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## Tenth Circuit Affirms False Claims Act Summary Judgment on Scierter Grounds

In *United States ex rel. Smith v. The Boeing Co.*, 825 F.3d 1138 (10th Cir. 2016), the Tenth Circuit affirmed the district court's grant of summary judgment on scierter grounds, finding that a difference of opinion as to two reasonable but conflicting interpretations of a contractual manufacturing requirement could not render Defendant Boeing's certifications "knowingly false" as a matter of law.

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### Background

Between 1997 and 2002, Boeing contracted with the federal government for the sale and lease of "next generation" 737 aircraft ("737NG"). Unlike prior 737 models, Boeing contracted to manufacture the 737NG using advanced, computer-aided assembly techniques. Boeing subcontracted with Ducommun to supply parts for the 737NGs. The subcontract required Ducommun to use a computer-guided manufacturing process called Advanced Technology Assembly ("ATA"). After observing irregularities, Boeing discovered through an audit that Ducommun had instead used manual, hand-directed manufacturing techniques. The companies entered into a settlement agreement that resulted in Boeing accepting the parts at a reduced price. Ducommun continued to supply parts for the 737NG using traditional (manual) manufacturing techniques. The parts were then used in the aircraft leased and sold to the federal government.

The relators—members of the Boeing team that audited Ducommun—filed a *qui tam* complaint in 2005 alleging that Boeing and Ducommun were required to manufacture the 737NGs using ATA processes and tools capable of collecting "statistical process control" ("SPC") data.<sup>1</sup> Because the companies failed to do so, the relators argued, the 737NG's parts did not conform to the "type design" previously approved by the Federal Aviation Administration ("FAA"). The FAA must approve the "type design"—essentially manufacturing requirements—for all types of aircraft. The Relators supported their theory by citing engineering documents that they contended required the use of SPC data in manufacturing the 737NG. Both Boeing and the FAA interpreted the same engineering documents differently. Relying on these documents, the relators argued that Boeing falsely certified that its aircraft complied with FAA regulations when it knew Ducommun's parts did not conform to the type design for 737NG aircraft. The Relators further argued that compliance with FAA-established manufacturing requirements was a condition of payment.

The district court granted Boeing and Ducommun's motions for summary judgment, concluding that the relators failed to identify evidence of falsity, materiality, and scierter sufficient to proceed to trial.

### The Tenth Circuit Decision

A unanimous panel of the Tenth Circuit agreed with the district court that the relators had failed to demonstrate that they could prove the scierter required under the False Claims Act ("FCA"). In doing so, the Court reiterated that a FCA relator "must show more than a falsehood—they must show that [a defendant] *knowingly* presented a false claim for payment." 825 F.3d at 1149. In reviewing the record, the Court found that the relators had presented no evidence that anyone at Boeing knew that the Ducommun parts failed to comply with FAA regulations. Without facts

<sup>1</sup> The relators previously filed a *qui tam* complaint in 2002, which they voluntarily dismissed after the Federal Aviation Administration found no violations and the government declined to intervene.

showing Boeing's knowledge of nonconformities with the pertinent regulations when submitting claims for payment, the Court found that the relators' "naked assertions, devoid of any evidence of scienter, can't survive summary judgment." 825 F.3d at 1149.

As the primary grounds for its decision, the court rejected the relators' claim that advanced manufacturing processes and SPC were "so clearly required" under the 737NG type design that Boeing's claims for payment were "knowingly false as a matter of law." *Id.* The relators relied on the 737NG's engineering notes and supporting expert testimony. Yet, the Tenth Circuit observed that both the original authors of the engineering notes, contemporaneous Boeing documents, and the FAA disagreed with the relators' self-interested reading of these documents, and that the documents appeared to permit the use of traditional (manual) manufacturing methods, albeit at tighter tolerances, when sophisticated SPC machinery was not employed. Thus, the court held, the record revealed, at most, "conflicting opinions" on whether the 737NG and its parts required the use of computerized manufacturing processes. 825 F.3d at 1151. The Court found such evidence did not raise a genuine dispute of material fact as to Boeing's scienter.

### Implications of the Court's Decision

The *Boeing* decision is one of the latest in a growing line of authority that declines to find the scienter element of an FCA claim satisfied when a statute, regulation, or contract provision is susceptible to more than one reasonable interpretation and the defendant conducts itself in a manner that is consistent with one of the reasonable interpretations. The case also illustrates the challenges of trying to use government standards that are open to more than one interpretation—here manufacturing standards—as the basis for an FCA action.

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