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### Whistleblower Defense Alert: Court Finds Relator Ill-Suited To Question Federal Agency's Judgment, Tosses Qui Tam Suit

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Last week, the District of Kansas granted summary judgment to Boeing in *U.S. ex rel. Smith v. The Boeing Company*, Case No. 05-10730MLB (D. Kan.), a False Claims Act case in which the *qui tam* relators effectively tried to second-guess the professional judgment of the Federal Aviation Administration (FAA). Noting that the relators' failed to demonstrate anything beyond a "good-faith difference of opinion" over the meaning of the requirements in question, the court granted the defendants' summary judgment motion. The court reinforced this conclusion with a lengthy opinion articulating why the conclusions of FAA investigators – who twice investigated and rejected the relators' allegations – were entitled to deference. The opinion provides two helpful lines of reasoning for FCA defendants: (1) relators cannot survive summary judgment simply because they are able to posit an alternative interpretation of the contractual provision or regulation in question, and (2) courts should defer to investigative findings made by agencies tasked with enforcing the regulations in question.

In *Smith*, the contracts in question involved the sale of aircraft to the Air Force and the Navy. The relators alleged that Boeing and one of its suppliers violated FAA regulations when they used manually controlled machine tools rather than automated machine tools to manufacture certain parts. The relators contended that this non-conforming manufacturing process rendered the aircraft unsuitable for flight, and thus the defendants made false statements when they certified compliance with FAA regulations in order to obtain a "FAA Standard Airworthiness Certificate," which was required under their contracts with the government.

The court began by citing the well-established principle that "[e]xpressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false." The relators' case turned on differences of opinion about what the FAA's regulations required and whether the defendants' manufacturing processes were reasonable. The court correctly refused to determine which party's interpretation of the relevant requirements

was the best. Noting that, although the defendants' understanding of the requirement in question was "certainly not the only possible understanding ... and perhaps not even the best one," the court nevertheless granted summary judgment because the defendants' interpretation was "a plausible one." Because the defendants' interpretation was "plausible," the court held there was insufficient evidence to establish either falsity or scienter under the FCA. As discussed in greater detail in a [prior article](#), defendants facing allegations that turn on the interpretation of a contractual provision or regulation should consider attacking the case at the motion to dismiss stage, as the "plausibility" determination is one that in many cases can and should be made on the pleadings.

Much of the court's analysis focused on the role the FAA played in investigating the relators' allegations. The court emphasized the fact that the FAA investigated the relators' claims on two separate occasions. Relying on the FAA's findings, the court essentially granted *Chevron* deference to the FAA's determinations. Although the court never cited or acknowledged *Chevron*, the court articulated many of the policies underlying the Supreme Court's holding in *Chevron*.

The court acknowledged that "the FAA – the federal agency charged by Congress for determining whether type design and other regulatory requirements are met – specifically examined relators' allegations and essentially concluded that Boeing's interpretation was correct." Next, the court compared the FAA, with its "far-reaching technical expertise" and its accountability as a member of the Executive Branch to federal judges and juries who "have no such expertise or restraints." It observed that "allowing [federal judges and juries] to decide whether aircraft are airworthy has the potential to derail the oversight systems devised by Congress and implemented by the President." The Supreme Court cited the same policy rationale in *Chevron*, holding that "judges are not experts in the field," and thus "may not substitute [their] own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Interestingly, the court indicated that if the FAA had not already investigated the relators' claims, it would have stayed the case and submitted the points of contention to the FAA.

There are a number of strategic implications from this opinion. It is not uncommon for the government to commission an investigation of a putative whistleblower's allegations. When the investigation is favorable to the defendant, defendants should use the reasoning in *Smith* (and *Chevron*) to argue that the court should not substitute its judgment for the reviewing agency. The argument is stronger when the reviewing agency has technical expertise, like the FAA or FDA, but it is also valid to argue that a court should defer to the findings of the Defense Contract Audit Agency, Defense Criminal Investigative Service, or agency inspector general. The overarching point is the same – as the *Smith* court held, the FCA "is not the appropriate vehicle for challenging a federal agency's construction and application of its regulations."

Finally, the *Smith* court's materiality analysis was also instructive. The court again leaned heavily on the FAA's conclusions, citing testimony from an Air Force official who said "the FAA is my engineering department." Based on the FAA's findings that the aircraft met its airworthiness standards, the court held that the relators' allegations could not have had a natural tendency to influence the government's payment decision. The court reinforced this holding by noting that the government did not terminate its aircraft leases with Boeing after the relators' allegations became known and instead, exercised its option to purchase the leased aircraft.

The court's approach to materiality again emphasizes the potential importance of the government's actions after a *qui tam* complaint is filed. If an investigation results in conclusions that are favorable to the defendant, the defendant should seek to obtain testimony from the relevant government purchasers recognizing the expertise of the investigators. Similarly, the fact that the government continues to purchase the product in question is also highly relevant to materiality.

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