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Supreme Court Agrees to Review Wisconsin Bell Fraud Claims (1)

By Daniel Seiden and Lydia Wheeler

Documents

- Wisconsin Bell said US funds not involved in FCA dispute
- Whistleblower said $100 million went to E-Rate from US

The US Supreme Court said Monday that it will review Wisconsin Bell Inc.'s challenge to the revival of a False Claims Act suit alleging that the AT&T subsidiary defrauded a Federal Communications Commission program.

The Supreme Court's decision in this case could affect the reach of the FCA and who can be a proper defendant.

The US Court of Appeals for the Seventh Circuit reinstated whistleblower Todd Heath's claims that Wisconsin Bell defrauded the Universal Service Program for Schools and Libraries, or E-rate, which helps them afford telecommunications and internet services.

Wisconsin Bell allegedly submitted claims for subsidies, while falsely certifying compliance with a "lowest corresponding price" rule. The rule is violated if a provider charges E-rate customers a higher rate than it charged similarly situated customers for similar services.

The company's petition to the Supreme Court said the point of the FCA is to protect government money, but private telecommunications carriers supplied the money used in the $4.5 billion program.

The appeals court improperly found that reimbursement requests to E-Rate are actionable claims under the FCA, because the program is funded exclusively by private carriers' contributions and administered by a private non-profit entity, the petition said.

Enforcement Stakes

The decision to take the case "signals a desire to clarify an aspect of FCA jurisprudence left muddled in the wake of the 2009 amendments, which shifted the focus from presentment of false claims to the federal government to merely false claims being used to obtain federal funds," said Bob Rhoad, who represents FCA defendants with Nichols Liu LLP.

The Supreme Court seems ready to address "what constitutes federal funds in the context of industry-funded private entities established by Congress, and whether that tenuous relationship between the government and the entity, without more, is sufficient," he said.

"It may seem academic, but the answer will likely shape FCA enforcement by both the government and relators bar when it comes to such entities," Rhoad said.

"There must be, and there is, a dividing line between funds subject to the FCA and those that are not; private funds are not subject to the FCA," said Megan Mocho, who represents FCA defendants with Holland & Knight LLP.

Upholding the Seventh Circuit decision "would unleash the powers of the FCA upon a broad swath of inherently non-governmental transactions, ones beyond the expected reach of the FCA during its enactment," she said.

The FCA shouldn't cover the "ever-increasing number of congressionally chartered, yet private, organizations now in existence," she said.

The Supreme Court should side with the Seventh Circuit to effectuate the purpose of the FCA, said David Colapinto, who represents whistleblowers with Kohn, Kohn & Colapinto LLP.

Congress mandated the E-Rate program, and its funding is required to be paid by carriers under federal laws and regulations, he said.

"Simply because Congress required the telecommunications carriers to fund the program through a non-profit rather than funneling the funds through a federal agency does not permit companies to defraud a federal program," he said.

The record in this case "amply supports" the Seventh Circuit's holding that false statements to the E-Rate program can support an FCA action, said Anne Hayes Hartman, who represents whistleblowers with Morgan Verkamp LLC.

"Universal Service Fund fees are collected by telecommunications providers from consumers, to be distributed consistent with federal law, and the FCA is an appropriate mechanism to ensure that those funds are spent consistently with the federal statutes that govern their use," she said.

Split Cited

The appeals court's conclusion created a circuit split with the Fifth Circuit, which said in 2014 that the FCA doesn't apply to E-Rate reimbursement requests because the government doesn't have a financial stake in money allegedly lost, Wisconsin Bell said.

Heath's response to the petition said the US government has shown that at least $100 million has flowed from the US Treasury to E-rate.

Heath also disagreed that there's a circuit split the Supreme Court needs to resolve. The record before the Fifth Circuit didn't include any factual showing about the amount of federal funds involved with E-Rate, and the courts applied identical legal reasoning to different facts, Heath said.

Heath filed this suit in 2008 in the US District Court for the Eastern District of Wisconsin. The district court granted Wisconsin Bell summary judgment in March 2022.

The Seventh Circuit reversed in August 2023 and issued an amended opinion in January to clarify the federal funds issue. Even a "drop" of federal money given to a defrauded entity will establish liability under the FCA, the appeals court had said.

Heath and the government offered evidence that the Universal Service Fund, which funds E-Rate, receives US Treasury funds, as well as fees from telecommunications companies as directed by the FCC, the appeals court said.

O'Neil, Cannon, Hollman DeJong & Laing SC and Goldberg Kohn Ltd. represent Heath. Mayer Brown LLP and Gibson, Dunn & Crutcher LLP represent Wisconsin Bell.

The case is Wis. Bell Inc. v. United States ex rel. Heath, U.S., No. 23-1127, petition granted 6/17/24.

To contact the reporters on this story: Daniel Seiden in Washington at dseiden@bloombergindustry.com; Lydia Wheeler in Washington at lwheeler@bloomberglaw.com

To contact the editor responsible for this story: Brian Flood at bflood@bloombergindustry.com

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