

September 9, 2016

## First Circuit Adopts “Arm of the State” Test to Affirm Dismissal of FCA Complaint

In January 2016 in a matter of first impression, the First Circuit held that the University of Massachusetts Medical School is a state agency, and therefore not a “person” subject to liability in a False Claims Act (“FCA”) *qui tam* action. 31 U.S.C. §§ 3729-3733. In affirming the dismissal of *United States ex rel. Willette v. University of Massachusetts, Worcester*, the First Circuit held that the Eleventh Amendment “arm-of-the-state” test, discussed in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000), is the applicable measure of whether an entity is a state agency for FCA purposes. This decision is consistent with the approach adopted by the other Circuit Courts to have considered the issue.

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### Background

Relator Michael A. Willette worked at the Center for Healthcare Financing (“CHCF”) at the University of Massachusetts Medical School (“UMMS”) for fourteen years beginning in 2000. CHCF recovers funds from third parties such as private insurers, or from the estates of deceased beneficiaries, to reimburse Medicaid expenditures paid by the Commonwealth of Massachusetts and the federal government. CHCF is a division of UMMS and is known as “Commonwealth Medicine” but is not separately incorporated. In 2013, Willette was appointed the personal representative of Leo Villani, another CHCF employee, who had passed away. In reviewing estate documents, Willette discovered that Villani had stolen nearly \$4,000,000 in CHCF collected funds. Willette claimed that after he reported the fraud, his superiors retaliated against him by excluding him from a meeting, denying him access to his work computer and departmental software while the investigation was ongoing, and demeaning him verbally. Willette sued UMMS and Villani’s estate in a *qui tam* action alleging violations of the FCA and its Massachusetts counterpart.<sup>1</sup> UMMS moved to dismiss Willette’s second amended complaint, and Willette cross-moved for leave to file a third amended complaint, seeking to add Commonwealth Medicine and several employees or former employees of UMMS or CHCF as defendants. The District Court dismissed Willette’s FCA claims against UMMS.

In granting UMMS’s motion, the District Court relied on the Supreme Court’s holding in *Stevens* that states cannot be sued in a private action under the FCA. The District Court applied the Eleventh Amendment’s arm-of-the-state test to determine that UMMS was a state agency and could not be subject to suit under the FCA because it was not a “person.” Subsequently, the District Court denied Willette’s motion to file a third amended complaint. Willette appealed.

### First Circuit’s Holding

Like the District Court and every other Circuit Court that has confronted this question, the First Circuit applied the arm-of-the-state test which was originally developed to determine whether unconsenting states can be sued in the Eleventh Amendment context.<sup>2</sup> Under the FCA, “any person” who submits a false claim can be subject to liability,

<sup>1</sup> Mass. Gen. Laws ch. 12, § 5

<sup>2</sup> See, e.g., *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 775 (6th Cir. 2015); *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 601-02 (11th Cir.), cert. denied, 134 S.Ct.2312 (2014); *United States ex rel. Oberg v. Ky. Higher Educ.*

but the statute does not define the term “person.” 31 U.S.C. § 3729. In *Stevens*, the Supreme Court determined that a “person” does not include the sovereign but did not provide a concrete guideline for determining whether an entity is a “person” or a “sovereign.” 529 U.S. at 787-88. The Court did, however, discuss the similarities between the FCA and the Eleventh Amendment, *id.* at 779-80, and the lower courts have since used this commentary to apply the arm-of-the-state test to FCA “person” analysis. Under this test, the court first determines whether the state has indicated by statute or by the organization of the entity that the state and the entity share the state’s sovereign immunity. Next, the court will review a variety of additional factors, including the degree of state control over the entity, the way the entity is described and treated by its enabling statute and other state entities, how state courts have viewed the entity, the functions performed by the entity and whether the entity is separately incorporated. If this analysis is conclusive, the inquiry ends. However, if it is not, the court will consider whether the state’s treasury would be at risk if there is an adverse judgment.

The First Circuit considered each arm-of-the-state factor, including: (1) that universities are usually considered arms of the state, (2) that CHCF is not separately incorporated, (3) the elaborate systems of control that the Commonwealth has over the University system and (4) the state-agency treatment the University has received from the Supreme Judicial Court. Ultimately, the court held that for FCA purposes, UMMS and the Commonwealth are indistinguishable. The court determined that the first prong of the arm-of-the-state test was conclusive and held that UMMS was an arm of the state, and was therefore not a “person” under the FCA and could not be subject to suit under the FCA. Accordingly, the court affirmed the District Court.

### Implications of the Court's Decision

The First Circuit’s decision to join rather than depart from the approach adopted by the other circuits that have considered this question shows a developing consensus among the Circuits on this issue. State higher education institutions, affiliated entities and other entities that could be viewed as the state should look to this when evaluating their status and risk.

If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or an attorney in our [False Claims Act](#) practice.

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*Student Loan Corp.*, 681 F.3d 575, 579-80 (4th Cir. 2012); *Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d 1116, 1121-22 (9th Cir. 2007); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006); *United States ex rel. Adrian v. Regents of the Univ. of Cal.*, 363 F.3d 398, 401-02 (5th Cir. 2004).