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United States Supreme Court Rules Local Governments Subject to False Claims Act Liability

For the last three years, since the United States Supreme Court decided in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), that States are not "persons" within the meaning of the federal False Claims Act ("FCA") 31 U.S.C. §§3729-3733, many counties and municipalities have assumed that they, too, enjoy immunity from FCA liability. On March 10, 2003, the Court, in a stunning unanimous decision in *Cook County, Illinois vs. United States ex rel. Janet Chandler*, No. 01-1572 (U.S. Mar. 10, 2003), resolved a split among the Circuit Courts of Appeal, slamming the door on local governments aspiring themselves to be "non-persons," and subjecting them to FCA treble damages and penalties.

Under the FCA, "[a]ny person", who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," 31 U.S.C. §3729(a)(1), is liable to the government for treble damages, up to \$11,000 per false claim in penalties, reasonable expenses, costs and attorneys fees. 31 U.S.C. §3729(a). The Attorney General of the United

States may sue under the FCA, but, increasingly, this task has fallen to private whistleblowers (*qui tam* relators, as they are called in FCA litigation), whom the FCA allows to institute private actions on behalf of the United States for a share of the recovery of up to thirty percent, as well as reasonable expenses, costs and attorneys fees. 31 U.S.C. §3730(b), §3730(d).

Alleging that Cook County had submitted false statements and reports in connection with a \$5 million federal grant to Cook County Hospital, relator Dr. Janet Chandler brought a *qui tam* action under the FCA. Following the Supreme Court's decision in *Stevens*, the district court in Illinois dismissed Chandler's action, holding that a County, like a State, could not be subjected to treble damages. 118 F. Supp. 2d 902, 903 (2000). The Seventh Circuit reversed, however, 277 F. 3d 969 (CA7 2002), in conflict with the Third and Fifth Circuits, all leading up to the Supreme Court's review of the case.

It should first be said that *Cook County* is a dream decision for FCA geeks. The Court cited case law and commentary back to 1787 in deter-

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mining that municipalities had been considered "persons" long before the Civil War-era FCA was enacted in 1863, and that Congress had done nothing since to alter their status and potential liability.

Cook County's main argument, however, and the issue that had really split the Circuits, was that when the FCA was amended in 1986 to subject damages under the FCA to trebling rather than doubling, the nature of the FCA itself changed from a "remedial" to a "punitive" statute. Both *Stevens* and the Solicitor General on oral argument for the United States in *Cook County* conceded this to be true. Thus, argued Cook County, under the common law presumption against punitive damages for municipalities, the 1986 amendments effectively eliminated FCA liability for municipalities.

The Court disposed of this argument decisively, countering with a presumption of its own, the "cardinal rule . . . that repeals by implication are disfavored." *Cook County*, slip opinion at p.9, citing *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). The Court stated that the FCA's damages multiplier had both a compensatory and a punitive function, and that, in fact, once a private whistleblower was paid his or her share of the proceeds of potentially up to 30% of the recovery, the government would net roughly double damages in any event, an amount more consistent with the FCA's remedial, as opposed to its punitive, purpose. *Id* at 10.

Finally, the Court pointed out that local governments now often administer or receive substantial federal funds, and so subjecting them to FCA liability would "expose only local taxpayers who have already enjoyed the indirect benefit of the fraud, to the extent that the federal money has already been passed along in lower taxes or expanded services." *Id* at 12. The Court concluded that while it was certainly within Congress' authority to immunize municipalities from FCA liability, "it makes no sense to suggest Congress did so under its breath. It is simply not plausible that Congress

intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims." *Id* at 13.

The *Cook County* decision could not have come at a worse time for counties and municipalities, in the face of a still slumping economy and decreasing revenues. Not only, according to the Solicitor General, are there 140 pending FCA whistleblower cases that have been awaiting this decision, who knows how many more actions have not been filed since *Stevens* that *Cook County* now will revive.

Counties and municipalities and similar government instrumentalities will want to intensify their efforts to assure compliance with applicable federal program law and regulations, and to prevent potentially budget-busting liability under the FCA.

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