FIFTH CIRCUIT: TELECOM CORPORATIONS NOT SUBJECT TO FCA CLAIMS ON E-RATE ALLEGATIONS

The Fifth Circuit rejected the government's attempt to expand the FCA's reach to include non-government funds overseen by a non-governmental entity simply because the government had the ability to exert a modicum of control over the entity.

THE DECISION

In *U.S. ex rel. Rene Shupe v. Cisco Systems et al.* a whistleblower filed a *qui tam* action alleging that telecommunications companies had violated the False Claims Act ("FCA") while participating in an FCC program known as E-Rate. Under the program, telecom companies are statutorily mandated to provide funding for a joint fund (the Universal Service Fund ("USF")) that is overseen by a non-governmental, nonprofit administrator: the Universal Service Administrative Company ("USAC"). Companies may then submit funding applications to the USAC in a bidding process to secure resources for certain telecom services, including maintenance and access improvements.

The whistleblower alleged that the Defendants violated the FCA when they falsely certified compliance with the program's requirements to the USAC upon receiving funding. Though the government did not intervene in the case, it did file a brief opposing the Defendant's interlocutory appeal for a reversal of the trial court's denial of its motion to dismiss the case.

The FCA allows for claims to be filed when the government "provides a portion of" the funding from which an allegedly false claim could be or was paid. (Shupe at 4.) Defendants argued that because the USF was not funded by the government and because the USAC was not a governmental agency, the whistleblower had failed to state a claim under the FCA. In response, the government proposed a sweeping reading of the FCA's language urging the Court to rule that the government "provides" funding sufficient to trigger the FCA so long as it has the ability to exercise control over the entity to which a claim was submitted.

The Fifth Circuit, rejecting the Government's argument and reversing the lower court, read the FCA's language to be far narrower. In an extensive review of FCA case law, the Court noted that claims similar to this fall into one of three categories:

1. a drop of Treasury funding;
2. quasi-governmental entities that can trigger FCA liability; and
3. quasi-governmental entities that do not trigger FCA liability.

Under the first category, the smallest amount of funding from the Treasury, even if it is part of a larger pool, triggers FCA liability. But here the USF is entirely industry funded. As to the remaining categories, the Court found it was in fact the implementing statutory language - not the government's ability to control an entity - that determined whether or not a claim could be stated under the FCA.

For example, claims to the United States Postal Service can trigger FCA liability because the implementing statute reads that the USPS provides a fundamental service "to the people by the government of the United States." (Shupe at 10.) In contrast, claims submitted to Amtrak cannot trigger FCA liability, as the implementing statute for Amtrack expressly disclaims that it is an agency of the government.

Applying this rule, the Court concluded that the funding provided in the USF and administered by the USAC was not provided by the government and therefore submissions to the USAC could not trigger FCA liability.

Should you have any questions regarding the False Claims Act or defense of whistleblower actions, please contact:

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