THE FALSE CLAIMS ACT AND INDIAN TRIBES: TO WHAT EXTENT DOES SOVEREIGN IMMUNITY PROTECT TRIBES AND THEIR BUSINESS ACTIVITIES?

EXECUTIVE SUMMARY: DAHLSTROM V. SAUK-SUIATTLE INDIAN TRIBE, NO. C16-0053JLR, 2017 WL 1064399 (W.D. WASH. MAR. 21, 2017)

On March 21, 2017, a federal judge agreed with the Sauk-Suiattle Indian tribe (the "Sauk-Suiattle" or the "Tribe") that it could not be sued under the federal False Claims Act ("FCA") due to the tribe's immunity from suit as a sovereign nation. The FCA prohibits any person from knowingly presenting or causing to be presented to the United States government a false or fraudulent claim for payment or approval and is a powerful tool in the government's arsenal to fight fraud and abuse, particularly in the health care arena.[1] The U.S. District Court for the Western District of Washington State (the "Court") did, however, permit individuals, including the director of a health clinic and the clinic itself, to be sued for allegedly submitting false claims for payment to the federal government and the state of Washington. This case is an important reminder to tribes and their attorneys, especially those involved in health care, to consider whether their tribes' leaders, health care providers and clinics are sufficiently protected from these increasingly prevalent lawsuits. Tribes and their counsel should consider how best to structure tribal businesses and protect individual employees and agents in light of this and other relevant cases.

SUMMARY OF SAUK-SUIATTLE ORDER

The Court granted a motion to dismiss a *qui tam* (i.e., whistleblower) FCA case against the Sauk-Suiattle holding that the Tribe was immune from suit based on tribal sovereign immunity. The Court denied the motion with respect to a co-defendant health clinic and individual co-defendant owners/director[2] of the health clinic, ruling that the sovereign immunity defense did not apply to the clinic or the individuals. The case was dropped with respect to the Sauk-Suiattle, but it will proceed against the health clinic and its owners and director.

THE CASE DETAILS

Facts and Claim. On January 12, 2016, Raju Dahlstrom filed a complaint under seal against the Sauk-Suiattle, a federally recognized Indian tribe located in Washington State; Community Natural Medicine, PLLC, a tribe-affiliated health clinic ("CNM"); and individuals Christine Morlock, Robert Morlack and Ronda Metcalf (collectively, the "Defendants") under the FCA[3] and the Washington State Medical Fraud and False Claims Act.[4]

Dahlstrom was a Sauk-Suiattle employee hired in 2010 as a case manager for CNM. He was later promoted to director. He was terminated from employment on December 8, 2015. Dahlstrom alleged that the Defendants knowingly presented or caused to be presented false or fraudulent claims to the U.S. and to the state of Washington by (1) approving payments of cosmetic dentistry for two individuals; (2) allowing an individual to use vaccines specifically donated to the Sauk-Suiattle for that individual's own private business; (3) fraudulently certifying compliance with the Indian Health Service Loan Repayment Program; (4) using government funds to secretly purchase land originally intended for residential care for children and, after acquiring that land, dropping the programs for children; and (5) fraudulently using government resources designated for health care facility costs.

On September 16, 2016, the U.S. and Washington State notified the Court of their decision not to pursue the case against the Sauk-Suiattle, and the Court ordered Dahlstrom to proceed against the Sauk-Suiattle on his own. On January 12, 2017, the Defendants filed a motion to dismiss arguing that the Defendants were immune from Dahlstrom's claims based on the Tribe's sovereign immunity. Dahlstrom replied that the sovereign immunity defense does not exist where a lawsuit is brought on behalf of the U.S. and, further, that the term "person" in the FCA includes tribal entities.

Decision. The Court granted the motion to dismiss with respect to Dahlstrom's claims against the Tribe. However, it denied the motion with respect to the claims against CNM and the individual Defendants finding that while the Tribe was exempt from suit based on tribal sovereign immunity, the doctrine of sovereign immunity did not extend to CNM or to the individuals.

Analysis. The Court ruled that unless a tribe has given up its right not to be sued or Congress specifically has inserted language in a federal statute stating that a tribe can be subject to a lawsuit, a tribe like the Sauk-Suiattle cannot be sued under a particular statute because it is immune from suit as a sovereign nation. The judge in this case ruled that the FCA was not written to permit a lawsuit against an Indian tribe.

In analyzing the Defendants' sovereign immunity defense, the Court stated, "'[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'"[5] Further, tribal [sovereign] immunity is "'a matter of federal law and is not subject to diminution by the States.'"[6] Like a state, a Native American tribe is "'a sovereign that does not fall within the definition of "person" under the False Claims Act.'"[7] Since the Sauk-Suiattle is a federally recognized Indian Tribe, the Court reasoned, the Sauk-Suiattle was immune from Dahlstrom's FCA suit.

Next, the Court looked at whether CNM could be sued under the FCA. The Court explained that while the doctrine of sovereign immunity applies to a tribe, the doctrine applies to entities with a nexus to a tribe only if the entity can be shown by a preponderance of the evidence (i.e., more likely than not) to be an "arm of the tribe." The Court summarized a five-factor test articulated by the Ninth Circuit[8] to determine whether a business functions as an "arm of the tribe" so that it is entitled to sovereign immunity. Ninth Circuit courts examined:

1. The method of creation of the economic entity;
2. The entity's purpose;
3. The entity's structure, ownership and management, including the amount of control the tribe has over the entities;
4. The tribe's intent with respect to the sharing of its sovereign immunity; and
5. The financial relationship between the tribe and the entity.

After reviewing the parties' pleadings and finding some inconsistencies in the descriptions of CNM's relationship to the Tribe, the Court concluded that the Defendants had not met their burden of establishing that CNM is an arm of the Tribe. This means the plaintiff in the complaint, Raju Dahlstrom, could proceed against CNM even though the Sauk-Suiattle was immune from suit under the Court's ruling.

Finally, the Court looked at whether the individual defendants who worked for the tribe and clinic could be sued under the FCA. The Court rejected their argument that they were covered by the Tribe's sovereign immunity as tribal employees, agents or officials acting in their official tribal capacity. Under *Stoner v. Santa Clara County Office of Education*[9], state employees may be sued under the FCA even for "'actions taken in the course of their official duties.'"[10] The *Stoner* Court cited *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*[11] for the proposition that *qui tam* suits may be brought against individual state employees "'because such [actions] seek damages from the individual defendants rather than the state treasury."[12] The Court concluded, just as the reasoning of *Stevens* extended to provide tribes with sovereign immunity, "the reasoning in *Stoner* extend[ed] to permit suits against individual tribal employees for 'actions taken in the course of official duties.'"[i][13] Accordingly, the Court held that the individual Defendants were not immune from suit under the doctrine of sovereign immunity.

PRACTICAL TAKEAWAYS AND RECOMMENDATIONS

Tribal leadership and their counsel should take note of the *Dahlstrom* case for several reasons:

1. While sovereign immunity may be a well established defense to a FCA action brought against an Indian tribe as demonstrated in *Dahlstrom*, that immunity *does not necessarily* extend to tribal businesses, including health care-related businesses. Tribes located in the geographic area covered by the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) and desiring to extend their sovereign immunity to tribe-affiliated businesses, and entities should structure those businesses/entities to meet the "arm of the tribe" test articulated by the Ninth Circuit. Tribes elsewhere should seek guidance about the controlling case law in their jurisdictions, to determine how best to structure businesses or entities to protect their sovereign immunity defense rights.
2. *Dahlstrom* is yet another FCA case holding that a tribe's sovereign immunity does not extend to individuals acting on behalf of a tribe as employees, agents or officials. In the non-FCA realm, the U.S. Supreme Court just ruled in *Lewis v Clark**[14]*** that a Mohegan Tribal Gaming Authority employed limousine driver was *not* entitled to tribal immunity related to a lawsuit over a motor vehicle accident, overturning a Connecticut Supreme Court decision upholding a sovereign immunity defense for the driver. In light of the new *Dahlstrom* and *Lewis* decisions, tribes and their counsel must consider options for protecting individuals who work for a tribe in good faith but who nonetheless are sued in their individual capacities for alleged wrong-doing. An individual working within the scope of their employment for a tribal business can be subject to potentially ruinous financial liability if sued under the FCA. Tribes may want to carefully review insurance options to cover individuals and tribal businesses. Tribes should also look at their own laws and contracts to understand indemnification and defense coverage issues in the event individuals and businesses are sued under the FCA.

3. Tribal councils and lawyers assisting tribes should pay close attention to the FCA. In fiscal year 2016 alone, the U.S. Department of Justice recovered over $4.7 billion from FCA cases.[15] Tribes and their leaders and providers are becoming more frequent targets of these actions. Often tribes are vulnerable to significant exposure under the FCA where some lack sufficient funding for robust protective compliance programs or the tribe's long-time and community-oriented practices vary from federal legal requirements. Council members, health care committee and board members, providers and leaders in tribal health currently risk their own personal assets in these expensive cases. Tribes should consider utilizing some resources to expand compliance programs and to engage counsel to do a FCA risk assessment of their governmental billing practices.

4. In a case footnote, the Court noted that its dismissal of the case against the Sauk-Suiattle involved a FCA lawsuit where the U.S. government elected *not* to intervene in the case filed by the plaintiff Dahlstrom, leaving open the question whether the Court would have dismissed the case against the Sauk-Suiattle *if the U.S. had intervened* (i.e., joined) in the case.[16] This very issue was addressed by an Oregon federal district court FCA case decided on April 11, 2017[17], in which the Oregon court held that a state university was immune from suit under the FCA as an "arm of the state" under circumstances where the federal government intervened in the suit. The Oregon Court in *Doughty v. Oregon Health & Sciences. Univ*. concluded that the U.S. may not bring a FCA action against an arm of the state and that a sovereign immunity defense is not limited to FCA qui tam cases brought by private parties. This is a very positive development.

Tribes and their counsel should watch for developments in the Oregon case and in other FCA cases directed at Indian tribes.

If you have any questions or would like additional information about this topic, please contact:

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[1] For a more complete background about the FCA, please request a copy of *Healthcare and the False Claims Act, 2016*, Honig, et al., Healthlaw Publishing LLC, 2017, at healthlawpublishing.com.

[2] Defendants Christin Marie Jody Morlock, N.D. and Robert Larry Morlock own Community Natural Medicine, PLLC. ("CNM") Ronda Kay Metcalf is the Director of the Indian Health Services and of CNM. (*Dahlstrom v. Sauk-Suiattle Indian Tribe of Washington*, Order Denying Motion for TRO (Jan. 31, 2017)).

[3] 31 U.S.C. §§ 3729-33.

[4] RCW 74.66.005 et seq.

[5] *Dahlstrom v. Sauk-Suiattle Tribe*, 2017 WL 1064399 (U.S. Dist. Ct. W.D. WA)(Mar. 21, 2017) (citing Kiowa *Tribe of Okla. V. Mfg. Techs. Inc.,* 523 U.S. 751,754 (1998); *Three Affiliated Tribes of Fort Berthold* Reservation v. Wold Eng'g, 476 U.S. 877 (1986); *Santa Clara v. Martinez*, 436 U.S. 49 (1978); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940)).

[6] Id.

[7] *Howard ex re. United States v. Shoshone-Paiute Tribes of the Duck Valley Indian Reservation*, 608 Fed. Appx. 468 (9th Cir. 2015).

[8] *White v. Univ. of Cal.,* 765 F.3d 1010, 1025 (9th Cir. 2014).

[9] *Stoner v. Santa Clara County Office of Education* 502 F.3d 1116, 1125 (9th Circ. 2007).

[10] Id.

[11] *Vt. Agency of Nat. Res. v. United States ex rel. Stevens* 529 U.S. 765, 787 (2000).

[12] *Stoner* Op. cit.

[13] *Dahlstrom* Op. cit. @4 citing Stoner Op. cit. at 1125.

[14] *Lewis v. Clarke*, No. 15-1500, slip op. (U.S. Ap. 25, 2017).

[15] Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016

Third Highest Annual Recovery in FCA History from Justice News (Dec. 14, 2016) found at: https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.

[16] Fn 2 of *Dahlstrom v. Sauk-Suiattle Indian Tribe*.

[17] *United States ex rel. Doughty v. Oregon Health & Sciences Univ.*, Case No. 3:13-CV-01306-BR (D. Or. Apr. 11, 2017).