

# STATE OF ALASKA

**DEPARTMENT OF LAW**  
*OFFICE OF THE ATTORNEY GENERAL*

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February 22, 2010

James B. Gottstein, Esq.  
Law Project for Psychiatric Rights, Inc.  
406 G Street, Suite 206  
Anchorage, Alaska 99501

Re: *U.S. ex rel. LPPR v. Matsutani, et al.*

Dear Mr. Gottstein:

The Law Project for Psychiatric Rights (LPPR) has named four state officials as defendants in its False Claims Act case alleging Medicaid fraud. These officials (Department of Health and Social Services Commissioner William Hogan, and Division Directors Tammy Sandoval, Steve McComb, and William Streur) have been included due to their official duties in administering Alaska's Medicaid program. However, as state officials performing state functions, these officials enjoy sovereign immunity from liability under the False Claims Act. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 788 (2000); *Bly-McGee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001). The Alaska Department of Law will be representing these four state officials and will be filing the enclosed Motion to Dismiss the claims against them on March 1, 2010, if the LPPR does not voluntarily dismiss them from the case this week. Under the False Claims Act, the court may award reasonable attorney's fees and expenses to prevailing defendants. 31 U.S.C. § 3730(d)(4). The State of Alaska will agree not to seek any fees and expenses if the LPPR dismisses the state defendants and motion practice can be avoided.

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Sincerely,

DANIEL S. SULLIVAN  
ATTORNEY GENERAL

By:   
Stacie L. Kraly  
Chief Assistant Attorney General

R. Scott Taylor  
Senior Assistant Attorney General

RST:cb  
Enclosure



False Claims Act does not subject a State (or state agency) to liability in such actions.”<sup>1</sup>

The claims against these four state officials are necessarily barred by *Stevens*.

Among the many defendants named by plaintiff, the relator Law Project for Psychiatric Rights, are: William Hogan, Commissioner, Alaska Department of Health and Social Services; Tammy Sandoval, Director, Alaska Office of Children’s Services; Steve McComb, Director, Alaska Division of Juvenile Justice; and William Streur, Director, Alaska Division of Health Care Services.<sup>2</sup> Although the caption of the relator’s complaint states that these Alaska state officials are being sued “individually” as well as in their official capacity, the descriptions of the parties and the allegations against them in the body of the complaint are limited to their official capacities and duties as state employees.<sup>3</sup>

Count 1 of the complaint alleges that defendants “Hogan and Struer are ... liable under the False Claims Act for Alaska authorizing false claims for reimbursement by the Government ...” and “in having Alaska authorize claims for reimbursement of outpatient pediatric prescriptions for psychotropic drugs by Medicaid and/or CHIP that are not for an indication approved by the FDA or supported by one or more of the Compendia ....”<sup>4</sup> Count 2 of the complaint alleges that defendants Sandoval and McComb “are liable under the False Claims Act” because they “administer programs that

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<sup>1</sup> 529 U.S. 765, 788 (2000).

<sup>2</sup> Complaint at p. 1.

<sup>3</sup> Complaint at ¶¶ 11 – 14 and ¶¶ 188 – 190.

<sup>4</sup> Complaint at ¶¶ 188 – 189.

have submitted and continue to submit, or have caused and continue to cause to be submitted, or both, claims to Medicaid and/or CHIP for reimbursement of outpatient pediatric prescriptions for psychotropic drugs that are not for an indication that is approved by the FDA or supported by one or more of the Compendia ....”<sup>5</sup> These allegations implicate only official state actions of these four defendants in “authorizing” or “submitting” claims to Medicaid and/or CHIP.

The United States Supreme Court held in *Stevens*<sup>6</sup> that a state or state agency is not a “person” within the meaning of the False Claims Act and, therefore, not subject to liability in *qui tam* suits brought by private parties.<sup>7</sup> *Qui tam* suits against state officials and employees acting in their official capacity are similarly barred. In *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*,<sup>8</sup> the appellate court upheld the district court’s dismissal, under *Stevens*, of a *qui tam* suit alleging Medicaid fraud against Gary Gesaman, an official of the Iowa Department of Human Services who administered a state Medicaid program:

Since a damage claim against a state official in his official capacity is a suit against the state, *see Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), a state employee sued for money damages for actions taken in an official capacity stands in the shoes of the sovereign and is not a person under the FCA. *See Stevens*, 529 U.S. at 788, 120 S.Ct. 1858. The District Court did not

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<sup>5</sup> Complaint at ¶ 190.

<sup>6</sup> 529 U.S. 765 (2000).

<sup>7</sup> *Id.* at 787-88.

<sup>8</sup> 269 F.3d 932 (8th Cir. 2001), cert. denied, 536 U.S. 925 (2002).

err in dismissing the damage claim against Gesaman in his official capacity.<sup>9</sup>

In Counts 1 and 2 of its complaint, Law Project for Psychiatric Rights has alleged Medicaid fraud under the FCA against defendants William Hogan, Tammy Sandoval, Steve McComb, and William Streur for actions taken in their official capacities in “authorizing” or “submitting” claims to Medicaid and/or CHIP. The complaint contains no allegations that these Alaska state officials were acting in anything other than an official capacity. Accordingly, these four defendants stand in the shoes of the sovereign and cannot be subject to liability under the False Claims Act. Under *Stevens*, Counts 1 and 2 of the Complaint fail to state a claim under the FCA. Defendants Hogan, Sandoval, McComb, and Streur respectfully request that these claims be dismissed and that they be dismissed as defendants in this case.

DATED this 22<sup>nd</sup> day of February, 2010, at Anchorage, Alaska.

DANIEL S. SULLIVAN  
ATTORNEY GENERAL

By: /s/ Stacie L. Kraly  
Chief Assistant Attorney General  
Alaska Bar No. 9406040

/s/ R. Scott Taylor  
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<sup>9</sup> *Id.* at 936. See also *Bly-McGee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (dismissing qui tam suit against state’s attorneys for conduct related to their official litigation duties); *Alexander v. Gilmore*, 202 F. Supp. 2d 478 (E.D. Va. 2002) (dismissing suit against officials of state department of corrections where no facts alleged to suggest that officials were acting in anything other than official capacity).