

# The FCA and the USF: Reactions and Impressions from the FCBA's False Claims Act Seminar

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Last week, the Federal Communication Bar Association's (FCBA's) Enforcement Committee hosted a [legal seminar](#) on an issue that is somewhat new and unfamiliar to the communications bar – the federal False Claims Act (FCA), and particularly its use by the federal government to combat fraud in the Universal Service Fund (USF). All in attendance had the unique opportunity to hear from representatives from the Department of Justice (DOJ), the U.S. Attorney's office and the FCC's Enforcement Bureau on the process for evaluating FCA cases, including the substantial intergovernmental coordination, as well as a lively debate from practitioners and litigators regarding whether or not the FCA should be applied to claims for USF. For those unfamiliar with the FCA, a brief overview is available [here](#).

While the entire discussion was enlightening and rich with inside detail, there were a few things that stood out for anyone keeping an eye on these issues.

- **The *Shupe* decision may likely be distinguishable for post-2009 FCA cases.** Almost certainly a highlight for most was hearing from attorneys on both sides of [U.S. ex rel. Shupe v. Cisco Systems Inc. et al.](#) *Shupe* is a case decided in 2014 in the Fifth Circuit that held that the E-Rate program – 1 of the 4 USF programs – does not trigger FCA liability for two reasons: 1) because the program does not involve federal funds and 2) because USAC is not a government entity. The debate highlighted an important point – the *Shupe* case is based on an older version of the FCA. The Congress [amended the FCA in 2009](#) and, in doing so, significantly expanded the definition of a claim for government funds. The *Shupe* decision was based on conduct that preceded the 2009 amendments, and therefore the impact of the decision for new cases could be limited.
- **The pending *Heath* case in Wisconsin may decide whether post-2009 FCA liability does apply to USF claims.** Practitioners also debated the impact of [U.S. ex. rel. Todd Heath v. Wisconsin Bell Inc.](#), currently pending in the Eastern District of Wisconsin, which is poised to challenge the *Shupe* decision. In *Heath*, another case involving an E-Rate service provider, the court's preliminary decisions have indicated the FCA does apply to USF funds in the post-2009 amendments era. However, at the seminar, practitioners reported that the court had denied interlocutory appeal, and it appeared that the case would have to go to trial before any further decisions could be made.
- **FCA investigations are multi-faceted and often involve civil, criminal and administrative government interests.** The standard processing of qui tam complaints – complaints filed under seal by private citizen whistleblowers on behalf of the government –

includes the complaints being sent to both the civil and criminal divisions of the U.S. Attorney's office and the civil and criminal divisions of the DOJ. Additionally, cases involving fraud associated with an administrative agency is referred to that agency for recommendations as to whether the government should intervene and prosecute the case. The administrative agencies may also have their own independent investigations and enforcement proceedings in progress regarding the same or similar conduct. The agency's interests will be considered as part of the investigation and resolution. Finally, due to the "[Yates Memo](#)", all DOJ FCA investigations will focus on individuals' liability from the beginning. Even if the corporation settles its investigation with the government, the settlement will not protect individuals from criminal or civil liability for his or her personal responsibility in the fraud.

- **It is critical for companies to have procedures in place to address fraud internally as well as procedures for addressing FCA investigations.** The best situation for any company is to identify and resolve any instances of fraud before any investigation and to have a robust compliance process in place to address issues. Additionally, having a compliance culture among employees and working to have positive separation moments with exiting staff can limit exposure to whistleblower complaints. However, if a company finds themselves in a FCA investigation it is important to understand that the company will not know the government's theory of liability for a substantial portion of the investigation. Companies should consider conducting their own internal investigations to understand the issues and potential vulnerabilities and begin to develop the company's defense(s).

The FCA's application to claims for funds from the USF will continue to be an issue of interest to companies participating in any of the USF programs as well as other FCC programs, such as the Telecommunications Relay Service (TRS) fund. Here at the CommLawMonitor, we will continue to watch for developments.