How Justices' E-Rate Decision May Affect Scope Of FCA

By **David Colapinto** (August 8, 2024)

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During the 2024-25 term, the U.S. Supreme Court will hear arguments in a False Claims Act case with widespread implications for the ability of whistleblowers and the U.S. government to hold fraudsters accountable under the law.[1]

On June 17, the court granted a writ of certiorari in Wisconsin Bell Inc. v. U.S. ex rel. Heath, in which Wisconsin Bell, an AT&T subsidiary, is challenging the revival of a whistleblower suit alleging that the company defrauded the Federal Communications Commission's E-rate program.[2] The E-rate program helps certain schools and libraries afford internet and telecommunications.

The case centers around whether reimbursement requests submitted to the E-rate program are claims under the FCA. The program, while set up by Congress, is administered by a private nonprofit organization and is funded by government-mandated payments made by private telecommunications carriers.

The decision will thus determine whether FCA enforcement will cover funds used in industry-funded federal programs that are mandated by Congress.

Given that the FCA is America's number one anti-fraud law, the possibility of a narrow ruling by the Supreme Court threatens to remove a critical tool from law enforcement and open the door for widespread fraud in key government programs.[3]

Background

The Universal Service Program for Schools and Libraries, also known as E-rate, was created in response to the Telecommunications Act, which directs the FCC to further universal access to telecommunications services.

Through the program, which is funded by the Universal Service Fund, eligible schools and libraries may receive discounts on telecommunications and internet access. After services are provided, either the school, library or telecommunications vendor submits requests through the E-rate program for reimbursement of approved discounts.

The E-rate program is administered by the Universal Service Administrative Company, or USAC, a nonprofit that was created by Congress that acts solely pursuant to authority granted by the FCC. The program is funded by payments that telecommunications carriers are mandated to make to the Universal Service Fund. Each year, the E-rate program distributes up to $4.5 billion.

In 2008, whistleblower Todd Heath filed a qui tam lawsuit in the U.S. District Court for the Eastern District of Wisconsin, alleging Wisconsin Bell falsely certified compliance with a "lowest corresponding price" rule that requires carriers to give preferential pricing to schools and libraries through the E-rate program.[4]

Heath's complaint, filed under Title 31 of the U.S. Code, Section 3729, alleged that Wisconsin Bell charged schools and libraries more than was allowed under the E-rate

program, thus causing the federal government to pay more than it should have.

In response to Heath's claims, Wisconsin Bell argued that none of the funding for the E-rate program comes from taxpayers, and that, although telecommunications carriers are required to pay into the E-rate program fund, the amounts charged to schools and libraries are private — not government — funds. Thus, Wisconsin Bell argued, the FCA does not apply because only private funds are at issue.

While the district court granted summary judgment in favor of Wisconsin Bell in 2022, a unanimous three-judge panel of the U.S. Court of Appeals for the Seventh Circuit — Circuit Judges David Hamilton, Frank Easterbrook and John Lee — reversed the decision, ruling in U.S. ex rel. Heath v. Wisconsin Bell that Heath had offered sufficient evidence of falsity or scienter to defraud a federal program and remanding the case to trial.

Wisconsin Bell requested review by the Supreme Court on the grounds that the Seventh Circuit decision conflicts with a 2014 ruling from the U.S. Court of Appeals for the Fifth Circuit in Consumers' Research v. FCC that the FCA does not apply to E-rate program funds. Heath argued against this notion of a circuit split, claiming that the factual basis of the two cases was dramatically different.

In granting Wisconsin Bell's cert petition on June 17, the court framed the question presented as, "Whether reimbursement requests submitted to the E-rate program are 'claims' under the False Claims Act."

Legal Analysis

Wisconsin Bell asks the court to narrow the statutory definition of "claim" solely in connection with a request that is made directly to a government agency for money, and that is paid from the U.S. Department of the Treasury.

The company argues that no "claims" are at issue in this case because the funds were paid through the USAC, which is not a government agency. While Wisconsin Bell's argument might have some surface appeal, it ignores both the pre-2009 and post-2009 definitions of "claim" in the FCA. The case involves alleged false claims under both FCA definitions.

Notably, from 1986 until 2009, the FCA defined "claim" to mean "any request or demand ... made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded."

Heath argues that under this definition of "claim," Wisconsin Bell is liable because Congress not only created the federal program that was allegedly defrauded, and mandated the payments into the Universal Service Fund, but Congress also provides a portion of the funds in question.

As noted in Heath's brief in opposition to the petition for certiorari, the Seventh Circuit relied on critical evidence in the record that the Universal Service Fund received more than $100 million directly from the U.S. Treasury. Thus, at least some portion of the Universal Service Fund is provided by the U.S. government.

In 2009, Congress amended the FCA's definition of "claim" to include, inter alia, requests or demands either (1) "presented to an officer, employee, or agent of the United States"; or (2) " made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest,

and if the United States Government ... provides or has provided any portion of the money or property requested or demanded."

Under this definition, once again the statutory requirements of a claim are satisfied because the government provides at least a portion of the funds in the Universal Service Fund, USAC is acting as an agent of the federal government, and the claims made by Wisconsin Bell are for money that "is to be spent or used on the Government's behalf" and "to advance a Government program" — i.e., the FCC's E-rate program.

Given the statutory creation of the Universal Service Fund, the mandate that a certain portion of the rates charged by telecommunications carriers be deposited into the fund, and that this funding of the E-rate program is required by statute and FCC regulations, in 2017, in U.S. ex rel. Futrell v. E-rate Program LLC, the U. S. District Court for the Eastern District of Missouri concluded that the U.S. makes available the money requested by carriers from the E-rate program, and that the money "was provided to the program by the Government and is protected by the FCA."

In reaching this decision, the court quoted the U.S. Court of Appeals for the Third Circuit's 2008 ruling in U.S. ex rel. Sanders v. American-Amicable Life Insurance Company of Texas, which noted that the "plain meaning of the term 'provided' is 'to make available,'" citing common dictionary definitions.

The fact that the USAC was created by Congress to administer the funds ignores that the FCC has supervisory authority over the Universal Service Fund and that at least some portion of the funds is provided by the U.S. Treasury.

Moreover, Wisconsin Bell does not dispute that, since 2018, all the funds in the Universal Service Fund have been collected by and distributed from the U.S. Treasury, including all $4.5 billion available for distribution in 2024.

Significantly, in a related challenge to the constitutionality of the Universal Service Fund, on June 10, the Supreme Court rejected a petition for certiorari filed by Consumers' Research in Consumers' Research v. FCC, which argued that the funding program was an unconstitutional delegation of fundraising functions from Congress to the FCC, and that allowing the USAC to administer the program's funds was an improper transfer of government power to the private sector.

In that case, Consumers' Research asked the court to review related 2023 decisions in Consumers' Research v. FCC from the U.S. Court of Appeals for the Sixth Circuit and the U.S. Court of Appeals for the Eleventh Circuit, both of which rejected the group's constitutional challenge to the Universal Service Fund.

Consumers' Research has filed a petition for rehearing in the Supreme Court asking the court to reconsider the denial of its petition for certiorari. The petition for rehearing is still pending and is based, in part, on the Supreme Court's grant of certiorari in Wisconsin Bell, and, in part, on Consumer Research's challenge to the constitutionality of the Universal Service Fund in the Fifth Circuit.

On July 25, the Fifth Circuit, sitting en banc, ruled in Consumers' Research v. FCC that the Universal Service Fund is an unconstitutional delegation of funding authority. Now that the Fifth Circuit has granted Consumers' Research's constitutional challenge, there exists a circuit split that might cause the Supreme Court to grant Consumers' Research's petition for a review of the Sixth Circuit and Eleventh Circuit rulings holding that the Universal Service

Fund is not an improper delegation of fundraising functions by Congress.

How that constitutional issue gets resolved in the Consumers' Research cases may influence the Supreme Court's view on whether the USAC is an agent of the federal government, and could affect how the court rules in Wisconsin Bell. If the court, however, declines to grant certiorari on Consumers' Research's constitutional challenges to the Universal Service Fund, it might tip the balance against Wisconsin Bell in the FCA qui tam case.

Assuming that the Universal Service Fund is constitutional, it would be consistent with the statutory definition of "claim" under the FCA to conclude that Congress may delegate a funding program to the FCC and that it may create an agent such as USAC to assist in the administration of a federal program with funding mandated by Congress. In such circumstances, those funds would not be considered private funds exempt from liability under the FCA because Congress has exercised its constitutional authority to mandate funding and require the FCC to oversee the program.

Based on the factual record and that under the existing legal framework the Universal Service Fund is constitutional, the court could easily conclude that requests for funds from the E-rate program are claims within the meaning of the FCA. To conclude otherwise would create havoc in the policing of fraud in a variety of federal programs.

However, with the Fifth Circuit's July 25 decision in Consumers' Research creating a circuit split on the constitutionality of the Universal Service Fund, the outcome remains far from certain.

Implications of Wisconsin Bell

The court's decision in Wisconsin Bell will have widespread implications for the reach of the FCA. Multiple industry groups supported Wisconsin Bell's cert petition. During the merits briefing, the court is likely to hear from amici groups on both sides, and from the government.

As U.S. Department of Justice officials continually note, the FCA is a critical tool for rooting out fraud to protect public funds and government programs.[5] Key to the success of the FCA are its qui tam provisions, which enable individuals like whistleblower Heath to file suits on behalf of the U.S. government that report fraud on federal programs and to receive a portion of any recoveries made in the case.

Since the FCA was modernized in 1986, it has allowed the U.S. government to recover over $75 billion in taxpayer dollars from fraudsters, with over $50 billion of these recoveries stemming from qui tam whistleblower lawsuits.[6]

A ruling in this case that finds Wisconsin Bell's request for funds from the E-rate program is not a claim under the FCA will thus remove this important tool from the government's arsenal for fighting fraud within the E-rate program, a program that is vital for funding budget-strapped schools and libraries that provide critical educational services to youth across the company.

But such a ruling would have implications far beyond the E-rate program. It will determine whether a whole host of government programs, in which private money is used to fund government programs under the government mandate, are covered by the FCA.

For example, the Universal Service Fund also provides critical funding for: (1) the Rural

Health Care Program, which has paid hundreds of millions of dollars for construction of regional broadband telehealth networks in 42 states and provides payments for telecommunications discounts on expenses related to broadband connectivity by health care providers; (2) the Lifeline Program, which helps low-income people pay for phone and broadband services by paying telecommunications companies billions of dollars; and (3) the Connect America Fund, which has provided billions to subsidize carriers that increase telecommunications and broadband in rural areas.

If the court adopts a narrow interpretation of "claim" in Wisconsin Bell, it will also affect whether fraud at self-funded agencies can be addressed under the FCA. For example, as noted by the relator in Wisconsin Bell, the U.S. Postal Service is a self-funding agency and its funding is not passed through the U.S. Treasury, but the courts have held that Postal Service funds are protected by the FCA.

Likewise, the Federal Housing Administration is not funded by the U.S. Treasury, but the courts have always held that the FCA applies to false claims on FHA insurance payments.

There could even be implications for prosecuting Medicare fraud, the largest sector of FCA recoveries.[7] Until now, the courts have uniformly considered fraud on Medicare as actionable under the FCA, but taxpayers pay into the Medicare Trust Fund, which is a non-Treasury account, and funds are dispensed through insurance companies or other healthcare providers.

There are many other federal programs that are funded through mechanisms that do not require the Treasury to pay claim recipients directly, and fighting fraud in those programs will become much more difficult if the Supreme Court adopts the definition of "claim" urged by Wisconsin Bell.

By removing liability under the FCA for defrauding federal programs because the claims are not paid directly by the U.S. Treasury, but by other means mandated by Congress, the court would severely weaken the FCA, opening the door for fraudsters to defraud federal programs simply because of alternative funding structures set up by Congress.

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[1] https://kkc.com/frequently-asked-questions/what-is-the-false-claims-act/.

[2] https://www.supremecourt.gov/orders/courtorders/061724zor_4fci.pdf.

[3] https://www.justice.gov/opa/pr/justice-department-celebrates-25th-anniversary-false-claims-act-amendments-1986.

[4] https://kkc.com/frequently-asked-questions/qui-tam-lawsuits/.

[5] https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023.

[6] https://www.justice.gov/opa/media/1339306/dl?inline.

[7] https://kkc.com/frequently-asked-questions/false-claims-act-guide-for-healthcare-whistleblowers/.