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### Civil False Claims Act: Supreme Court Agrees to Hear Case Challenging FCA Suits against State Entities

The United States Supreme Court recently granted the State of Vermont's petition for a writ of certiorari, in a case challenging the propriety of False Claims Act suits against sovereign state entities. See *State of Vermont Agency of Natural Resources v. United States of America ex rel. Stevens*, 162 F.3d 195 (2nd Cir. 1998), cert. granted, 1999 WL 315530 (U.S. June 24, 1999) (No. 98-1828). The Supreme Court granted certiorari just one day after issuing a strongly worded but closely-decided affirmation of state sovereignty and the breadth of the Eleventh Amendment in *Alden v. Maine*, \_\_\_ U.S. \_\_\_\_ (1999). Supreme Court review is relatively rare in civil False Claims Act jurisprudence, with only two FCA decisions in the last twelve years. However, both cases, *United States ex rel. Schumer v. Hughes Aircraft*, 520 U.S. 939 (1997), and *United States v. Halper*, 490 U.S. 435 (1989), resulted in decisions favorable to defendants.

The State of Vermont's petition for a writ of certiorari presents two primary issues for the Court's review: 1) whether states are "persons" subject to liability under § 3729(a) of the False Claims Act (a question of statutory, rather than constitutional, interpretation), and 2) whether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting state. In a split decision, the Second Circuit ruled in *Stevens* that states are persons under the FCA, and that the doctrine of sovereign immunity does not protect states from such suits because the real party in interest in such suits is the federal government. The Supreme Court will apparently consider both issues in its review.

Judge Weinstein dissented, and also raised additional, more fundamental questions about the propriety of qui tam litigation in general, challenging: 1) the standing of qui tam relators to file suit when they have not suffered injury in fact under Article III of the Constitution; 2) the propriety of allowing private individuals to conduct litigation on the government's behalf under the Appointments Clause of Article II; and 3) the interference qui tam suits create with the Executive branch's duty under Article II to "take Care that the Laws be faithfully executed." The Article II and Article III challenges to the constitutionality of qui tam enforcement clearly have broader application, and would offer protection to non-state defendants from qui tam FCA litigation. These issues are currently before the Fifth Circuit in *United States ex rel. Riley v. St. Luke's Episcopal Hospital*, No. H-94-3996. These additional constitutional questions, however, were not presented in the State of Vermont's petition, and are therefore not now before the Court.

The Supreme Court's review was anticipated, in light of the significant split among the Circuit Courts of Appeal following the Fifth Circuit's ruling in *United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279 (5th Cir. 1999), and the D.C. Circuit's rulings in *United States ex rel. Long v. SCS Business & Technical Institute*, 173 F.3d 890 (D.C. Cir.), supplemented by 173 F.3d 870 (D.C. Cir. 1999). See FraudMail Alert No. 99-04-13. In *Foulds*, the court held that that the government has not "commenced or prosecuted" an action within the meaning of the Eleventh Amendment where it assumes a passive role and declines intervention in qui tam suits. In *Long*, the D.C. Circuit held that states are not "persons" subject to suit under the FCA. In addition to the Second Circuit's ruling in *Stevens*, contrary results on one or both of these issues have been reached in the Fourth, Eighth and Ninth Circuits.

The Supreme Court's very recent 5-4 decision in *Alden* held that the federal government does not have the power to subject nonconsenting states to suits for damages by private individuals in state courts. Although the underlying issues differ in *Alden* and in *Stevens*, the majority opinion, delivered by Justice Kennedy and joined by Justices O'Connor, Scalia and Thomas and the dissent, filed by Justice Souter and joined by Justices Stevens, Ginsburg and Breyer, provide insight into the Court's views on important federalism and policy issues that have equal application in qui tam suits against state sovereigns.

The *Alden* decision refers repeatedly to the need to preserve the "dignity" of state sovereigns, the importance of political accountability, and the need to preserve the principles of federalism. Justice Kennedy notes (in reasoning similar to that offered by the Long court) that "the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity. Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." *Alden*, slip. op. at 47. The Court also noted that the federal government had the power to file its own suit on behalf of state employees, yet chose not to do so: "The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that . . . the States have consented to suits of the first kind but not of the second." *Id.* at 51.

Additionally, the Kennedy opinion noted that private suits "threaten the financial integrity of the States . . . [A]n unlimited congressional power to authorize suits . . . to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources." *Id.* at 41. Again, the policy concerns raised in *Alden* could apply with equal force to qui tam litigation against states, where any recovery to the federal government (including bounties to relators and attorneys fees to relator's counsel) is paid for by state taxpayers.

State entities will enjoy a significant victory if the Supreme Court agrees with the results in the *Long* and/or *Foulds* decisions, although the Supreme Court's review is likely to have little, if any, impact on non-state entities. The *Alden* decision also states in dicta that the principle of sovereign "immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." This could have a debilitating effect upon a local government. For example, in the recent case of *United States ex rel. Garibaldi v. Orleans Parish School Board*, No. Civ. A. 96-0464, 1999 WL 250159 (E.D. La. Apr. 27, 1999), a municipal entity was found not to have

Eleventh Amendment immunity and was held liable for an FCA judgment of nearly \$23 million.

If you have questions regarding this area, or would like a copy of the decisions discussed, please contact us at [fraudmail@friedfrank.com](mailto:fraudmail@friedfrank.com) or (202) 639-7220.

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