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Government Investigations & White-Collar Alert

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Wisconsin Bell and the False Claims Act

By Brian A. Hill, Jarrad Kirsh, Adam R. Tarosky, and Robert Fisher

The Supreme Court "claims" a case and will determine whether requests to the E-Rate program count as claims under the False Claims Act.

What's the impact?

- By granting certiorari, SCOTUS opens up the possibility that individuals and entities requesting E-Rate reimbursement could be subject to civil penalties for false "claims" in the future.
- Anyone transacting with any federal adjacent private entities should monitor developments in this case to determine their level of potential liability under the FCA.

When does money come from the government? That is the question that the Supreme Court will answer after granting cert in *Wisconsin Bell, Inc. v. U.S. ex rel. Heath*, No. 23-1127. Originating in the Eastern District of Wisconsin and passing through the Seventh Circuit, *Wisconsin Bell* asks the Court to consider whether reimbursement requests under the Schools and Libraries Universal Service Support program—better known as the E-Rate program—count as "claims" under the False Claims Act (FCA).

How do E-Rate reimbursements work?

The E-Rate program was established by the Federal Communications Commission (FCC) under the Telecommunications Act of 1996 and requires telecommunication carriers to charge libraries and schools the "lowest corresponding price" for telecommunications services—that is, the lowest price that they charge similarly situated non-residential customers for similar services. It is paid for by the Universal Service Fund, which is funded by required contributions by private telecommunications carriers. The Fund is administered by a private nonprofit organization, the Universal Service Administrative Company. When a school or library receives services under the E-Rate program, it either pays the full price and submits a request for reimbursement, or it pays a discounted price and the service provider submits a request for the rest.

Does the FCA apply to E-Rate reimbursement?

The FCA imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." Anyone found liable is subject to "a civil penalty of not less than $5,000 and not more than $10,000, [adjusted for inflation], plus 3 times the amount of damages which the [g]overnment sustains."

IMPLICATIONS OF 2009 FCA AMENDMENTS

Prior to 2009, the FCA defined a "claim" to mean "any request or demand . . . for money or property made to a contractor, grantee, or other recipient if the United States [g]overnment provides any portion of the money or property which is requested or demanded." However, Congress passed the Fraud Enforcement and Recovery Act of 2009 (FERA), which implemented substantial changes to the FCA.

Prior to FERA, a claim could only qualify under the FCA if it was presented "to an officer or employee of the United States." FERA struck that language. The 2009 revision essentially kept the original definition while broadening the definition to also include "any request or demand . . . for money or property . . . presented to an officer, employee, or agent of the United States." The change was not retroactive, so courts and parties dealing with cases that involve conduct from before and after 2009 have to contend with both definitions.

What is a relator under the FCA?

While the United States can bring cases under the FCA, cases can also be brought by persons. Such a person bringing a case under the FCA is called a relator, and they bring their action in the name of the government. The government can choose whether to take over the case or let the relator conduct it on their own; either way, the relator receives a portion of the proceeds if the case is successful.

Relator brings allegations against common carrier

Todd Heath is just such a relator. Wisconsin Bell is a common carrier that provides services to schools and libraries, among other customers, and receives subsidies under the E-Rate program. These subsidies include both reimbursement requests directly from the customer and reimbursement requests from Wisconsin Bell directly. Heath alleges that Wisconsin Bell charged these schools and libraries more than the lowest corresponding price—making all of those reimbursement requests false claims under the FCA.

On summary judgment, the district court found that Heath did not show falsity or scienter under the FCA and granted summary judgment for Wisconsin Bell. Heath appealed, and the Seventh Circuit reversed in an opinion that contained only a brief statement about whether the E-Rate program involves federal funds. After Wisconsin Bell moved for rehearing, the Seventh Circuit issued a revised opinion that found as a matter of law that reimbursement requests under the E-Rate program counted as "claims" under both the pre- and post-revision definitions in the FCA.

The Seventh Circuit had three alternative bases for its conclusion. First, it found that the Universal Service Fund—while funded by fees paid by the telecommunications companies, as directed by the FCC—also received funds from the US Treasury, which collects delinquent debts to the Fund, penalties and interest, and civil settlement and criminal restitution payments. Since both definitions of "claim" apply if the government provides "any portion" of the funds, the Seventh Circuit said that this money was sufficient to bring E-Rate reimbursement requests under the umbrella of the FCA. Second, the Seventh Circuit found that the Universal Service Administrative Company, created by the FCC to administer the Fund, was an agent of the United States, bringing the E-Rate program within the post-2009 definition of "claim." Finally, the Seventh Circuit found that the degree of government involvement in the E-Rate program—from Congress ordering the FCC to collect the fees to fund the program, to the FCC setting the fee amounts, to the FCC establishing the Universal Service Administrative Company to manage the Fund—was sufficient to say that the United States "provided" the money in the E-Rate program, again meeting the definition of a "claim" in both the old and current versions of the FCA.

In doing so, the Seventh Circuit's ruling directly contradicted an earlier ruling by the Fifth Circuit. In *U.S. ex rel. Shupe v. Cisco Sys., Inc.*, the Fifth Circuit expressly found that the E-Rate program did not fall under the FCA's purview. It ruled that the Universal Service Administrative Company was "explicitly a private corporation owned by an industry trade group," even if it was created by the actions of Congress and the FCC, and that the money in the Universal Service Fund was "provided by private telecommunication providers because of a mandatory contribution scheme established by the FCC and Congress" and was not a tax. As such, it found that because there were "no federal funds involved in the program, and [the Universal Service Administrative Company was] not itself a government entity," the federal government did not provide any portion of the E-Rate funds. And while the Fifth Circuit only had to deal with the pre-2009

definition of "claim"—and therefore did not examine whether the Administrative Company was an agent—it predicted that its opinion would affect FCA cases under both versions of the statute.

The Seventh Circuit noted that it was disagreeing with the Fifth Circuit's *Shupe* opinion but justified its opposite holding. First, it said that the Fifth Circuit never acknowledged that some funds in the Universal Service Fund—the unpaid debts, civil settlements, and criminal restitution payments—*can* be traced back to the US Treasury, meaning that the government *did* provide money to the E-Rate program and the program was not entirely privately funded. Second, the Seventh Circuit pointed to the 2009 amendment to the definition of "claim"—which, again, the Fifth Circuit did not need to consider—and repeated that the Universal Service Administrative Company fell within that definition because it was an agent of the federal government. And third, the Seventh Circuit said that the FCA only requires that the government provide the funds, not that they come from the US Treasury. It explained that the government maintained an active enough role in the collection and distribution of the E-Rate money that it "provided" the funds for the purposes of the FCA.

How will SCOTUS interpret the FCA dispute ?

With the circuit split in place, it falls on the Supreme Court to decide whether requests to the E-Rate program count as claims under the FCA. Might it rule that the Seventh Circuit's finding that money in the fund can be traced to the Treasury is close, but no cigar? The precedent for that could be found in *United States v. Cohn*, 270 U.S. 339 (1926). In *Cohn*, the Supreme Court analyzed an old criminal version of the FCA in the context of false statements made to obtain possession of a shipment of cigars from a customhouse in Chicago. The United States was not owed any payment for the duty-free cigars and never held title to them, but it was in possession of the cigars pursuant to customs regulations until Cohn's brokers made false representations to get their hands on them. The court found that obtaining the cigars in these circumstances was not a "claim against the government." Such an argument could be made regarding the money that the Treasury obtains for the E-Rate program—that it is money that belongs to the private program, and which the Treasury only has temporary possession of as it collects it. If the Supreme Court accepts that, one of the bases for the Seventh Circuit's conclusion will be reversed.

Whether it does so—and its opinion on the Seventh Circuit's other rationales—could have a sizable impact.

What's next for organizations relying on E-Rate?

Most obviously, whether requests to the E-Rate program fall under the FCA affects E-Rate program participants: the telecommunications providers that provide services to the libraries and schools that might be liable under the FCA if they do not charge the lowest corresponding price, and the schools and libraries themselves that could get in trouble if their own reimbursement

requests are false. If the Supreme Court adopts any one of the Seventh Circuit's justifications as to why E-Rate requests count as "claims," those entities would face the FCA's civil penalties and treble damages for any false or fraudulent requests that they submit as part of the program.

But the impact could go further than that. In its cert petition, Wisconsin Bell flagged Fannie Mae and Freddie Mac as being at risk of falling within the FCA based on the Seventh Circuit's "agent" understanding, and the Boy Scouts, Veterans of Foreign Wars, and US Olympic Committee as potentially falling within the FCA based on the Seventh Circuit's justification related to "the federal government's role in establishing and overseeing" them. Whether that is just fearmongering before the Court remains to be seen, but anyone who transacts with any federal adjacent private entity should be keeping an eye on this case through its briefing and argument.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Brian A. Hill
202.236.5098
bhill@nixonpeabody.com

Jarrad Kirsh
617.345.6168
jkirsh@nixonpeabody.com

Adam R. Tarosky
202.585.8036
atarosky@nixonpeabody.com

Robert Fisher
617.345.1335
rfisher@nixonpeabody.com