

MUNICIPAL LAW NEWSLETTER

BOARDMAN ^{LLP}
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Volume 7, Issue 4, April 2002

IN THIS ISSUE

- *Municipalities Liable for Treble Damages Under False Claims Act*
- *Order 888 Upheld By U.S. Supreme Court*
- *Speaker's Forum*
- *Court of Appeals Upholds PSC Decision Denying Madison Water Utility's Request To Include Cost of Reimbursement Program for Private Lead Pipe Replacement in Water Rates*
- *Court Rejects Use of Contingent Legal Description in Incorporation Petition*
- *Legislative Update*
- *FCC Classifies Cable Modem Service as "Information Service"*
- *FERC Uphold Refunds to WEPCO Wholesale Customers*

Municipalities Liable for Treble Damages Under False Claims Act

The False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, provides for suits to be brought in the name of the government by private individuals in a qui tam action. The current version of the FCA imposes a civil penalty between \$5,000 and \$10,000 per false claim, plus three times the amount of damages sustained by the government.

The question of whether the treble damage provisions extend to municipalities has been addressed by several federal circuit courts recently. The Seventh Circuit has held that municipalities are liable for treble damages. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002). The Fifth and Third Circuits have ruled to the contrary. *See United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001); *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3rd Cir. 2002).

Municipalities are traditionally immune from punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The congressional intent to abrogate that traditional immunity must be clear before a federal statute will be held to impose punitive damages on local governments.

In 2000, the United States Supreme Court held that the treble damages provision of the FCA was punitive. *Vermont Department of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Therefore, the question faced by the circuit courts was whether Congress intended the FCA to abrogate the tra-

ditional immunity.

In *Dunleavy*, the relator was prosecuting the qui tam action after the government settled with the county. The government concluded that no fraud had been committed. The Third Circuit found that there was no clear indication in the statute that Congress intended to include local governments. The court noted that Congress could easily have stated that it was including municipalities, as it has done in subjecting local governments to civil damage awards under the securities laws, the Clean Water Act and other federal statutes.

In *Chandler*, the claim involved a federal medical research grant. The relator charged that the county and its subcontractor misrepresented the success of the program and submitted false progress reports to the government, including information on "ghost" program participants who did not exist. In finding that municipalities were subject to the FCA, the Seventh Circuit focused on the 1986 amendments to the statute. The court found three changes were relevant. First, Congress permitted the Attorney General to issue a Civil Investigative Demand ("CID") to "any person" in possession of relevant information. Political subdivisions of states were included in the CID provision's definition of "person." Second, Congress adopted a "whistle blower" statute protecting relators and their witnesses from retaliation by employers. Third, Congress increased the

Continued on page 2

Municipalities Liable for Treble Damages. . .

Continued from front page

penalties for violations from \$2,000 per claim and double damages to \$5,000 to \$10,000 per claim and treble damages. The court found that the changes made it more likely for FCA claims to be filed and to succeed, which demonstrated a Congressional intent to expand the scope of the FCA.

The Seventh Circuit distinguished punitive damage claims under the FCA and those available under the Federal Civil Rights Act (Section 1983). The court noted that punitive damages under the FCA are limited to treble damages, but are essentially unlimited under § 1983. Moreover, a finding of liability under the FCA means that the municipality, and by extension its taxpayers themselves, have been enriched by the fraudulent conduct of the municipality. Therefore, at least a portion of the recovery will come from money wrongfully obtained through false claims. Under section 1983, the liability is based on unconstitutional acts of municipal employees and both the compensatory and punitive damages come directly from the tax base. Thus, there is no assurance that the taxpayers have been unjustly enriched by the actions that give rise to liability.

The Seventh Circuit noted that billions of dollars flow from the federal government to municipalities every year. The Seventh Circuit found that by creating the FCA in 1863 and then strengthening it in 1986, Congress had very carefully crafted a specific remedy for violations designed both to remedy and deter fraud by recipients of federal funds. Holding that the treble damages provisions do not apply to municipalities would effectively exempt local governments from the FCA.

The argument was advanced in all three cases that municipalities should be subject to the FCA, but that the courts should not apply the treble damages provision to them. The courts unanimously rejected this contention on grounds that they would effectively be rewriting the statute. *Garibaldi*, 244 F.3d at 493; *Chandler*, 277 F.3d at 979; and *Dunleavy*, 279 F.3d at 225. Therefore, it is an all-or-nothing approach.

Given the amount of federal funds that are awarded annually to municipalities, the added incentive for suits by private parties to enforce the FCA, and the split among the circuits, it is likely that this issue will reach the United States Supreme Court in the near future. The Seventh Circuit has granted a stay of its decision pending the filing of a writ of certiorari by Cook County. *United States ex rel. Chandler v. Cook County*, 2002 WL 276 352 (7th Cir. Feb. 15, 2002)

— Mark J. Steichen

Order 888 Upheld By U.S. Supreme Court

The United States Supreme Court has sided with the Federal Energy Regulatory Commission (“Commission”) in turning aside two challenges to Commission jurisdiction related to open access transmission. In *New York, et. al. v. FERC*, the Court upheld the Commission’s determinations in Order 888 that (1) it has jurisdiction over the transmission component of unbundled retail transactions; and (2) it has discretion to refuse to maintain jurisdiction over the transmission component of bundled retail sales.

Led by New York, nine states had challenged the Commission’s assertion of jurisdiction over unbundled retail transmission. In a separate matter, Enron contested the Commission’s decision not to regulate bundled retail transmission. The Court combined both proceedings in issuing its opinion.

According to the majority opinion, the Commission “did not exceed its jurisdiction by including unbundled retail transmission within the scope of Order No. 888’s open access requirements.” The Court held that the Commission’s assertion of jurisdiction is supported by the plain language of the Federal Power Act, and that no statutory language otherwise limited FERC’s transmission jurisdiction to the wholesale market.

Likewise, the Court found that the Commission’s decision not to regulate bundled retail transmission was permitted by the statute and based on reasonable policy determinations. The Court agreed with the Commission that Order 888 was a sufficient remedy to discrimination problems within the wholesale market. The Court also acknowledged the Commission’s position that regulating bundled retail transmission in itself raises difficult jurisdictional problems.

In a dissenting opinion, Justice Thomas (joined by Justices Scalia and Kennedy) wrote that the Commission’s reasons for refusing to assert jurisdiction over bundled retail transmission were inadequate and did not warrant deference. According to Justice Thomas, the decision not to regulate could be found to conflict with the Commission’s duty to regulate when it finds unjust, unreasonable, unduly discriminatory or preferential treatment.

—Richard A. Heinemann

SPEAKER’S FORUM

April 26, 2002

Equitable Estoppel
Town Lawyers Institute - Madison, WI
Richard A. Lehmann

May 16, 2002

Public Rights-of-Way: Authority, Responsibility and Use
Wisconsin State Bar Annual Convention - Madison, WI
Anita T. Gallucci

May 22-23, 2002

Eminent Domain
NBI - Milwaukee & Madison, WI
Richard A. Lehmann and Mark J. Steichen

Court of Appeals Upholds PSC Decision Denying Madison Water Utility's Request To Include Cost of Reimbursement Program for Private Lead Pipe Replacement in Water Rates

The Wisconsin Court of Appeals has ruled that the City of Madison cannot impose a surcharge on its water utility customers to pay for the cost of a private lead pipe replacement program undertaken to comply with requirements of the Safe Drinking Water Act. The ruling affirms a previous determination by the Public Service Commission ("PSC") and reverses a Circuit Court decision that authorized Madison to impose its surcharge.

The Madison Water Utility (MWU) applied to the PSC for authority to increase its water rates in the form of a 5.5 cents surcharge per hundred feet of water consumption. The intent of the surcharge was to reimburse customers with lead pipe laterals for one-half of the cost of their lead service replacement from the curb stop to the house, not to exceed \$1,000. MWU estimated the surcharge would result in an annual charge to an average residential customer of \$5.10 per year.

The lead service replacement program was required because MWU exceeded the action level for lead under the Lead and Copper Rule. In such cases, the law requires the addition of chemicals to the water in order to optimize corrosion control. The addition of chemicals in MWU's case, however, caused other problems, particularly with the sewerage district and the possible discharge of phosphorus into Madison's lakes.

As an alternative to chemical treatment, MWU obtained EPA and DNR approval to replace lead services, provided MWU ensure that private lead laterals were also replaced. Since MWU had no ownership interest in the private lead laterals, it could not undertake the replacement of these services itself. However, the City, by ordinance, could require homeowners to replace their lead laterals.

Requiring property owners to replace their lead laterals became a controversial issue in the City. Ultimately, however, a compromise was reached whereby the City would reimburse private property owners 50% of the cost of lead lateral replacement up to \$1,000. The Madison City Council passed this ordinance. Subject to PSC approval, the reimbursement program was to be funded primarily from the 5.5¢ surcharge.

The PSC denied MWU authority to include the surcharge in its rates. While the PSC agreed with MWU's decision to undertake lead line replacement as opposed to adding chemicals, the PSC felt that "it would be unreasonable and unjustly discriminatory if public program dollars generated through utility rates were to be authorized as a subsidy to furnish a direct benefit to an exclusive group of private property owners."

"The city passed the ordinance requiring property owners to replace their lead laterals. It therefore is the appropriate body with the necessary authority to provide any subsidy to assure the success of the replacement program. The Commission believes it would establish an unwise precedent

for cash flows generated from charges to public utility customers to be put toward a subsidy which clearly and directly benefits a specific group of private property owners."

A Dane County Circuit Court reversed the PSC's decision. The Circuit Court found that the water utility had a legal obligation to comply with the Safe Drinking Water Act regulations; that the water utility had negotiated a more cost effective way of complying with these regulations than chemical treatment; and that this savings was of benefit to all customers. The Circuit Court held that the cost of complying with this regulatory responsibility had to be borne by the water utility and could not be passed on to private property owners.

The Circuit Court noted further that "The PSC's denial of the proposed surcharge, despite the negotiation and public comment that went into its formulation, discourages efficient management. It encourages the utility to acquiesce to standard mandatory chemical treatment, a more costly and less desirable solution."

The Court of Appeals reversed the Circuit Court decision. In so ruling, the Court of Appeals emphasized that its responsibility was to determine whether or not there was a rational basis for the PSC's original determination and not to determine whether the City's proposed surcharge was reasonable. The Court of Appeals held that it was reasonable for the PSC to have concluded it would be unjustly discriminatory to use public money from utility rates to subsidize a program that directly benefitted a subset of private property owners, namely, those who own lead pipes and who have the responsibility of maintaining and/or replacing them anyway.

According to the Court of Appeals, the fact that the lead pipe replacement program is the least cost alternative and ultimately benefits all public utility customers by ensuring compliance with federal standards does not mean that the PSC's determination lacked a rational basis. The Court of Appeals held that it was reasonable for the PSC to conclude that the City's replacement program was a local government decision for the benefit of the public at large and that, therefore, the subsidy should be funded by the local government itself and not by water utility ratepayers.

This decision emphasizes how difficult it is to overturn a PSC decision - even a bad decision - once it is made. The PSC's decision undermines a municipal water utility's ability to address compliance issues in the most practical, cost-effective way possible. If MWU had determined to add chemicals to its water to comply with the lead rule, the cost of the chemicals would be included in utility rates. However, MWU was not able to include in rates a cheaper alternative compliance mechanism that would not have been required (the replacement of the private lead laterals) but for the violation of the lead rule.

— *Lawrie J. Kobza & Richard A. Heinemann*

Court Rejects Use of Contingent Legal Description in Incorporation Petition

In a case of first impression, the LaCrosse County Circuit Court has held that the use of a contingent legal description to describe the boundaries in an incorporation petition is invalid. *Matter of Incorporation of Town of Campbell*, LaCrosse County Case No. 01-CV-103 (February 28, 2002). The Town of Campbell and the City of LaCrosse have been involved for many years in on-going border disputes over annexations and the proposed incorporation of the Town. In Spring, 2001, seventeen annexations had been overturned by the Circuit Court on grounds of lack of contiguity (the “annexed parcels”). Those decisions were appealed. A Petition for Incorporation was pending that did not include the annexed parcels. Seeking to include these parcels in the incorporation, but hedging their bets in the event that the annexations were reinstated on appeal, the petitioners dismissed the pending incorporation and filed a new Petition for Incorporation. The new Petition contained a contingent legal description that included the annexed parcels. It provided that if the annexed parcels were reinstated to the City on appeal, they would be considered deleted from the incorporation territory. If, on remand, the decision was overturned on other grounds, the parcels would be included in the territory for incorporation.

The City challenged the validity of the contingent description. The Wisconsin Supreme Court had declined to address the validity of contingent descriptions in *Schatzman v. Town of Greenfield*, 273 Wis. 277, 279, 77 N.W.2d 511 (1956) and their validity remained an open issue. The City argued that the use of contingent descriptions would violate the plain language and the intent of the incorporation statute, Wis. Stat. § 66.0203. Under the statute, a circuit court first determines whether the Petition meets certain minimum criteria for population and area. Next, the Department of Administration determines whether the proposed territory meets substantive criteria for incorporation as a village or city. If the Department approves the incorporation, it then goes to a referendum. The statute requires that the circuit court and the Department conduct their review based on facts that existed at the time of the Petition. If contingent descriptions were permitted, the circuit court might review the Petition based on one boundary, the Department might conduct its review on a different boundary and voters at a referendum might consider a third boundary depending on what contingencies arose.

The City also argued that permitting contingent descriptions would violate long-standing policy. In *In Re Incorporation of Village of St. Frances*, 201 Wis. 431, 436,

243 N.W.2d 315 (1932), the Wisconsin Supreme Court adopted the “rule of prior precedence.” This rule provides that only one annexation or incorporation proceeding for any given territory should be pending at any given time. Competing petitions are not allowed to “stand in line.” The court said that, “[t]o permit both incorporation proceedings and the annexation proceedings to go on at the same time would result in doubt, confusion and be beneficial to no one.” *Id.* at 435. If contingent descriptions were allowed, multiple annexation and incorporation petitions for the same territory could “stand in line” while awaiting disposition of earlier proceedings.

In *Town of Campbell*, the annexation petitions were reinstated to the City on appeal. At that point, the incorporation petitioners argued against deletion of the annexed territories from the Petition. The Circuit Court noted

that this was contrary to the explicit language of the Petition. Moreover, the Circuit Court found that keeping the annexed territories within the boundaries of the proposed incorporation would violate the “rule of prior precedence.” Turning to the contingent description, the Circuit Court adopted the City’s arguments. It found that the use of the contingent description would violate both the statutory procedure set forth in § 66.0203, Stat., and the policy of not permitting multiple competing petitions to be in existence at a given time.

The City of LaCrosse was represented by the Boardman Law Firm.

— Mark J. Steichen

. . . use of the contingent description would violate both the statutory procedure set forth in § 66.0203, Stat., and the policy of not permitting multiple competing petitions to be in existence at a given time.

LEGISLATIVE UPDATE

The following bills are dead for this legislative session because they failed to pass or be concurred in:

BILL	TOPIC
AB 113	Municipal Residency Requirements
AB 233	Sale of a Municipal Utility
AB 518	Municipal Telcos Ban
AB 584	Utility Share Revenue Payments
SB 23	Municipal Cable TV
SB 248	Municipal Telcos Ban

These bills were discussed in previous Municipal Law Newsletter articles. You may check the current status of a bill on the Internet at <http://www.legis.state.wi.us/billform.html>

FCC Classifies Cable Modem Service as "Information Service"

On March 14, 2002, the Federal Communications Commission ("FCC" or "Commission") issued a declaratory ruling and notice of proposed rulemaking concluding that cable modem service (*i.e.*, Internet access over a cable system) is properly classified as an interstate information service and is therefore subject to FCC jurisdiction. The FCC determined that cable modem service is neither a "cable service" nor a "telecommunications service."

This ruling will have far reaching effects on municipalities and consumers. Regarding the franchise fees municipalities collect from the local cable operator, the FCC said that revenues from cable modem service should not be used in computing the cable operator's franchise fee. Many communities currently collect a franchise fee from the local cable operator that represents 5% of the cable operator's revenues derived from providing cable television service and cable modem service in the community. Thus, the FCC's ruling will likely result in lost revenue for municipalities who currently receive franchise fees on cable modem services. The Commission, however, seeks comments in the rulemaking proceeding regarding whether the Cable Act provides an independent basis of authority to municipalities for assessing franchise fees on cable modem service.

The Commission also seeks comments on what impact its classification of cable modem service as an information service will have on the authority of municipalities to impose consumer protection requirements under the Cable Act on cable modem service.

Regarding the so-called "open access" debate, the FCC rejected the open access position and ruled that cable operators are not required to carry unaffiliated Internet service providers ("ISPs") on their cable modem systems. Those who favor "open access" urged the FCC to require cable operators to allow third-party ISPs to purchase from cable operators unbundled transmission capability (Internet service has two components: a transmission and a content component) so that subscribers could choose to obtain the "content component" from the ISP of their choice.

The Commission also seeks comments in the rulemaking regarding whether market conditions made it necessary or appropriate for the FCC to impose open-access conditions on cable modem service providers and whether state and local governments may do so on their own. The FCC also tentatively concluded that it would forbear from imposing open-access requirements on cable operators within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit previously held that cable modem service is both an "information service" and "telecommu-

nications service." If cable modem service is a telecommunications service, then, as noted by the Ninth Circuit, the FCC would have authority to mandate open access.

The FCC said that the ultimate resolution of the issues raised in the proposed rulemaking will promote broadband deployment, which should result in better quality, lower prices and more choices for consumers.

— Anita T. Gallucci

FERC Uphold Refunds to WEPCO Wholesale Customers

After taking over six years to make its determination, the Federal Energy Regulatory Commission ("FERC") issued a decision on March 1, 2002, upholding the award of refunds to wholesale customers of Wisconsin Electric Power Company ("WEPCO"). A FERC staff audit report determined in 1992 that WEPCO had improperly collected certain final coal mine reclamation costs through the fuel adjustment clause. The reclamation costs related to two coal contracts WEPCO entered into in 1977. Subsequent to 1977, WEPCO's coal supplier became subject to state and federal laws that required the supplier to reclaim the land disturbed by the coal supplier's mining operations.

WEPCO and its coal supplier ultimately entered into a settlement agreement in 1987, under which WEPCO agreed to pay the supplier 12.6 million dollars for final reclamation costs associated with WEPCO's coal contracts. In anticipation of its liability for such costs, WEPCO collected about 6% of this amount from wholesale customers through the fuel clause in 1986.

Because WEPCO failed to apply to the FERC for approval to collect its final reclamation cost estimates through the fuel clause and because the pass throughs resulted in WEPCO's 1986 ratepayers paying for costs associated with coal burned in providing service to prior ratepayers, the administrative law judge in a December 1995 decision ordered WEPCO to refund the improperly collected amounts, with interest.

In its March 1, 2002 decision, the FERC affirmed the administrative law judge's ruling that those amounts WEPCO charged 1986 ratepayers for final reclamation costs that were associated with coal used to serve previous ratepayers should be refunded in full, with interest. However, with respect to reclamation costs associated with coal burned to provide service to 1986 ratepayers, the Commission concluded that a lesser remedy was warranted.

— Anita T. Gallucci

MUNICIPAL LAW NEWSLETTER

The Municipal Law Newsletter is published monthly by the Municipal Utility and Municipal Special Services Practice Group and the Environmental and Land Use Practice Group of Boardman, Suhr, Curry & Field LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, (608) 257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin (MEUW) and the Municipal Environmental Group - Municipal Drinking Water Division.

If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the Boardman attorneys listed below who are contributing to this newsletter.

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