

## LOCAL GOVERNMENTS CAN BE SUED UNDER FALSE CLAIMS ACT

The U.S. Supreme Court has ruled that a local government may be sued under the federal False Claims Act (FCA). *Cook County, Ill v. U.S. ex rel. Janet Chandler*. 538 U.S. \_\_\_, U.S. No. 01-1572 (March 10, 2003). An interesting wrinkle for Vermont municipalities is that this decision is the opposite of that same Court's decision in *Vermont Agency of Natural Resources (ANR) v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000). In that case, the Court held that ANR could not be sued under the FCA because ANR was not a "person." In *Cook County*, the Court held that a local government is a "person" for purposes of the FCA.

The FCA was passed in 1863 to stop "the massive frauds perpetrated by large [private] contractors during the Civil War." The law has been amended but still provides that the government, or a private person acting on behalf of the government, may bring suit against a person who has knowingly presented false or fraudulent claims to the government for payment. If the plaintiff wins, the defendant may be liable for "treble" damages (triple the amount of a jury award), costs, fees and civil penalties up to \$10,000 per claim. The private person suing on behalf of the government may be awarded up to 30 percent of the amount awarded, plus fees and costs.

The argument in *Vermont ANR* was that the state agency was not a person who could be sued because the agency was part of the sovereign, who presumably could not be sued under English common law. The Court found that the original language of the FCA allowed for fines and imprisonment against "persons" who attempted to defraud. Obviously, the Court said, such punishments were not meant to be assessed against the sovereign. In addition, although Congress had plenty of time to change the language to provide for suing the sovereign, if that was its intent, it had never done so. Therefore, the presumption that a state agency is still part of the sovereign and cannot be sued still applies.

So, what happened in *Cook County* to change the Court's mind? Well, said Justice Souter, long before passage of the FCA, the law recognized that "person" includes "persons politic and incorporate." Corporations can enjoy "the capacity to sue and be sued" just as other persons can. English common law recognized both municipal and private corporations as persons. In U.S. law, the municipal corporation was the "archetypal American corporation" before private corporations became widespread.

Cook County argued that FCA references to persons as members of the military certainly excluded corporations and that penalties such as imprisonment could not apply to corporations. The Court replied that only the appropriate penalty need be applied, depending on the type of "person" found guilty. Local governments could not be imprisoned, but they could be fined. The next argument was that the FCA was aimed at private contractors, not local governments. The Court said the law was written expansively "to reach all types of fraud." It then noted that "Whatever municipal corporations may have been doing in 1863, in 2003 local governments are commonly at the receiving end of all sorts of federal funding schemes and thus no less able than individuals or private corporations to impose on the federal fisc and exploit the exercise of the federal spending power."

Finally, Cook County argued that a municipal corporation should not be subject to punitive or exemplary damages. The Court explained that the relationship between

compensatory, remedial and punitive damages is complex. Under the FCA, it is necessary to compensate the federal government for costs, delays and inconveniences suffered in addition to recouping the money originally paid out. Also, when a private person sues and wins on behalf of the government, that person takes home up to 30 percent or more of the awarded amount. Therefore, the treble damages do not constitute a windfall for the government.

There is a concern that when a local government is sued and loses, the local “blameless and unknowing taxpayers” must provide the money to pay the penalties, even if they were unaware of the fraudulent acts committed by their nefarious officials. The answer to this is a question: Why shouldn’t the local taxpayers who have benefited to some extent from the fraud pay, rather than leaving *all* federal taxpayers permanently out of pocket?

Finally, the Court said, “It is simply not plausible that Congress intended to repeal municipal liability ... by the very Act it passed to strengthen the Government’s hand in fighting false claims.” The application of this case to local government is simple. A fraudulent claim for money from the federal government is a crime. False dealing when applying for grants, FEMA money or other federal dollars could turn out to be very expensive.

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