

---

False Claims Act & Qui Tam  
**Quarterly Review**

---

Volume 53 ♦ July 2009  
Edited by Cleveland Lawrence III  
Taxpayers Against Fraud Education Fund

# The Miami-Dade County False Claims Ordinance: Smoke & Mirrors

*Jonathan Kroner\**

## INTRODUCTION

Miami-Dade County's self-defeating ordinance should be discarded and replaced, or preempted by an effective Florida False Claims Act.

### The Problem: Rampant Fraud in South Florida

South Florida is a contender for the fraud capital of the nation. Medicare, Medicaid<sup>1</sup>, mortgage<sup>2</sup>, money laundering<sup>3</sup>, and insurance fraud<sup>4</sup> all flourish in Miami-Dade County. Included among these wrongdoers are corrupt county contractors who defraud our County of much-needed funds, unquestionably harming our residents and taxpayers. A recently approved \$2.4 billion stadium provides additional opportunities for such contractors who already take advantage of the lack of oversight in our county's \$7.5 billion dollar budget.

Is there a remedy for this theft? Yes. Our municipal leaders are far from the first elected officials to be faced with such a challenge.

### Lincoln's Answer to Fraud

During the Civil War, President Abraham Lincoln fought contractors' fraud by insisting that Congress provide better tools for policing rampant government contracting fraud. In response, a newly enacted whistleblower law, commonly dubbed the "Lincoln Law", allowed whistleblowers to recover a "bounty." Civil War whistleblowers, often insiders to the fraud scheme, were awarded up to 50% where their cases, brought on the government's behalf, resulted in a recovery from fraudulent government contractors.

---

\* Jonathan Kroner represents courageous relators (whistleblowers) in Miami, Florida. He most gratefully expresses his appreciation for comments and suggestions to Lesley Ann Skillen, Getnick & Getnick, New York; and Ann Lugbill, Murphy Anderson PLLC, Cincinnati.

1. Medicare and Medicaid lose to fraud an estimated \$2.5 billion annually in South Florida. (Miami Herald, August 11, 2008). In 2007, Miami's U.S. attorney, Alexander Acosta, said that inspectors found that nearly one-third of the businesses that bill Medicare for services allegedly delivered to beneficiaries—481 of 1,600—didn't exist. <http://www.npr.org/templates/story/story.php?storyId=16045685> (last visited March 19, 2009).

2. S. Florida as the nation's mortgage fraud capital for second year running, Tenth Periodic Mortgage Fraud Case Report to Mortgage Bankers Association, <http://www.thetitlereport.com/Media/MediaManager/fraudreport2007.pdf>

3. Southern District of Florida in Miami takes first place among the federal judicial districts with the most money laundering referrals (106 cases), followed by the Southern District of New York (83 cases). U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2003 report, last year reported) <http://www.ojp.usdoj.gov/bjs/pub/press/mlo01pr.htm> (last visited April 2, 2009). See generally, Financial Crimes Enforcement Network <http://www.fincen.gov/> (last visited March 24, 2009).

4. "Florida ranks in the top four (4) among all states' fraud divisions . . . 2nd in the number of arrests, 3rd in the number of cases presented for prosecution. . . ." Florida Department of Financial Services. <http://www.fldfs.com/FRAUD/> (last visited April 2, 2009).

The Lincoln Law, now called the False Claims Act, imposes double and treble civil damages and civil penalties of \$5,500 to \$11,000 for each false bill or payment submitted. And it rewards brave whistleblowers with 15% to 30% of recoveries obtained from those caught cheating the government.

Fighting fraud is an all-American, bipartisan effort. Presidents Reagan and Obama supported and signed amendments that strengthened this Civil War-era anti-fraud statute. Republicans and Democrats agreed with President Lincoln that whistleblower laws deter fraud against the government and help to recover funds wrongfully diverted by corrupt contractors.

The Federal False Claims Act has recovered over \$22 billion since the Reagan-era 1986 amendments.<sup>5</sup> Hundreds of billions more have been saved due to the False Claims Act's deterrence effect on would-be fraudsters.<sup>6</sup> For every dollar invested in investigation and prosecution of health care fraud under the Federal False Claims Act, the U.S. Treasury recovered fifteen dollars.<sup>7</sup>

Congress wisely recognized the preventative benefits of an effective and well-designed whistleblower law like the False Claims Act by requiring that federal contractors and Medicare and Medicaid providers provide training and notice to their employees about the federal False Claims Act's prohibitions against cheating the government.<sup>8</sup> The federal Deficit Reduction Act incentivizes states to enact effective state False Claims Act statutes that provide for whistleblower-instigated suits.<sup>9</sup>

At the municipal level, taxpayers and residents of New York City, Chicago, San Francisco, and other cities benefit from *bona fide* False Claims Act ordinances, modeled on the successes of the federal Lincoln Law. Both the federal False Claims Act and the various state laws provide for a system of "checks and balances," much like our federal and state Constitutions, whereby the executive branch cannot dismiss a False Claims Act action without the federal judiciary first reviewing and permitting the dismissal.

Then there is Miami-Dade County's so-called False Claims Ordinance.

### Miami-Dade County's Answer to Fraud

Ten years ago, in response to a *Miami Herald* series on airport construction fraud, Miami-Dade County adopted a False Claims Ordinance.<sup>10</sup> The Miami-Dade False Claims Ordinance, however, does not live up to its name or the venerable history of

5. <http://www.taf.org/statistics.htm> (last visited March 19, 2009).

6. Sen. Charles Grassley (R-IA) and Rep. Howard Berman (D-CA). <http://www.taf.org/whyfca.htm> (last visited March 23, 2009).

7. Jack A. Meyer, *Taxpayers Against Fraud Education Fund, Fighting Medicare Fraud: More Bang for the Federal Buck* (July 2006), available at <http://www.taf.org/publications.htm> (last visited March 19, 2009).

8. The DRA requires entities that receive or pay \$5 million or more annually in Medicaid to establish written policies for all their employees, and for their contractors' employees and agents. These policies must provide: detailed information about the federal FCA; administrative remedies for false claims and statements; state laws with penalties for false claims or statements; and whistleblower protections. 42 U.S.C. §1396a(a)(68).

9. "State false claims act requirements for increased State share of recoveries." 42 U.S.C. §1396(h).

10. Miami-Dade County, Fla. Code, Chapter 21, Article XV. False Claims Ordinance 21-255 through 21-266. Ord. No. 99-152, §1, 11-2-99.

anti-fraud whistleblower laws. Instead, the Miami False Claims Ordinance combines both whistleblower *disincentives* and protections for corrupt contractors—ensuring that local residents and taxpayers will never benefit from the law. In fact, the Ordinance is so defective that lawyers who specialize in False Claims Act litigation do not view it as a false claims ordinance.<sup>11</sup>

Other municipalities, whether in Miami-Dade County (where there are approximately 35 separate municipalities<sup>12</sup>), or elsewhere, might mistake the County's Ordinance as an appropriate model to deter fraud. To illustrate the problem, at least one other municipality, the City of Miami Beach, used the Miami False Claims Ordinance as a model for its similar law.<sup>13</sup> If other municipalities were also to model their ordinances on the Miami-Dade Ordinance, it will derail other municipalities' efforts to prevent and prosecute fraud.

The Miami-Dade Ordinance is based in part on Florida's False Claims Act.<sup>14</sup> Even where Florida and Miami-Dade have identical provisions, the Miami-Dade False Claims Ordinance is ineffective for two reasons. First, since county fraudulent contractor cases often involve smaller dollar amounts than statewide fraud schemes, whistleblowers' incentives are often just not sufficient. Incentives for successfully bringing suit against a local fraudulent contractor need to take into account financial realities of exposing and litigating complex financial fraud schemes. Second, because local politicians are particularly vulnerable to being swayed by contractors' contributions and personal ties, the need for strong oversight and other effective anti-retaliation whistleblower protections are essential if the Ordinance is to be effective.

## THE ORDINANCE POSES UNNECESSARY BARRIERS

### Power to Dismiss without Oversight

The Miami-Dade False Claims Ordinance is fatally flawed because it gives the County Manager the unchecked power to dismiss all fraud suits brought by a whistleblower—even completely valid, big-dollar schemes that unquestionably violate conflict of interest or fraudulent billing laws. The County's Ordinance gives the County Manager sole dis-

11. *The New York City False Claims Act: A Tale of One City*, by Lesley Ann Skillen, *The False Claims and Qui Tam Quarterly Review*, Vol.39, page 93, October 2005 identifies bona fide municipal ordinances: San Francisco Admin. Code §§6.80 et seq., §21.35 (1999); Chicago, Ill., Mun. Code §§1-21-010 through 1-22-060 (2005); and New York City Admin. Code, Title 7, §7-808 (2005).

12. [http://www.miamidade.gov/Portal\\_Content/government/other\\_local\\_government.asp](http://www.miamidade.gov/Portal_Content/government/other_local_government.asp) (last visited March 22, 2009).

13. City of Miami Beach, Fla. Ord. No. 2003-3398, §1, 2-26-03. §70-300 to §70-312. That ordinance limits whistleblowers to Miami Beach residents (few of whom work on city contracts) and "person in privity of contract." City of Miami Beach, Fla. Code §70-304(b). So who is in privity of contract—a corrupt contractor's administrative assistant, a supply subcontractor, an outside auditor? How can limiting the population of potential whistleblowers do anything but limit the effectiveness of the ordinance?

14. The table at the end compares the Ordinance with the federal and Florida false claim statutes.

cretion to dismiss a case, *notwithstanding the objections of the person bringing the case*.<sup>15</sup>

To make matters worse, the public may never know of Miami-Dade fraud allegations, nor of the County's failure to prosecute wrongdoers. This is because these cases are confidentially sealed.

The County Manager can get rid of a case secretly, with no judicial or other independent oversight.<sup>16</sup> This directly conflicts with the "balance of powers" system of government, exemplified in the federal False Claims Act, where an independent federal judge, with lifetime tenure unaffected by partisan politics, decides whether to dismiss the action. Moreover the Lincoln Law gives whistleblowers a right to be heard and object to "sweetheart deal" settlements.<sup>17</sup> This is consistent with the principles behind the rest of Florida's open government and sunshine laws.

As a result, while potential Miami-Dade whistleblowers and their lawyers have ample fraud schemes upon which to base suits, the County Manager's discretionary ability to dismiss their False Claims suits, means that few valid local fraud cases will ever be filed or pursued. Under the shroud of secrecy, a county manager can dismiss a case, thereby protecting long-standing business, political, or personal relationships without fear of public scrutiny.

As a further daunting disincentive, the County's dismissal triggers a *mandatory* fee assessment against the whistleblower by the "prevailing" defendant.<sup>18</sup>

Consider what might happen under the Miami-Dade False Claims Ordinance. A private attorney spends weeks of unpaid time investigating and developing the facts of the violations revealed to him by the whistleblowing client. After weeks or months of hard and careful work, a suit is filed on behalf of the courageous whistleblower. The county's investigation eventually results in the corrupt contractor and its lawyers being notified of the existence of the fraud claims. Defense counsel could easily charge \$50,000 to \$1 million or more in legal fees for evaluating a case's. Then the corrupt contractor or its attorney calls a county commissioner, county manager or county Attorney and says essentially "Oops!, Thanks for bringing this to our attention. My client (who is personally known to commissioner as a major contributor) might have made a mistake, but this will be taken care of." A commissioner then instructs or pressures the County Manager to dismiss the case.

This is not fiction. Municipal contractors are the largest contributors to county commissioners campaigns. Likewise, defense law firms and their attorneys are Flori-

15. Rights of the parties in civil actions.

(1) If the County Manager, on behalf of the County, elects to proceed with the action, he or she has the primary responsibility for prosecuting the action, and is not bound by any prior or subsequent act(s) of the person bringing the action. *The County may also voluntarily dismiss the action notwithstanding the objections of the person bringing the action.* [Emphasis supplied].

Miami-Dade County, Fla. Code §21-260.

16. Miami-Dade County has a "strong mayor" form of government, this concentrates political influence.

17. (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion. [emphasis supplied] 31 U.S.C. 3730(c)(2)(a).

18. Miami-Dade County, Fla. Code §21-262(3).

da's largest group of federal campaign contributors.<sup>19</sup>

Following dismissal, the *de facto* corrupt contractor seeks the *mandatory* reimbursement of its legal fees and costs which are assessed against the good-faith whistleblower.<sup>20</sup> Could a lawyer bring a case under a municipal ordinance with a provision like this without risking malpractice?

These shortcomings in Miami-Dade's Ordinance result in a False Claims Ordinance with little or no real deterrent effect upon corrupt contractors or any likelihood that meaningful cases will be filed and pursued.

### Dismissal Against Those Who "Furthered" the Fraud

The Miami-Dade Ordinance requires that a judge must dismiss a whistleblower (but not the case) who has "furthered" a violation.<sup>21</sup> The undefined "furthered" can be broadly construed. Does a truck driver "further" a violation if he unknowingly delivers goods but does not otherwise participate in the fraud? What about a clerical employee whose job required that she copy and file documents essential to the fraud scheme, perhaps even knew of the fraud, and later had second thoughts and risked her family's financial security to blow the whistle?

This County Ordinance's "furthered" language is far more restrictive than similar provisions of the federal False Claims Act, upon which this part of the Ordinance is based. The federal law wisely recognizes that sometimes "it takes a thief to catch a thief." It does not eliminate a whistleblower's recovery under the False Claims Act unless the plaintiff help plan the fraud or is convicted as a result of the government's investigation.

Under the Federal FCA courts may reduce rewards to a wrongdoing relator "to the extent the court considers appropriate."<sup>22</sup> But even those who participate in a fraud may blow the whistle and receive compensation for their efforts.

For example, a whistleblower who worked for a defense contractor, who *failed to test the guidance system for nuclear tipped missiles*, and who testified they were "just as likely to hit Chicago as Kiev" was nonetheless awarded 10.8% (instead of up to 25%) of the recovery.<sup>23</sup> In that case, the judge reviewed and considered the whistleblower's "horrifying" behavior and then awarded him \$864,000, emphasizing that *the consequences of the fraud make it all that much more important to provide incentives to encourage whistleblowers*.

19. Five law firms included among top 20 contributors in Florida. <http://www.opensecrets.org/states/donors.php?cycle=2008&state=FL>. When grouped by profession, lawyers contributed \$17.5 million, exceeding real estate \$14.8, health professions \$7.0, and miscellaneous business \$5.3, <http://www.opensecrets.org/states/indus.php?cycle=2008&state=FL> based on Federal Election Commission data available electronically on February 09, 2009.

20. Miami-Dade County, Fla. Code §21-262(3).

21. "Whether or not the County proceeds with the action, if the court finds that the action was brought by a person who planned, initiated, or *furthered* the violation of Section 21-258 upon which the action was brought, the person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the County to continue the action." [*emphasis supplied*]. Miami-Dade County, Fla. Code §21-261(5)

22. 31 U.S.C. §3730(d)(3).

23. *United States ex rel. Barajas v. Northrop Corp.*, 1992 U.S. Dist. LEXIS 22817, 38-39 (C.D. Cal. May 14, 1992) (\$864,000 awarded to whistleblower).

Dismissal for having “furthered” a false claim converts a corrupt contractor—after all, there was in fact a false claim—into a prevailing (winning) defendant and triggers mandatory fees against the whistleblower. Would a secretary or truck driver or other potential whistleblower who may have “furthered” a fraud risk defense fees of tens or hundreds of thousands of dollars?

### Bars to Current or Former County Employee

The Ordinance places a jurisdictional bar against current and former county employees, and against actions based “in whole or in part” on information obtained in the course of county employment.<sup>24</sup> Worse, the Ordinance places a jurisdictional bar against anyone bringing an action where information was obtained from a current or former employee of the county, without regard to whether or not the information had anything to do with that county employees’ job with the county.<sup>25</sup>

The very people most likely to witness wrongdoing and who might have tried unsuccessfully to fix it internally risk dismissal if they expose it.

Nothing in the Federal FCA prohibits a government employee from filing action based on information acquired while working for the government, not even requiring a wait until the United States declines to initiate suit.<sup>26</sup>

But in Miami-Dade County, if a clerical or park service employee learns of fraud, brings it to the attention of persons responsible for stopping fraud and sees no remedial action, they can *not* use this Ordinance to stop the fraud. Worse, if they attempt to use the Ordinance and file suit, the confidential “seal” will gag them from disclosing the fraud to any other person (such as a newspaper). On top of that, once the suit is dismissed the Ordinance mandates that such whistleblowers pay the corrupt contractor’s legal fees and costs.

### The “Innocent Claimant” Defense

The so-called “Innocent Claimant” defense allows a contractor, who actually defrauded the county, the opportunity to avoid all responsibility by persuading a judge or jury, in essence, that it didn’t mean to cheat the county.<sup>27</sup> This results in an innocent whistle-

24. “(3) No court shall have jurisdiction over an action where the person bringing the action under Section 21-258 is:

(b) An employee or former employee of the County, and the action is based, in whole or in part, upon information obtained in the course or scope of County employment.”

Miami-Dade County, Fla. Code §21-263(3)(b)

25. “(4) No court shall have jurisdiction over an action where the person bringing the action under Section 21-258 obtained the information from an employee or former employee of the County.” Miami-Dade County, Fla. Code §21-263(4).

26. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991) (criticized in *United States ex rel. Holmes v. Consumer Ins. Group*, 279 F.3d 1245 (10th Cir. 2002).

27. Innocent claimant affirmative defense.

The provisions of this article shall not apply if the claimant can demonstrate by a preponderance of the evidence each of the following facts:

(1) The claimant submitted or caused to have submitted the claim to or against the County reason-

blower then being held responsible for tens or hundreds of thousands of dollars in legal fees and costs of a contractor who, in fact, filed false claims against the county.

The Ordinance should encourage scrupulous compliance with the terms of County contracts—not just an ability to prove good intentions after the fact. The similar Federal FCA provision reduces the contractor’s penalties from triple to double.<sup>28</sup>

### The Innocent Claimant’s Window of Corrections

The “Innocent Claimant” defense also allows a contractor who defrauded the County a chance to avoid responsibility and shift its fees and costs to the whistleblower by taking “immediate steps to modify, correct, or withdraw” its false claim within five days of *discovering the falsity* of the claim.<sup>29</sup> The moment of “discovering the falsity” should be limited to *before* the filing date of a case under this Ordinance. This is how a similar defense is handled under the Federal FCA.<sup>30</sup> Otherwise, the claimant (a contractor who did in fact submit false claims and cheat the county) can lose at trial, maybe even lose on appeal, and then “discover the falsity” and make the correction.<sup>31</sup>

A post-judgment correction defense can convert a corrupt contractor into a “prevailing party” and trigger the contractor’s right to impose legal fees upon an innocent whistleblower. To bring any case under a municipal ordinance with a provision like this risks legal malpractice.

---

ably believing that such claim was free of any material misstatements, or any exaggerated, inflated, or unsubstantiated assertions or damages;

(2) The claimant had no reasonable basis to doubt the truth, veracity, or accuracy of such claim at the time it was submitted;

(3) Prior to submitting the claim, the claimant diligently investigated the facts underlying such claim and prepared the claim in a reasonable manner given all the relevant information available; and

(4) When information indicating that any element, statement, or allegation in the claim was false or misleading first became available, such claimant, within five (5) business days of discovering the falsity of the claim, took immediate steps to modify, correct, or withdraw such claim and provided the County with immediate notice thereof.

Miami-Dade County, Fla. Code §21-266

Note that subparagraph (3) requires investigation of just facts but not the contract’s requirements.

28. 31 U.S.C. §3729(a).

29. *Id.*, §21-266(4), above.

30. 31 U.S.C. §3729(a) . . .“(C) at the time such person furnished the United States with the information about the violation, *no criminal prosecution, civil action, or administrative action had commenced under this title* with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; . . .” [emphasis supplied]

31. Sound crazy? *Cf.* litigation history through U.S. Sup. Ct. of 29 CFR 541.118(a)(6). *Auer v. Robbins*, 519 U.S. 452, 463–464 (1997) (unlimited window of corrections).

## THE ORDINANCE REDUCES AND OR ELIMINATES WHISTLEBLOWER INCENTIVES

### Prevailing Whistleblower's Fees and Costs Subtracted from Proceeds Reduces or Eliminates the Award

The Ordinance purports to award attorney's fees and costs (but no expenses) to a prevailing plaintiff's attorney, but takes those fees from the "recovered proceeds" rather than from the defendant.<sup>32</sup>

In contrast, the Federal FCA, and DRA guidelines, charge the defendant for a prevailing whistleblower's attorney's fees and costs, and the whistleblower's expenses.<sup>33</sup>

The Ordinance's fee provision eliminates whistleblower incentives to report any but the largest of frauds, since attorney's fees and costs will wipe out whistleblower awards in all but big-dollar cases. For example, a modest case could cost over \$50,000 in fees and costs to get through trial (for a simple fraud involving few witnesses, few depositions, no experts and no appeal). A whistleblower could expect to receive, at best, only 10% to 25% of the amount by which the recovery exceeds those fees.<sup>34</sup> In essence, the Ordinance provides a \$100,000 to \$200,000 safe harbor for corrupt contractors' protection from whistleblowers.

The Federal FCA, in contrast, by providing fees and costs in addition to the underlying award, allows attorneys to pursue smaller cases than could be pursued under the Miami-Dade ordinance.<sup>35</sup>

Treatment of whistleblowers seems shabby compared to what the county does for itself. The Ordinance provides for payment to the county of fees, costs, and expenses, if it prevails.<sup>36</sup> A whistleblower and the whistleblower's attorney stand in the shoes of

32. "Expenses; attorney's fees and costs.

(2) If the court awards the person bringing the action proceeds under this article, the person shall also be awarded an amount for reasonable attorney's fees and costs. *Payment for reasonable attorney's fees and costs shall be made from the recovered proceeds before the distribution of any award.* [emphasis supplied]. Miami-Dade County, Fla. Code §21-262.

This article assumes the Ordinance's use of "shall" is mandatory and not permissive. However, a Florida "shall" can mean other than "shall" when the result is "unreasonable." See Wisotsky, Steven, *How to Interpret Statutes—or Not: the Phantom of Plain Meaning*, 83 Fla. B. J. 1 (Jan. 2009), page 43. <http://www.floridabar.org/> (last visited March 19, 2009). But a whistleblower shouldn't have to risk his or own savings that "shall" might mean "may."

33. "Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." [emphasis supplied] 31 U.S.C. §3730(d)(2), incorporated by reference at DRA's 42 U.S.C. §1396h(b)(2).

34. In contrast to the whistleblower's fees and costs, the Ordinance does not state that the county attorneys' legal fees, costs and expenses shall be paid from the recovered proceeds. Miami-Dade County, Fla. Code §21-262(1). However, defendants will likely argue that the Ordinance does not state that they would be in addition to those proceeds.

35. *Coleman v. Hernandez*, 490 F. Supp. 2d 278, 284 (DC Conn 2007) (\$10,224 for FCA violation of Section 8 housing agreement as 30% of recovery where government did not intervene, attorney's fees and costs not reported).

36. "(1) If the County initiates an action under this article or assumes control of an action brought by a person under this article, and the County prevails in such action, the County shall be awarded its reasonable attorney's fees, expenses, and costs." Miami-Dade County, Fla. Code §21-262 (1).

the county to enforce the county's rights and to recover funds for the county. There is no rational basis for the disparate treatment of fees, costs and expenses.

Additionally, since the Ordinance subtracts whistleblowers' fees and costs from the proceeds, the county—rather than an adjudicated corrupt contractor—pays 70% or more of those fees from *its* share of the proceeds. What is the logic of taking a prevailing plaintiff's fees from the county's recovery rather than from the wrongdoing defendant?

### Fees Charged Against Whistleblower

If the whistleblower fails to prove the county's case, the Ordinance burdens him or her with *mandatory* defendant fees and costs.<sup>37</sup> As discussed above, the ordinance poses many barriers to whistleblowers. Charging whistleblowers with defendants' fees and costs chills the likelihood of any prudent whistleblower taking any action under this ordinance. Whistleblowers have enough stress without risking tens or hundreds of thousands of dollars in legal fees—financial ruin for most potential whistleblowers.

Although Miami-Dade County burdens a whistleblower with a defendant's fees and costs, it exempts itself from defendants' expenses, fees or other costs.<sup>38</sup>

The County's approach is the precise opposite of the Federal FCA which requires a court to make a finding that the case was "clearly frivolous, clearly vexatious or brought primarily for purposes of harassment."<sup>39</sup> Similarly, the imposition of defense fees would fail DRA guidelines since it requires provisions "at least as effective in rewarding and facilitating" these cases as the Federal FCA.<sup>40</sup>

### If Intervened: 10% reward, instead of 15%–25%

If the County proceeds with and prevails in an action, the whistleblower will receive ten percent (10%) of the proceeds.<sup>41</sup> These awards are less than the fifteen to twenty-five percent (15%–25%) awarded to a whistleblower under the Federal FCA and DRA guidelines (25% minimum).<sup>42</sup>

37. "If the County does not proceed with an action under this article and the defendant is the prevailing party, the court shall award the defendant reasonable attorney's fees and costs against the person bringing the action." Miami-Dade County, Fla. Code §21-262(3).

38. Miami-Dade County, Fla. Code §21-262(4).

39. "If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. §3730(d)(4)

40. 42 U.S.C. §1396h(b)(2). Other minor provisions also erode successful FCA actions. For example, §21-259(2)(a) triples the 60 days seal allowed under the FCA. 31 U.S.C. §730(b)(2). This makes it more likely that evidence will stale and witnesses forget. Cf. Frederick M. Morgan, Jr. (Morgan Verkamp, LLC, Cincinnati, Ohio), *Of Third Rails and Rabbit Trails: the "No-Contact Rule" and the McDade Amendment in Qui Tam Lawsuits*, Legal Ethics, 37 TAF Q.R. 85, 87 (2005) ("[I]t is irresponsible for relator's counsel to allow potential sources of highly valuable evidence to wither on the vine, or for that matter move, forget, or expired:").

41. Miami-Dade County, Fla. Code §21-261(1).

42. 31 U.S.C. §3730(d)(1).

### If Declined: 25% reward, instead of 25%–30%

If the county declines to prosecute the case, and that whistleblower proceeds and wins, it awards the whistleblower twenty-five percent (25%).<sup>43</sup> In contrast, the Federal FCA provides for up to thirty percent (30%)<sup>44</sup>, and the DRA sets thirty percent (30%) as a *minimum*. California's FCA, for example, provides for up to fifty percent (50%),<sup>45</sup> the same that the FCA awarded originally.<sup>46</sup>

The county's annual budget is approximately \$5 billion.<sup>47</sup> Its contracts are generally smaller than the federal government's contracts. If anything, to create financial incentives as strong as those under the Federal FCA incentives, the percentage should be higher than the percentages awarded by the federal government. Why would a county decrease incentives to deter fraud?

### Elimination of Civil Penalties (\$5,000–\$10,000 per claim under FCA)

Miami-Dade's Ordinance has no civil penalties. The omission of civil penalties presents corrupt contractors a free pass for high-volume, low-dollar fraud and for false claims for which there are no damages. Thus, for approximately half of the false claims defined in the Ordinance at §21-251(1)(a) through (g) the county could decline, a whistleblower could prevail, the whistleblower's award would be zero dollars (\$0.00), from which the whistleblower's attorney would, of course, receive nothing.

In contrast, there is no requirement under the Federal FCA that the United States suffer damages as result of fraud.<sup>48</sup> The time-tested and proven Federal FCA imposes triple damages *and* up to \$10,000 per transaction.<sup>49</sup> Likewise, the DRA mandates a civil penalty "that is not less than the amount of the civil penalty" under the Federal FCA.<sup>50</sup>

43. Miami-Dade County, Fla. Code §21-261(3).

44. "The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds." 31 U.S.C. 3730(d)(2).

45. Cal. Govt. Code. §12652(f)(3).

46. "... shall be entitled to receive a one half the amount..." Ch 67 §6, 12 Stat 696 (1863).

47. [http://www.miamidade.gov/budget/FY2008-09/Adopted/Final\\_Budget\\_Vol1.asp](http://www.miamidade.gov/budget/FY2008-09/Adopted/Final_Budget_Vol1.asp).

48. *Harrison v Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999). *U.S. v. United Technologies Corp.*, 2008 WL 3007997 (S.D. Ohio. August 1, 2008) (Although government suffered no actual damages, each invoice the defendant submitted to the government constituted a violation of the FCA and court awarded FCA civil penalties of \$10,000 per invoice submitted, totaling \$7,090,000.)

49. "... person who makes a false claim ... is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person" 31 U.S.C. §3729(a).

50. 42 U.S.C. §1396h(b)(4).

## CONCLUSION AND RECOMMENDATIONS

To bring any case under this Ordinance risks legal malpractice. The ordinance has few redeeming virtues.<sup>51</sup> How to fix it? Two recommendations:

1. Model an amended Ordinance on the proven and time-tested Federal FCA, or rewrite it to conform to DRA guidelines.<sup>52</sup>
2. Amend the Florida FCA to bring it up to DRA compliance, extend it to all (not just Medicaid) false claims; and include false claims made against cities and counties.<sup>53</sup>

	Federal	Florida	Miami-Dade
Award: intervention	15%–25% <sup>54</sup>	15%–25% <sup>55</sup> , except when it's 10% <sup>56</sup>	10%, except when it's 5% <sup>57</sup>
Award: no intervention	25%–30% <sup>58</sup>	25%–30% <sup>59</sup>	25% <sup>60</sup>
Civil penalty	\$5,000–\$11,000	\$5,000–\$11,000 <sup>61</sup>	\$0.00
Must prove damages	No, just false claims.	Yes. <sup>62</sup>	As a practical matter, yes, because no civil penalty.
Prevailing plaintiff fees	Yes, on top of recovery.	“from the recovered proceeds” <sup>63</sup>	“from the recovered proceeds” <sup>64</sup>
Prevailing defendant fees	No, except if frivolous. <sup>65</sup>	Yes. Mandatory. <sup>66</sup>	Yes. Mandatory. <sup>67</sup>

51. Unlike the federal statute, the Ordinance includes tax fraud. Miami-Dade County, Fla. Code §21-258 (1)(g). 31 U.S.C. §3729(e) but cf., 26 U.S.C. §7623 (tax whistleblower). If the Ordinance were appropriately amended, the tax provision could generate significant revenue for the county.

52. TAF Model Ordinance <http://www.taf.org/modelstatefca.pdf> (last visited March 23, 2009).

53. Suggested by Lesley Ann Skillen, Getnick & Getnick, New York, who points out that the most effective State FCAs are those (like NY and CA) that also apply to cities and municipalities. A Florida FCA extended to cover claims against cities and counties would render the Miami-Dade ordinance redundant (or unconstitutional).

54. 31 U.S.C. §3730(d)(1).

55. Fla. Stat. §68.085(2).

56. “(2) If the department proceeds with an action which the court finds to be based primarily on disclosures of specific information, other than that provided by the person bringing the action, . . . the court may award such sums as it considers appropriate, but in no case more than 10 percent. . . .”

57. Miami-Dade County, Fla. Code §21-261(1). But five percent (5%) here: “. . . the court finds to be based primarily on disclosures of specific information, other than that provided by the person bringing the action, . . . 5 percent.” Miami-Dade County, Fla. Code §21-261(2).

58. 31 U.S.C. §3730(d)(2).

59. Fla. Stat. §68.085(3).

60. Miami-Dade County, Fla. Code §21-261(3).

61. Fla. Stat. §68.082(2)(g).

62. Fla. Stat. §68.09.

63. Fla. Stat. §68.086(2).

64. Miami-Dade County, Fla. Code §21-262(2).

65. 31 U.S.C. §3730(d)(4).

66. Fla. Stat. §68.086(3).

67. Miami-Dade County, Fla. Code §21-262(3).

**SPOTLIGHT**

	<b>Federal</b>	<b>Florida</b>	<b>Miami-Dade</b>
Defenses: innocent mistake	No, but reduces damages from 300% to 200%. <sup>68</sup>	Yes. <sup>69</sup> Not clear whether “innocent” false claims must be repaid, or whether defendants can keep their unearned money.	Yes. <sup>70</sup>
Corrections	Before knowledge of investigation or action. <sup>71</sup>	30 days before any action and damages reduced from 300% to 200%.	Yes, no limit as to when. <sup>72</sup>
Dismissal by government	No, judge decides.	Yes. <sup>73</sup>	Yes. <sup>74</sup>
Parties: persons who planned or initiated false claim	Yes, except 0% if criminally convicted. <sup>75</sup>	Yes, can be reduced by court except 0% if criminally convicted receive. <sup>76</sup>	No jurisdiction for anyone who “furthered” violation. <sup>77</sup>
Parties: gov’t employees	Yes. <sup>78</sup>	No. <sup>79</sup>	No. <sup>80</sup>
Reports on Effectiveness	Yes. <sup>81</sup>	No.	No.
Results	Billions. Over a billion in first three months of 2009. <sup>82</sup>		Unknown. Probably \$0 over 10 years.

68. 31 U.S.C. §3729(a).

69. Fla. Stat. §68.082(1)(c).

70. Miami-Dade County, Fla. Code §21-266.

71. 31 U.S.C. §3729(a)(C).

72. Miami-Dade County, Fla. Code §21-266(4).

73. Fla. Stat. §68.084(2)(a).

74. Miami-Dade County, Fla. Code §21-260.

75. 31 U.S.C. §3729(a).

76. Fla. Stat. §68.085(6).

77. Miami-Dade County, Fla. Code §21-261(5).

78. Except certain actions brought by current or former members of the armed forces. 31 U.S.C. §3730(e)(1).

79. Fla. Stat. §68.087(4)(b).

80. Miami-Dade County, Fla. Code §21-263(4).

81. Dept. of Justice False Claims Statistics for FY 1987-2008: <http://www.taf.org/statistics.htm> (last visited March 19, 2009). This excludes state Medicaid recoveries and criminal fines assessed in FCA cases.

82. <http://www.taf.org> (last visited March 19, 2009).