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# Lessons From the Frontlines

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**The Perfect Storm: How Patience, Perseverance, and Politics  
Led to the Passage of the Chicago False Claims Act**

# THE PERFECT STORM: How Patience, Perverserance, And Politics Led To The Passage Of The Chicago False Claims Act\*

*Steven H. Cohen*  
*Cohen Law Group\**

## INTRODUCTION

The past year has seen the onset of the next generation of false claims/qui tam legislation—those ordinances attacking fraudulent practices at the local level. First, in November 2004, Chicago's City Council passed the Chicago False Claims Act to become the first major city to pass a false claims law. Then, in May 2005, Mayor Michael Bloomberg signed into law the New York City False Claims Act.

The Chicago False Claims Act is generally patterned after the federal False Claims Act (the "FCA") and its Illinois counterpart, the Whistleblower Reward and Protection Act (the "Illinois FCA"). The Chicago law also has the same intent as the federal and Illinois FCAs: to empower and protect private individuals who take the bold step of coming forward as whistleblowers.

However, because of the political realities that gave rise to its passage, the Chicago legislation differs from the existing federal and state laws in key ways. This includes both the political environment that shaped the legislative process and the shifting political dynamics that occurred during the legislative campaign. Understanding and adjusting to these political realities will help the Relators' Bar both secure effective anti-fraud legislation in other states and municipalities and make sure those laws are effectively used.

## THE GENESIS OF THE CHICAGO ORDINANCE

Alderman Joe Moore, the primary sponsor of the Chicago False Claims Act, first conceived of a Chicago whistleblower bill almost two years before the final ordinance was passed. Moore, who has spent nearly fifteen years on the Chicago City Council, is a highly regarded independent, reform-minded Democrat. The rest of the Council is made up of an "insider" Democrat (and one Republican) aligned with Mayor Richard M. Daley and "outsider" independent Democrats who are not part of the Mayor's inner circle.

Years of Democratic Party Machine-run politics has produced the political reality that the Mayor still exerts overwhelming influence on the Council's composition and leadership, and correspondingly, the Council's legislation, even though Chicago is governed under a weak-Mayor/strong-Council construct. As an independent, Moore

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\* If only the Chicago Cubs could have such good fortune.

+ The author wishes to thank Alderman Joe Moore for his insights for this article, as well as his dedication to getting the Chicago FCA passed. The author also would like to thank Beth Anne Yeager for her invaluable support and assistance with this article.

has only limited ability to influence the legislative agenda of a Council that is closely aligned with the Mayor's Office.

In February 2004, Moore introduced an ordinance that contained both an anti-retaliation provision and monetary incentives for blowing the whistle on fraud and abuse of City monies. The Mayor's Office indicated that it was unwilling to support any proposed legislation that allowed for monetary incentives to whistleblowers; instead, offering a "compromise" bill that only contained a whistleblower protection provision. Moore rejected this compromise as too weak. Notwithstanding the persistence of its proponents, without the backing of the Mayor or the Council leadership, Moore's bill was quickly relegated to the bottom of the Council's legislative agenda.

However, in late 2004, several events converged to set up the opportunity to pass a comprehensive False Claims Act: media exposure of a scandal involving private contractors with political connections bilking the City of millions of dollars, an embarrassed Mayor's Office motivated to support reform, the perseverance of Moore and others advocating anti-fraud legislation, and the passing of the Chicago budget for Fiscal Year 2005.

According to a January 2004 *Chicago Sun-Times* report, the City was paying up to \$94 an hour for private trucks that often sat idle. Known as the "Hired Trucks scandal," the *Sun Times* reports tied some of the trucking companies to officials in Mayor Daley's administration. A federal investigation ensued, resulting in criminal charges and convictions. Interestingly, at the end of June 2005, another report indicated that one of the Aldermen was related to a trucking firm that received more than a million dollars from the City's Hired Trucks Program.

The Hired Trucks scandal prompted—to say the least—the Mayor's office to show that his administration was serious about uncovering and cleaning up fraud and abuse involving city contracts. One avenue was for Mayor Daley to publicly endorse the idea of a whistleblower statute. However, Moore and other proponents saw the scandal as a unique opportunity to push not only for a strong whistleblower protection ordinance but also a false claims/*qui tam* law.

Their position was strengthened when, in November 2004, as the City Council was preparing to vote on the Mayor's proposed 2005 City Budget, some Council members voiced dissension precipitated by the reports of the waste of city monies. The Mayor's office contacted Moore and agreed to co-sponsor a comprehensive Chicago False Claims Act, which included both whistleblower and *qui tam* provisions. Within days, the ordinance passed unanimously out of the Budget Committee and was on the Council floor for a passing vote the day after that. The law was passed without debate, without any committee hearings or testimony, and with no legislative record.

The passage of the Chicago False Claims Act is a prime example of how legislative efforts must draw from, and even exploit, political circumstances to succeed. In Chicago, this led to the passage of a potentially effective *qui tam* law that will go a long way in exposing and eliminating the seamier side of the way private companies transact business with the City of Chicago.

## A PRIMER ON THE CHICAGO FALSE CLAIMS ACT

The Chicago False Claims Act has three components: Two chapters added to the Municipal Code of Chicago (Chapter 1-21, "False Statements," and Chapter 1-22, "False Claims") and an amendment adding a new section on "Whistle blower protection," section 2-152-171, to an entirely different Chapter (Chapter 2-152).

The False Claims part, Chapter 1-22, is the most recognizable to relators' counsel as it closely follows the Illinois' FCA, known as the Whistleblower Reward and Protection Act,<sup>1</sup> which, in turn, closely follows the federal FCA.<sup>2</sup> The definition of "false claim" is the same,<sup>3</sup> as are the definitions of "claim," "knowing" and "knowingly."<sup>4</sup> "Investigation" is the same under both the Illinois and Chicago versions.<sup>5</sup> And, the penalties are the same.<sup>6</sup> However, neither the Chicago nor Illinois laws followed the federal act's reduced penalty for self-disclosure.<sup>7</sup>

Also familiar to relators' counsel are the *qui tam* provisions. A private action may be brought in the name of the City of Chicago, upon the filing the complaint *in camera* and under seal, and serving the city attorney (known as Corporation Counsel) a copy of the complaint and a written disclosure statement.<sup>8</sup> The city initially has sixty days in which to decide to intervene and proceed or decline, and the court may extend that time for "good cause."<sup>9</sup>

The rights of the *qui tam* plaintiff, or the "relator," are also the same, including the percentage of the proceeds recovered, and an award of reasonable expenses, plus attorneys' fees and costs.<sup>10</sup> The prohibition against cases which are based on public disclosures unless the *qui tam* plaintiff is the original source is also the same.<sup>11</sup> Like the federal and state FCA laws, Chicago's ordinance contains a six-year statute of limitations, unless the responsible government official knew or should have known about the conduct, in which case it is a three-year statute of limitations, with a ten-year statute of repose.<sup>12</sup> The preponderance burden of proof also follows the state and federal FCAs.<sup>13</sup>

Conversely, Chicago's False Claims provision diverges from the Illinois and federal FCAs in regard to discovery before a civil action is filed. Under the federal and Illinois law, government investigators' can obtain discovery using CIDs, or civil investigative

1. 740 ILCS 175.

2. 31 U.S.C. §§ 3729–3733

3. Compare Municipal Code of Chicago section 1-22-020(1)-(7)4 with 740 ILCS 175/3(a)(1)-(7) and 31 U.S.C. § 3729(a)(1)-(7).

4. Compare Chicago Code 1-22-010 with 740 ILCS 175/3(b), (c) and 31 U.S.C. § 3729(b), (c).

5. Compare Chicago Code 1-22-010 with 740 ILCS 175/2(d).

6. Compare Chicago Code 1-22-020 with 740 ILCS 175/3(a) and 31 U.S.C. § 3729(a).

7. 31 U.S.C. § 3729(a).

8. See Chicago Code 1-22-030(b)(1), (2); see also 740 ILCS 175/4(b); 31 U.S.C. § 3730(b).

9. See Chicago Code 1-22-030(b)(2)-(4); see also 740 ILCS 175/4(b)(2)-(4); 31 U.S.C. § 3730(b)(2)-(4).

10. See Chicago Code 1-22-030(d), (e); see also 740 ILCS 175/4(c), (d); 31 U.S.C. § 3730(c), (d).

11. See Chicago Code 1-22-030(f); see also 740 ILCS 175/4(e); 31 U.S.C. § 3730(e).

12. See Chicago Code 1-22-040(a); see also 740 ILCS 175/5(a); 31 U.S.C. § 3731(a).

13. See Chicago Code 1-22-040; see also 740 ILCS 175/5; 31 U.S.C. § 3731.

demands.<sup>14</sup> In Chicago, in comparison, the Corporation Counsel's discovery procedure is via subpoenas.<sup>15</sup> Furthermore, the return on a CID is twenty days.<sup>16</sup> If the putative defendant fails to respond, the prosecutor files a petition for an order from the court for enforcement of the CID.<sup>17</sup> Under the Chicago legislation, the Corporation Counsel sets the date of return, not less than ten days after the service of the subpoena; however, the putative defendant must move to modify or set aside the subpoena by the date of return or within twenty days after service if the date of return is more than twenty days out.<sup>18</sup> And, even though the corporation counsel may petition the court for an order of the enforcement of the subpoena,<sup>19</sup> a subpoena, unlike a CID, is self-enforcing. In other words, the failure to respond to a subpoena automatically results in an order holding the respondent in contempt of court. How this will actually work given that the proceedings are to be under seal is a question. Likely, the Corporation Counsel will have to initiate an enforcement action for an order to show cause.

The False Claims chapter also diverges from the Illinois and federal FCAs over what the prosecutor can do with the material obtained through pre-filing discovery. Under the federal and Illinois statutes, only an investigator or other officer or employee from the Department of Justice under the federal statute or the Illinois Attorney General or Department of State Police under the State statute may examine the information obtained.<sup>20</sup> In contrast, the Chicago Corporation Counsel has broader authority and may share the material with those the counsel "determined necessary . . . subject to the conditions imposed by him or her for effective enforcement of the laws of this city."<sup>21</sup> It will be interesting to see if the Corporation Counsel exercises this power, which appears to include sharing discovery with the *qui tam* plaintiff and/or *qui tam* counsel.

Of particular interest to relators and their counsel is Chicago's whistleblower protection provision, which, although part of the Chicago False Claims Act, is a separate provision from the False Claims chapter. The anti-retaliation ordinance,<sup>22</sup> provides that:

No person shall take any retaliatory action against an employee because the employee does any of the following: (1) Discloses or threatens to disclose to a supervisor or to a public body an activity, policy, or practice of any officer, employee, or city contractor that the employee reasonably believes evidences: (i) an unlawful use of funds, unlawful use of authority, or other unlawful conduct that poses a substantial and specific danger to public health or safety by any officer, employee

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14. 740 ILCS 175/5; 31 U.S.C. § 3733.

15. Chicago Code 1-22-050.

16. 740 ILCS 175/6(a)(2)(E); 31 U.S.C. § 3733(a)(2)(E).

17. 740 ILCS 175/6(a)(2)(E); 31 U.S.C. § 3733(a)(2)(E).

18. Chicago Code 1-22-050(a)(2)(C), (F).

19. See *id.* at 1-22-050(j)(1).

20. 740 ILCS 175/6(i)(2)(C); 31 U.S.C. § 3733(i)(2)(C).

21. Chicago Code 1-22-050(i)(2).

22. Chicago Code 2-152-171

or city contractor; or (ii) any other violation of a law, rule, or regulation by any officer, employee, or city contractor; or

(2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any activity, policy, or practice described in subsection (b)(1).<sup>23</sup>

Thus, the Chicago whistleblower provision specifies the protected activity that must precipitate the retaliation, in contrast with the federal and Illinois acts which prohibit retaliation “because of lawful acts done by the employee...in furtherance of an action under this action.”<sup>24</sup> Similarly, Chicago defines the retaliatory conduct—“reprimand, discharge, suspension, demotion, or denial of promotion or transfer.”<sup>25</sup> The federal and Illinois legislation broadens the potentially retaliatory conduct to add “any other manner [of discrimination] in the terms and conditions of employment by his or her employer.”<sup>26</sup> Practically, this may be a distinction without a difference if the courts follow the interpretation of the Illinois and federal *qui tam* whistleblower provisions that have adopted the Title VII standard for retaliation, that there must be a tangible adverse employment action.

Chicago also limits the recovery for the whistleblower to injunctive relief, reinstatement with full benefits and seniority, and two times back pay.<sup>27</sup> Under Illinois and federal law, the whistleblower “shall be entitled to all relief to make the employee whole,” adding to Chicago’s list “interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including [the ever-important] litigation costs and reasonable attorneys’ fees.”<sup>28</sup>

The fact that *qui tam* relators cannot recover costs and attorneys’ fees in Chicago significantly weakens the whistleblower protection. Also, where there are *qui tam* cases that include retaliation allegations, there will be challenges to attorneys’ fees and costs to split them between those recoverable under the false claims causes of action and those not under the retaliation claim. This could have been avoided had the Chicago whistleblower protection provision more closely followed the Illinois and federal false claims models as the False Claims chapter did.

The whistleblower provision also does not set forth a statute of limitations, and because it is an entirely separate provision from the False Claims Chapter, it might be very well interpreted to follow the recent Supreme Court decision which held that claims under 3730(h) are governed by the analogous state statute of limitations.<sup>29</sup>

23. *Id.* at (b).

24. 740 ILCS 175/4(g); 31 U.S.C. § 3730(h).

25. Municipal Code of Chicago Section 2-152-171(a)(2).

26. 740 ILCS 175/4(g); 31 U.S.C. § 3730(h).

27. Chicago Code 2-152-171(c).

28. 740 ILCS 175/4(g); 31 U.S.C. § 3730(h).

29. See *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, No. 04-169, slip op. at 1 (U.S. June 20, 2005).

The final difference between the Chicago False Claims Act and the federal and state FCAs is Chapter 1-21. This Chapter gives exclusive power to the Chicago Corporation Counsel to prosecute any person who knowingly makes false statements of material fact to the City, and any person who aids and abets the making of those false statements.<sup>30</sup> The civil penalties are not less than \$500 and not more than \$1000, as well as up to three times the amount of damages the City sustains, plus the City's litigation and collection costs and attorney's fees. There is no private right of action. Only the Corporation Counsel can prosecute, by instituting an action with the department of administrative hearings.<sup>31</sup>

Even though there is overlap with the False Claim Chapter provision covering false statements,<sup>32</sup> Chapter 1-21 is broader. Indeed, it reaches false statements that are not necessarily tied to fraudulent claims for payment, covering false statements "of material fact made in connection with an application, report, affidavit, oath, or attestation, including a statement of material fact made in connection with a bid, proposal, contract or economic disclosure statement or affidavit." In addition, those persons who aid and abet in these statements are also subject to prosecution.

It is apparent that Chapter 1-21 was enacted to target corruption involving false statements that may not rise to the level of a false claim because they are not made in connection with the payment or receipt of money but rather are statements made in connection with making an application or a contract. Such statements were an aspect of the Hired Trucks scandal, and some involved were eventually charged with perjury.

## **NOW THAT THERE IS A LAW, HOW DO WE MAKE SURE IT IS EFFECTIVE**

The effectiveness of the Chicago False Claims Acts will, of course, depend upon how it is implemented by the Corporation Counsel's Office and interpreted by the courts.

One open question remains whether it will be applied to conduct which occurred prior to passage. There is no express language in the Chicago FCA other than the standard, "This ordinance shall be in full force and effect from and after its passage and publication." Nor, as just noted, is there any clear indication from the City Council because there is no legislative history leading to the passage of the law.

Under federal law, in the absence of such clear intent, there is a presumption against retroactive legislation. Since the Chicago FCA follows the federal FCA, a court may very well look to the Supreme Court's decision, *Hughes Aircraft Co. v. United States ex rel. Schumer*,<sup>33</sup> which precluded retroactive application of the jurisdictional bar provision in the 1986 amendments to the federal FCA because it affected the parties' substantive, rather than procedural rights.

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30. Chicago Code 1-21-1010 and 1-21-020.

31. Chicago Code 1-21-030.

32. Chicago Code 1-22-020(2)

33. 520 U.S. 939, 117 S. Ct. 1871 (1997).

Similarly, the Chicago FCA, although it addresses unlawful conduct—fraud—the increased penalties in the FCA substantively changes the defendant's rights. Just as the Supreme Court held that the 1991 amendments to the Civil Rights Act which added compensatory and punitive damages would not apply retroactively,<sup>34</sup> in the absence of legislative intent, Illinois courts may limit the reach of the Chicago FCA to conduct occurring after the date of the Act. The net effect will be to carve out all such fraud against the City occurring before November 2005, which would include false payments made in the Hired Trucks scandal. Of course, given the absence of legislative history, there is no indication that the City Council intended to have federal or Illinois case law apply to the Chicago ordinance—although the close patterning of the laws is a persuasive sign that case law interpreting the federal law should be followed for the Chicago FCA.

The Chicago FCA will face other challenges to its effective implementation. A significant potential obstacle is the lack of any express implementation process written into the law.

The Chicago ordinance is silent as to how a filed *qui tam* case gets processed and investigated by the Chicago Corporation Counsel Office. This leaves open the possibility that cases could languish in the Corporation Counsel's office, just as some state and federal cases do under the sixty-day-plus-repeated-extensions mechanism built into the federal and Illinois laws.

Another potential problem area is the lack of any public reporting requirement, such as the type included in the New York City law.<sup>35</sup> New York's built-in monitoring would have worked well in Chicago as a check on languishing cases, much as Senator Grassley's current inquiry into the current administration's declination of false claims cases. Without a reporting requirement, there is no oversight, no check and balance on the impact of political influences on the Corporation Counsel, and no easy way to assess the effectiveness of the Chicago False Claims Act in rooting out fraud.

How can Chicago best address these implementation problems? One solution is for the City Council to amend the Chicago FCA. However, if those ordinances are amended, they will be open to further, possibly unfavorable, amendments.

Another option would be an executive order. The Mayor can set policy for the city via executive order. Yet, subsequent administrations can change such policy by issuing new executive orders.

Perhaps the quickest and easiest path would be an internal policy issued by the Corporation Counsel. Under this scenario, it will be up to the relators' bar and the proponents of the ordinance to encourage the Corporation Counsel's office to dedicate one or more attorneys to false claims cases so that they can quickly become at ease with the legislative scheme, as currently exists in the more effective U.S. Attorneys' offices. Of course, the political reality in Chicago is that whatever process is adopted, and whatever form it takes, it will have to be done with the imprimatur of the Mayor's Office.

34. See *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994).

35. See New York City False Claims Act, Int. No. 630-2005 Section 7-808.

## CONCLUSION

The new Chicago False Claims Act has great potential to be an effective and powerful anti-fraud tool, but only if it is used. The Relators Bar should heed the advice that precinct captains used to give to voters in Chicago—use it early and often.