

Application of False Claims Act Limited By First Circuit Court of Appeals

On January 9, 2017, the *Supreme Court of the United States* denied certiorari in the case *U.S. ex rel. Willette v. University of Massachusetts (Willette)*,¹ a case from the U.S. Court of Appeals for the First Circuit holding that the *University of Massachusetts Medical School (UMMS)* is “not a ‘person’ subject to suit under the [False Claims Act] FCA” because it serves as an “arm of the state,” thereby affirming the lower court’s dismissal of a suit against the educational institution by a private party under this statutory scheme.² Because the case limits the ability of *qui tam* plaintiffs to bring lawsuits against healthcare providers under the FCA, the decision may have a significant impact on the regulatory risk held by state-affiliated healthcare enterprises, given that over \$1.8 billion of the \$3.3 billion recovered by the *U.S. Department of Justice (DOJ)* and *U.S. Department of Health and Human Services (HHS)* due to healthcare fraud and abuse stemmed from *qui tam* actions under the FCA.³ This *Health Capital Topics* articles provides a summary of the *Willette* case, and discusses the potential impact the case may have on the regulatory environment within the healthcare industry.

In *Willette*, a relator working in UMMS’s *Center for Health Care Financing (CHCF)* filed suit under the FCA against UMMS, alleging that his deceased supervisor allocated to his personal accounts nearly \$4 million in payments recovered by CHCF.⁴ One of the functions of CHCF, a division within UMMS, was to identify “third-party entities that may be responsible for the cost of health care services provided to certain patients,”⁵ and often collected funds from private insurers and estates of deceased persons to reimburse Medicaid expenditures paid out by Massachusetts or the federal government.⁶ Upon presenting this fraud to his supervisors, the relator claims that UMMS retaliated against him by restricting access to his work computer and “verbally demean[ing]” him.⁷

The relator filed suit in 2013, alleging violations of the FCA, as well as its Massachusetts counterpart.⁸ Upon UMMS’s filing of a motion to dismiss, the U.S. District Court for the District of Massachusetts dismissed the claim on the basis that “states cannot be sued in a private action under the FCA,”⁹ and ruled that UMMS was an “arm-of-the-state” and therefore not subject to FCA actions brought by a private party.¹⁰

On appeal, the U.S. Court of Appeals for the First Circuit affirmed the lower court’s dismissal of the case, holding

that UMMS is structured as an “arm of the state and, thus, is not a ‘person’ subject to suit under the FCA.”¹¹ To determine whether UMMS qualified as an “arm of the state,” the First Circuit employed a two-part test:

- (1) “[I]f the state has indicated an intention — either explicitly by statute or implicitly through the structure of the entity — that the entity share the state’s sovereign immunity”;¹² and,
- (2) If the above question is “inconclusive, the court must proceed to the second stage and consider whether the state’s treasury would be at risk in the event of an adverse judgment.”¹³

Utilizing this test, the First Circuit found that UMMS is an “arm of the state” based on six (6) main points:

- (1) UMMS is not separately incorporated, but under Massachusetts law, is “a public institution of higher learning within the system of public higher education”;¹⁴
- (2) The state university system in Massachusetts, of which UMMS is a subdivision, is substantially governed by state-appointed officials, in that:
 - (a) The system “is governed by a board of trustees with nineteen voting members, sixteen of whom are direct gubernatorial appointees”;¹⁵ and,
 - (b) The governor of Massachusetts selects the chair of this board;¹⁶
- (3) The UMMS budget is subject to review and approval by the Massachusetts secretary of education and the Massachusetts board of higher education;¹⁷
- (4) The state government provides funding to “satisfy judgments or settlements for which UMMS is responsible”;¹⁸
- (5) UMMS is subject to “substantial state supervision in carrying out its educational mission,”¹⁹ in that:
 - (a) The following items for UMMS must be approved by either, or both, the Massachusetts secretary of education and the Massachusetts board of higher education:
 - (i) “Mission statement”;

- (ii) “Admission standards”; and,
- (iii) “Proposed Instructional Programs”;²⁰
- (b) UMMS property “is considered state property”;²¹ and,
- (c) UMMS employees “are designated as ‘employees of the commonwealth’” of Massachusetts;²² and,
- (6) State court declarations that the University of Massachusetts, which includes UMMS, and the state are “one and the same party, namely the Commonwealth of Massachusetts.”²³

Additionally, the First Circuit rejected the relator’s argument that CHCF should be “carved out” of UMMS and treated as a “for-profit” entity under the FCA, based on two main points:

- (1) CHCF is not a part of UMMS’s “clinical division,” which was spun off under a 1997 Massachusetts law into a non-profit corporation;²⁴ and,
- (2) The “mere fact that a governmental agency generates revenue for the state does not deprive the agency of arm-of-the-state status.”²⁵

For these reasons, the First Circuit held that the U.S. District Court for the District of Massachusetts properly dismissed the FCA action by the relator against UMMS because UMMS qualifies as an “arm of the state” and thereby is not a “‘person’ subject to suit under the FCA.”²⁶

The *Willette* case serves as an expansion of the “arm-of-the-state” analysis under the FCA previously applied by other circuits.²⁷ For example, in 2013, the U.S. Court of Appeals for the Fifth Circuit ruled in *U.S. ex rel. King v. University of Texas Health Science Center-Houston (King)* ruled that the state university medical center could not be sued under the FCA for alleged fraud involving federal research grants, because the enterprise qualified as an “arm of the state” that was immune from FCA liability.²⁸ The *Willette* and *King* cases highlight the importance of not only reviewing the merits of a FCA action, but also whether or not the parties involved may be sued under this scheme, under the premise that state-affiliated healthcare providers may be able to qualify as an “arm of the state” and thus evade FCA scrutiny and liability.²⁹

1 “U.S. ex rel. *Willette v. University of Massachusetts*” Case No. 15-1239 (1st Cir. January 27, 2016), *cert. denied* No. 15-1437 (U.S. January 9, 2017).
 2 *Ibid.*, p. 18.
 3 “Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2016” U.S. Department of Health and Human Services & U.S. Department of Justice, January 2017, <https://oig.hhs.gov/publications/docs/hcfac/FY2016-hcfac.pdf> (Accessed 1/31/17) p. 3, 64.
 4 Case No. 15-1239, p. 4.
 5 “U.S. ex rel. *Willette v. University of Massachusetts*” Case No. 4:13-cv-40066-TSH (D. Mass., January 21, 2015) Memorandum and Order on Defendant University of Massachusetts Medical School’s Motion to Dismiss and Plaintiff-Relator’s Cross-Motion for Leave to File a Third Amended Complaint, p. 2.
 6 Case No. 15-1239, p. 3-4.
 7 *Ibid.*, p. 4.
 8 Case No. 4:13-cv-40066-TSH, p. 4.
 9 Case No. 15-1239, p. 5.
 10 Case No. 4:13-cv-40066-TSH, p. 6.
 11 Case No. 15-1239, p. 15.
 12 *Ibid.*, p. 8.
 13 *Ibid.*, p. 9.
 14 *Ibid.*, p. 11.
 15 *Ibid.*
 16 *Ibid.*

17 *Ibid.*, p. 12.
 18 *Ibid.*, p. 13.
 19 *Ibid.*
 20 *Ibid.*
 21 *Ibid.*
 22 *Ibid.*
 23 *Ibid.*, p. 14, quoting “*Wong v. University of Massachusetts*, 438 Mass. 29, 30 (note 3) (Mass. 2002).
 24 *Ibid.*, p. 15.
 25 *Ibid.*, p. 16.
 26 *Ibid.*, p. 18.
 27 “Supreme Court Won’t Review Decision Finding Public University Can’t be Sued under FCA” AHLA Weekly, January 13, 2017, <https://www.healthlawyers.org/News/Health%20Lawyers%20Weekly/Pages/2017/January%202017/January%2013%202017/Supreme-Court-Wont-Review-Decision-Finding-Public-University-Cant-Be-Sued-Under-FCA.aspx> (Accessed 2/2/17).
 28 “U.S. ex rel. *King v. University of Texas Health Science Center-Houston*” Case No. 12-20795 (5th Cir. November 4, 2013) Opinion, p. 14.
 29 “University is ‘Arm-of-the-State,’ Can’t be Sued Under FCA” By Emma R. Cecil, Polsinelli, February 10, 2016, <http://www.polsinellifca.com/blog/2016/2/8/university-is-arm-of-the-state-cant-be-sued-under-fca> (Accessed 2/2/17).