



[Home](#) > [Publications](#) > [ABA Health eSource](#) > [2013-14](#) > [March](#) > [State Entities and the False Claims Act](#)

State Entities and the False Claims Act

Vol. 10 No. 7

Scott R. Grubman, Rogers & Hardin LLP, Atlanta, GA*



Early this year, a False Claims Act ("FCA")² whistleblower in a suit against the University of Texas Health Science Center filed a certiorari petition, asking the U.S. Supreme Court for guidance on whether and when a state entity such as a public university medical center can be held liable under the FCA.³ The relator - a former

university hospital professor - was seeking to challenge the Fifth Circuit's decision affirming dismissal of her FCA suit, in which she alleged medical research grant fraud.⁴ The Fifth Circuit held that the relator could not maintain her suit because, as an "arm of the state," the hospital was not subject to FCA liability.⁵

The basic rule underpinning that decision is not new. In the 2000 case of *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, the Supreme Court ruled that the FCA does not subject a state or state agency to FCA liability because neither falls within the FCA's definition of a "person."⁶ Since *Stevens*, however, circuit courts have formulated different tests to determine whether an entity is an "arm of the state" for purposes of FCA liability.⁷ This article describes the most common factors that lower courts consider in making that determination.

Why It's Important

Which entities can be held liable under the FCA is of critical importance to healthcare entities and their attorneys. FCA whistleblower suits have skyrocketed over the last several years, and that trend will likely continue for years to come. For instance, in 2013 alone, the Department of Justice collected nearly \$4 billion in FCA settlements and judgments, the vast majority of which came in healthcare-related cases.⁸ Moreover, the FCA is a powerful statute, calling for the imposition of treble damages and substantial per-claim penalties.⁹ The FCA also offers a major incentive for potential whistleblowers to come forward and report potential fraud - up to 30 percent of the proceeds plus attorneys' fees and costs.¹⁰ Knowledge of the tests applied to determine

whether an entity is subject to FCA liability could save healthcare entities substantial time and money by avoiding the necessity of a prolonged FCA investigation or litigation.

The Most Common Factors Applied By Lower Courts

Where Will the Money Come From?

The most common - and often most important - factor considered by courts in determining whether an entity is an arm of the state for FCA purposes is whether a judgment against that entity would be paid with state funds.¹¹ If a resulting judgment would be paid out of the state treasury, this factor will weigh heavily in favor of finding that the entity is an arm of the state and, therefore, not subject to FCA liability.¹² However, the fact that a judgment would not be paid directly out of the state treasury does not preclude such a finding. Instead, courts generally look deeper to determine whether state funds will in any way be used to satisfy a judgment.

For example, the U.S. Court of Appeals for the Eleventh Circuit recently held that an entity with a self-insurance fund was a state entity for FCA purposes even though the state would not be liable for any adverse judgments against the entity.¹³ In support of its holding, the Eleventh Circuit held that "it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant."¹⁴

Autonomy Exercised by the Entity

Another common and important factor is the degree of autonomy exercised by the entity in question.¹⁵ The more autonomy an entity exercises independent of state control, the less likely a court is to find that the entity is an arm of the state. The Eleventh Circuit held that this factor weighed in favor of finding that the entity in question was an arm of the state where the entity's board and executive director were appointed by the state's governor and approved by the state senate, the governor could remove any officer, and the entity's budget required state approval.¹⁶ The Eleventh Circuit held that the fact that the entity maintained "some degree of autonomy over its day-to-day operations does not change the fact that the State . . . ultimately retains near-total control over it."¹⁷

Entity's Treatment under State Law

Another important factor considered by courts is how the entity is treated under state law.¹⁸ In applying this factor, courts will generally look to both state statute and case law.¹⁹ In the University of Texas Health Science Center case, for example, the Fifth Circuit found that this factor weighed in favor of finding that the university medical center was an arm of the state where the state's Constitution provided for the establishment of the university system, the state's education code provided that the medical

center was part of the university system, and state courts had treated the medical center as a state agency in other contexts.²⁰

Other Relevant Factors

Other factors that have been considered by courts include: whether the entity is involved with state concerns as distinct from non-state (including local) concerns;²¹ whether the entity performs “central government functions”;²² whether the entity may sue or be sued in its own name;²³ whether the entity has the power to take property its own name;²⁴ and the extent of financing the entity receives independent of the state treasury and its ability to provide for its own financing.²⁵

Local Governments and Municipalities

Although the Supreme Court in *Stevens* held that the FCA does not impose liability upon states or state entities, it subsequently clarified that local governments and municipalities are subject to FCA liability.²⁶ In *Cook County v. United States ex rel. Chandler*, the Court held that a county-operated hospital could be held liable under the FCA because, unlike state-controlled entities, entities controlled by a local government or municipality are “persons” under the FCA.²⁷

Conclusion

Although it is well-settled that an entity such as a state-funded university medical center is not subject to FCA liability if it functions as an “arm of the state,” it is important for practitioners to understand the applicable circuit law in order to determine whether a particular entity is an arm of the state for FCA purposes, as courts in different circuits apply different factors in making this determination. Moreover, although state-controlled entities such as public universities will be immune from FCA liability, other publicly-funded entities such as county- or city-controlled public hospitals will typically be subject to liability under the FCA, as will private university medical centers.²⁸

*Scott R. Grubman is an attorney with Rogers & Hardin, LLP in Atlanta. He is a member of the firm’s government investigations and healthcare litigation practice groups. Prior to joining the firm earlier this year, he served as an Assistant U.S. Attorney for the Southern District of Georgia, where he investigated and prosecuted False Claims Act cases on behalf of the government. He can be reached at sgrubman@rh-law.com.

¹ 31 U.S.C. §§ 3729-3733.

² *United States ex rel. King v. Univ. of Texas Health Science Center-Houston*, Case. No. 13-927 (Jan. 31, 2014).

3 *United States ex rel. King v. Univ. of Texas Health*
4 *Science Center-Houston*, No. 12-20795, 2013 WL
5 5881083 (5th Cir. Nov. 4, 2013).

6 *Id.* at * 5-6.

7 *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529
8 U.S. 765, 787-88 (2000). The FCA makes it unlawful
9 for “any person” to submit false or fraudulent claims
10 for payment to the government. 31 U.S. § 3729(a)(1)
11 (emphasis added). Although the FCA itself does not
12 define “person”, the Court in *Stevens* applied the
“longstanding interpretative presumption that ‘person’
does not include the sovereign.” 529 U.S. at 780.

This “arm of the state” analysis is borrowed from
Eleventh Amendment sovereign immunity law. *See,*
e.g., U.S. ex rel. Oberg v. Kentucky Higher Educ.
Student Loan Corp., 681 F.3d 575, 579 (4th Cir.
2012) (applying Eleventh Amendment’s arm-of-the-
state analysis in FCA setting and citing other circuits
that had done the same). This is because the
question of whether an entity is a proper FCA
defendant has a “virtual coincidence of scope” with the
Eleventh Amendment sovereign immunity inquiry.
Stevens, 529 U.S. at 780.

Dept. of Justice, Civil Division, *Fraud Statistics –*
Overview (Dec. 23, 2013), available at
[http://www.justice.gov/civil/docs_forms/C-](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf)
[FRAUDS_FCA_Statistics.pdf](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf).

31 U.S.C. § 3729(a).

Id. § 3730(d).

Oberg, 681 F.3d at 580 (4th Cir. 2012); *King*, 2013
WL 5881083, at *6 (5th Cir. 2013) (quoting
Richardson v. S. Univ., 118 F.3d 450, 455 (5th Cir.
1997)); *Stoner v. Santa Clara County Office of Educ.*,
502 F.3d 1116, 1121 (9th Cir. 2007) (by reference to
Belanger v. Madera Unified School Dist., 963 F.2d
248, 250-51 (9th Cir. 1992)); *U.S. ex rel. Regence*
Bluecross Blueshield of Utah, 472 F.3d 702, 718 (10th
Cir. 2006); *U.S. ex rel. Lesinski v. South Fla. Water*
Mgmt. Dist., 739 F.3d 598, 605 (11th Cir. 2014).

King, 2013 WL 5881083, at *6.

12

Id.

13

Lesinski, 739 F.3d at 605.

14

Id. (quoting *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997)).

15

King, 2013 WL 5881083, at *4 (5th Cir.); *Oberg*, 681 F.3d at 580 (4th Cir.); *Stoner*, 502 F.3d at 1121 (9th Cir.); *Sikkenga*, 472 F.3d at 718 (10th Cir.); *Lesinski*, 739 F.3d at 602 (11th Cir.).

16

King, 2013 WL 5881083, at *4 (5th Cir.); *Oberg*, 681 F.3d at 580 (4th Cir.); *Stoner*, 502 F.3d at 1121 (9th Cir.); *Sikkenga*, 472 F.3d at 718 (10th Cir.); *Lesinski*, 739 F.3d at 602 (11th Cir.).

17

Id. at 604.

18

See, e.g., *King*, 2013 WL 5881083, at * 4 (5th Cir.).

19

Id. at *5.

20

Id.

21

Id.

22

Belanger, 963 F.2d at 250 (9th Cir.) (applied in FCA context in *Stoner*, 502 F.3d at 1121).

23

Id.; *King*, 2013 WL 5881083, at * 4 (5th Cir.).

24

Belanger, 963 F.2d at 250 (9th Cir.); *King*, 2013 WL 5881083, at * 4 (5th Cir.).

25

Sikkenga, 472 F.3d at 718 (10th Cir.). The tests applied by the Fifth and Eleventh Circuits contain a similar factor - the source of funds for the entity. *King*, 2013 WL 5881083, at *4 (5th Cir.); *Lesinski*, 739 F.3d at 602 (11th Cir.).

26

Cook County, Ill. v. U.S. ex rel. Chandler, 538 U.S. 119, 122 (2003).

27

Id.

28

In *Cook County*, for example, a county-operated hospital was found to be subject to FCA liability in a case dealing with research grant fraud. *Id.*; see also

U.S. ex rel. Campbell v. Montgomery County Hosp. Dist., 70 Fed. App'x 237, 238 (5th Cir. 2003) (reversing dismissal of FCA complaint against county hospital in light of *Cook*). Last year, a whistleblower suit was unsealed accusing the Vanderbilt University Medical Center of violating the FCA. *D'Alessio et al. v. Vanderbilt University et al.*, No. 3:2011-cv-00467 (M.D. Tenn. 2011). As a private university, Vanderbilt will be unable to avail itself of the rule in *Stevens*.