

# **Bond Case Briefs**

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## **VARIABLE RATE BONDS - MASSACHUSETTS**

### **Rosenberg v. JPMorgan Chase & Co.**

**Supreme Judicial Court of Massachusetts - May 11, 2021 - 487 Mass. 403 - 169 N.E.3d 445**

Relator filed complaint under Massachusetts False Claims Act (MFCA) against financial institutions that served as remarketing agents for Commonwealth on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, based on allegations that agents fraudulently inflated interest rates on bonds, in breach of agents' obligations in remarketing agreements determine lowest interest rate that would permit sale of bonds on any given rate determination date.

The Superior Court Department granted agents' motion to dismiss and relator appealed.

On transfer from Appeals Court, the Supreme Judicial Court held that:

- Information relating to agents' misrepresentations to Commonwealth was in public domain, for purposes of "public disclosure" bar to qui tam action;
- Purportedly true state of agents' fraud was in public domain;
- Remarketing agreements constituted "reports," and thus were statutory source of previously disclosed information, for purposes of "public disclosure" bar to qui tam action;
- Internet website that published information on all municipal bonds constituted "news media," and thus, was statutory source of previously disclosed information;
- Relator's assertions in complaint were substantially same as misrepresentations and true state of facts that were previously disclosed to public, for purposes of "public disclosure" bar to qui tam suit;
- Relator did not have knowledge independent of that information previously disclosed to public, as would bring relator's complaint within "original source" exception to "public disclosure" bar to suit; and
- Relator's information did not materially add to previously disclosed fraudulent scheme, as would bring relator's complaint within "original source" exception to "public disclosure" bar to suit.

Remarketing agents alleged misrepresentations that they would comply with their obligations to Commonwealth to determine applicable rate of interest on long-term, tax-exempt, variable rate bonds that financed long-term public projects and infrastructure that, in their judgment, was lowest rate that would permit sale of bonds bearing interest at applicable interest rate at par plus accrued interest as of applicable rate determination date, was in public domain, for purposes of "public disclosure" bar to qui tam action against agents under Massachusetts False Claims Act (MFCA), where representations were set forth in agreements with Commonwealth, in Municipal Securities Rulemaking Board (MSRB) rules that addressed agents' duties to bond issuers, and in Securities Industry Financial Markets Association (SIFMA) model disclosures.

Purportedly true state of remarketing agents' fraud in setting artificially high interest rates on long-term tax-exempt variable rate bonds to finance long-term public projects or infrastructure, when they represented to Commonwealth that they would comply with their obligations as remarketing agents to determine lowest interest rate that would permit sale of bonds on given rate determination

date, were in public domain, for purposes “public disclosure” bar to qui tam action against agents under Massachusetts False Claims Act (MFCA); relator’s assertion that agents were not obtaining lowest rates was available to public on Internet, specifically, website that publishes information on all municipal bonds, and relator used same data from website on Internet to conclude that agents were not setting lowest rates on bonds.

Remarketing agreements with Commonwealth, in which remarketing agents purportedly misrepresented state of facts that they would comply with their obligations to Commonwealth to determine applicable rate of interest on long-term, tax-exempt, variable rate bonds that financed long-term public projects and infrastructure that, in their judgment, was lowest rate that would permit sale of bonds bearing interest at applicable interest rate at par plus accrued interest as of applicable rate determination date, constituted “reports,” and thus were statutory source of previously disclosed information, for purposes of “public disclosure” bar to qui tam action against agents, under Massachusetts False Claims Act (MFCA).

Internet website that published information on all municipal bonds constituted “news media,” and thus, was statutory source of prior disclosure of purportedly true state of remarketing agents’ alleged fraud in setting artificially high interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, when agents represented to Commonwealth in remarketing agreements that they would comply with their obligations to determine lowest interest rate that would permit sale of bonds on given rate determination date, for purposes of public disclosure bar to qui tam action under Massachusetts False Claims Act (MFCA).

Relator’s allegations in qui tam complaint against remarketing agents, relating to agents’ purportedly fraudulent scheme to artificially inflate interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, when agents represented to Commonwealth in remarketing agreements that they would comply with their obligations to determine lowest interest rate that would permit sale of bonds on any given rate determination date, were substantially same as misrepresentations and true state of facts that were previously disclosed to public, such that publicly disclosed information put Commonwealth on trail of alleged fraud without relator’s assistance, and thus, relator’s complaint fell within “public disclosure” bar to qui tam suit under Massachusetts False Claims Act (MFCA).

Relator did not have knowledge independent of that information previously disclosed to public regarding scheme by remarketing agents to artificially inflate interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, despite agents’ obligations in remarketing agreements with Commonwealth to determine lowest interest rate that would permit sale of bonds on any given rate determination date, and thus, relator was not original source of information, as would bring relator’s complaint under “original source” exception to “public disclosure” bar to suit under Massachusetts False Claims Act (MFCA); Internet website that published information about municipal bonds publicly reported same data upon which relator relied, and relator’s analysis depended entirely on interest rate data, which were available on website.

Relator did not materially add to previously disclosed fraudulent scheme by remarketing agents to artificially inflate interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, in breach of agents’ obligations in remarketing agreements with Commonwealth to determine lowest interest rate that would permit sale of bonds on any given rate determination date, and thus, relator was not “original source” of information, as would bring his qui tam complaint within “original source” exception to “public disclosure” bar to suit under Massachusetts False Claims Act (MFCA), despite relator’s claim that his investigation revealed robo-resetting scheme for resetting interest rates; salient information was that agents promised they would reset rates individually and failed to do so, and manner in which they conducted the fraud —

purportedly in order to discourage holders of bonds from selling those bonds — was detail that would not influence behavior of someone already armed with knowledge of salient elements of fraud.

Relator's assertion of collusion between remarketing agents to artificially inflate interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, in breach of agents' obligations in remarketing agreements with Commonwealth to determine lowest interest rate that would permit sale of bonds on any given rate determination date, did not materially add to information previously publicly disclosed, and thus, relator was not "original source" of knowledge of scheme, as required for relator's complaint to come within "original source" exception to "public disclosure" bar to qui tam suit under Massachusetts False Claims Act (MFCA); complaint simply alleged that agents must have colluded in order for interest rates to have changed as they did, and only additional information beyond this deduction from data contained on website that published information regarding municipal bonds, obtained during single interview, was not relevant to purported fraud, but merely confirmed what relator had already had discerned from data.