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## False Claims Act Liability Expanded and Contracted in Two Important Decisions

The United States Supreme Court and the United States Court of Appeals for the Fifth Circuit recently rendered important decisions construing the breath and scope of the application of the United States False Claims Act ("FCA"). The Supreme Court found that the FCA did indeed apply to cities, counties and other instrumentality's of government, such as public hospital districts, even though the Supreme Court had decided three years ago that the FCA did not apply to the states in the case of Vermont Agency for Natural Resource v. United States ex. Rel. Stevens. The United States Court of Appeals for the Fifth Circuit in an en banc decision reversed a prior panel decision and found that there is a "materiality" requirement involving allegations of the submission of false claims and that FCA liability cannot be based on alleged contractual, regulatory and other statutory violations if,

in fact, such certifications were not material to the decision by the government to pay claims submitted for reimbursement.

The Supreme Court decision in Vermont v. Stevens, which was decided in 2000, held that states are not "persons" within the meaning of the FCA and thereby enjoy immunity from FCA liability. This decision created uncertainty about the application of immunity from FCA liability to counties, cities and other public entities, such as public hospitals and whether these governmental entities were "persons" under the FCA. The decision in the Cook County v. Chandler case, however, slammed the door on local governments which aspired themselves to be "non persons" under the FCA, thereby avoiding treble damages and penalties.

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The Supreme Court in its Cook County decision also stated that the FCA's multiple damages provision had both a compensatory, but also a punitive function, and that, in fact, once a private whistleblower was paid his or her share of the proceeds of potentially up to thirty percent of any recovery by the government, that the government would then net roughly double damages in any event which was an amount more consistent with the FCA's remedial, as opposed to its punitive purposes. This dictum is important in that it reflects the Supreme Court's explicit conclusion that an amount of damages in excess of double damages, plus any penalties would likely be punitive in nature. This, of course, would be important in assessing any damages under the FCA and ensuring that such damages are not unconstitutionally excessive and punitive (as opposed to remedial) in nature.

The Court of Appeals' decision in the Southland case is also important for a number of reasons, but the most important is its implications for the ability of relators and relators' counsel and the government to extract FCA settlements in cases that are based on alleged violations of other laws and contract terms, particularly where the contract or regulation at issue contains a separate enforcement or resolution methodology under the law.

The Southland case involved the submission to HUD of allegedly false certifications that certain subsidized housing was "decent, safe, and sanitary" (which of course is analogous to the certification on cost reports that a health care provider was in compliance with all rules and regulations governing the Medicare and Medicaid programs). This certification was contained in a voucher submitted to HUD in order to receive housing subsidies. The evidence demonstrated that HUD paid the claims, despite

the false certification, because of its policy to allow property managers to use the funds to improve property and to avoid displacing tenants who depended on subsidized housing. The District Court in the case, in essence, found that the alleged false certifications were not, as a matter of fact, material to the decision by HUD to pay claims. This decision was reversed by a panel in the Fifth Circuit in a sharply divided opinion, but the panel decision was later vacated in an en banc rehearing proceeding. The en banc court held that whether a claim is a "false claim" for FCA purposes "depends on the contract, regulation, or statute that supposedly warrants it". The en banc court looked at the contractual agreement between the defendants and HUD and held that, "the owners were entitled to the housing assistance payments sought, and thus, they made no false claims."

This decision has important implications for the alleged submission of false claims in the health care industry, particularly when it is based on a failure to comply with other rules and regulations of Federal health care programs, contractual relationships or other statutory violations, especially where there is an existing scheme for resolution of these issues. This decision does not obviate the compelling dynamic between a claim for payment and the nexus to a basis for payment, however, it does underscore that there can be no liability under the FCA for a false statement unless it is used to get a false claim paid. The case also suggest that if there is an enforcement mechanism to terminate funding, then the government must follow that mechanism before claiming a violation of the FCA. This would, of course, be analogous to the various administrative mechanisms under the Medicare and Medicaid programs (i.e. pre-payment review, recoupment and suspension of payments), which

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are available to control funding or cut off funding under the Federal health programs. The case also highlights the court's concern that any analysis under the FCA consider the language and application of any underlying contract, regulation or statute, as well as the course of conduct between the government and the alleged defendant to determine whether in fact a material false claim was submitted.

These two cases are important developments in FCA liability where in one case liability is explicitly expanded to include cities, counties and other public entities as "persons" under the FCA. The Fifth Circuit decision, however, clearly acts to restrict liability unless there is a showing of materiality and a course of conduct between the government and defendant which reflects that a false claim was in fact submitted to the government.

*Broad and Cassel, founded in January 1946, has more than 140 lawyers and 200 support personnel located in seven offices throughout the state of Florida. Broad and Cassel has a national and international client base with offices located in Boca Raton, Fort Lauderdale, Miami, Orlando, Tallahassee, Tampa, and West Palm Beach. The Firm has extensive experience in a wide variety of practice areas including: Corporate and Securities' Real Estate; Estate Planning and Trusts; Commercial Litigation; Construction Litigation; Health Law; Taxation; Bankruptcy and Creditors' Rights; Labor and Employment; Intellectual Property Law; Computer and Technology Law; Appellate Law; White Collar Criminal and Civil Fraud Defense; and Special Assets.*

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