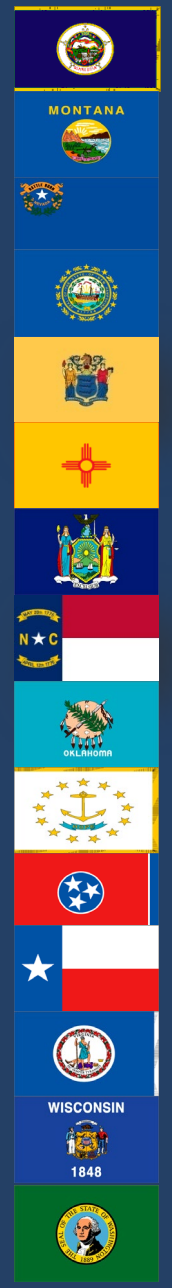
States	Medical Benefit Fraud	No Qui Tam	Allows Political Subdivision
Arkansas		X	
California			X
Colorado	X		
Connecticut	X		
Delaware			X
District of Columbia			
Florida			
Georgia			
Hawaii			X
Illinois			X
Indiana			
Iowa			
Kansas		X	
Louisiana	X		
Maryland			
Massachusetts			X
Michigan	X		
Minnesota			X
Mississippi		X	



State False Claims Act



States	Medical Benefit Fraud	No Qui Tam	Allows Political Subdivision
Missouri	X	X	
Montana			X
Nebraska	X	X	
Nevada			X
New Hampshire	X		
New Jersey			
New Mexico			
New York			X
North Carolina			
Oklahoma	X		
Oregon		X	
Puerto Rico			
Rhode Island			X
Tennessee			X
Texas	X		
Utah	X	X	
Virginia			X
Washington	X		
Wisconsin	X	REPEALED in 2015	
Wyoming	X	X	



municipalities may file under a state's fca statute

- Most state statutes follow the Federal FCA
- There are differences between state statutes and the Federal FCA
  - Minimum aggregate amount of actual damage - $500 - $10,000
  - Types of cases: Medical Benefits only; Tax
    - Minimum threshold – i.e. minimum of $1M in revenue and minimum damage
  - Public disclosure bar and "original source"
  - Statute of limitations
- In some states, the Attorney General may bring an FCA action on behalf of the municipality or the municipality may bring action on its own behalf;
- In some states, if a qui tam is filed, the state and/or municipality may elect to intervene (if the state has no damage, the municipality's consent may be required) REVIEW YOUR STATE STATUTE AND RULES

States that allow political subdivisions to file false claims actions

- California
- Delaware
- Hawaii
  - Allows claims based on tax fraud
- Illinois
  - Includes state colleges/universities, school districts, all involved in Intergovernmental agreements
- Massachusetts
- Minnesota
- Montana
  - Includes state universities

States that allow political subdivisions to file false claims actions

- New York
  - Includes tax fraud
  - Higher fines
  - 10 year statute of limitations
- Rhode Island
- Tennessee
  - Up to 50% recovery if state doesn't intervene
  - 33% recovered funds fighting fraud
  - Includes inadvertent false claims if defendant doesn't report the mistake within a reasonable period of time
- Virginia

Municipal false claims acts

- Anchorage, AL
- Broward County, FL
- Chicago, IL
- Allegheny County, PA
- District of Columbia
- Miami-Dade County, FL
- New York City
- Philadelphia, PA
- Bay Harbor Islands, FL
- Hallandale Beach, FL

Robust False Claims Municipal Code

Code should contain:

a. “Thou shalt not…”

- Knowingly present or cause to present a false claim for payment to the city;
- Knowingly make, or cause to be made, a false record to be paid;
- Conspire to present a false record to obtain payment from the city;
- Have possession of city’s property or monies with intent to defraud the city or conceal city property/monies or deliver or causes to deliver less monies than shown by the receipt;
- Certify the receipt of property/monies to be used by the city, with intent to defraud the city, without knowing whether the information in the receipt is true;
- Purchase public property from a city employee knowing that such employee is not authorized to sell the property;
- Knowingly make, or cause to be made, a record to conceal, avoid or reduce the amount of payment to the city;

Robust Code Continued

b. Damages: Up to Treble damages
    1. Provide “discounts” if:
        a) early self-referral
        b) full and truthful cooperation with the city’s investigation
        c) there was no pending investigation

c. Civil Penalties

c. Costs, expenses and the city’s attorneys fees and investigation fees
    1. City is not responsible for whistleblowers costs, expenses or attorneys fees

Robust Code Continued

e. Process and rules
    1. Whistleblower shall submit to the city's attorney a signed and verified complaint with all material evidence;
    2. Provide a timeline in which the city investigates and notifies the whistleblower of its intent to intervene or not intervene;
    3. Require full cooperation
f. Qui tam action allowed
g. Barred actions – i.e. false tax returns; minimum amount; if whistleblower is an employee, describe exhaustion of internal reporting requirement
h. Public disclosure bar – identify records deemed to be "publicly disclosed"
    1. Allegations made in an administrative hearing, media, etc.
i. Whistleblowers rights - i.e. right to be heard/object in court regarding dismissal or settlement
j. Reservation of Rights – i.e. city is not bound by the whistleblower's actions

Robust Code Continued

k. Awards – if city intervenes or qui tam
   - Provide the court with the discretion to establish the award with a minimum amount taking into account certain factors:
     1. whistleblower's participation in the prosecution
     2. whistleblower's promptness and cooperation in bringing complaint
     3. whether the allegations involves a safety issue
     4. whether the whistleblower participated in the wrongdoing
     5. fundamental fairness

l. Anti-retaliation provision

FCA Bases Brought For Municipalities

- *Los Angeles et al v. Office Depot*, settled 2/2015
  - In February 2015, the Court approved a $77.5 million settlement with Office Depot to settle a False Claims Act lawsuit brought by a former Office Depot account manager.
  - The City of Los Angeles and 18 other California cities, counties, and school districts intervened in the action to assert claims against Office Depot directly.
  - Action was on behalf of more than a thousand California public entities, mostly school districts.
  - The governmental entities purchased office supplies from Office Depot under a nationwide supply contract known as the U.S. Communities contract. Office Depot promised in the U.S. Communities contract to sell office supplies at its best governmental pricing nationwide. The complaint alleged that Office Depot repeatedly failed to give most of its California governmental customers the lowest price it was offering other governmental customers.

Impact of covid -19

- History has shown that large government-funded programs implemented following disasters lead to increased FCA cases
  - Hurricane Katrina FCA cases
  - Superstorm Sandy FCA cases
  - Deepwater Horizon FCA cases
  - 2008 Financial Recovery FCA cases
- Potential areas of COVID-19 FCA cases
  - Stimulus spending: Businesses (Loan Programs), Local/County Governments
  - False Medicare/Medicaid Claims
  - State/Municipal False Claims Laws

Who we are

LOURDES SÁNCHEZ RIDGE is a Partner at Pietragallo Gordon Alfano Bosick & Raspanti, LLP. She serves as Chair of the Municipal Law Group where she practices in the areas of municipal law including land use, civil rights, employment law, zoning, code enforcement, First Amendment matters, permits and licenses, building code violations, and the Torts Claims Act. She also practices in the area of government enforcement, corporate compliance and internal investigations, government related civil litigation, and the False Claims Act. She counsels and investigates corporations and individuals on matters of domestic and international concerns such as the Foreign Corrupt Practices Act (FCPA), health care fraud, bribery and corruption, securities fraud, ethics and fraudulent conveyances.

Lourdes Sanchez Ridge, Esq.
LSR1@Pietragallo.com

MICHAEL A. MORSE is a Partner of Pietragallo Gordon Alfano Bosick & Raspanti, LLP, where he serves as a member of the Government Enforcement, Compliance, and White Collar Litigation Group, Commercial Litigation Group, Health Care Law Group, and Qui Tam/False Claims Act Practice Group. From 2008 through 2018, Mr. Morse served as Chair of the firm's Qui Tam/False Claims Act Practice Group. Over the past 20 years, Mr. Morse has been involved in the recovery of over $1 Billion for state and federal taxpayers. Mr. Morse is certified in Healthcare Compliance by the Health Care Compliance Association and the Compliance Certification Board (CCB).

MICHAEL A. MORSE, ESQ., CHC
MAM@Pietragallo.com