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Supreme Court Holds That False Claims Act Scienter Turns On Defendant's Knowledge And Subjective Beliefs

***United States ex rel. Schutte v. SuperValu Inc.*, No. 21-1326; *United States ex rel. Proctor v. Safeway, Inc.*, No. 22-111**

Decided June 1, 2023

On June 1, the Supreme Court held that an objectively reasonable interpretation of an ambiguous statutory or regulatory requirement does not preclude a finding that the defendant acted "knowingly" under the False Claims Act.

Background:

Medicare and Medicaid rules often require pharmacies to disclose and charge the government for their "usual and customary" price for prescription drugs.

Two private relators sued, alleging that Safeway and SuperValu violated the FCA by reporting and charging their retail prices, rather than the prices they charged under certain discount programs, as their "usual and customary" prices to Medicare and Medicaid.

The district court agreed with the relators that the pharmacies' "usual and customary" prices should have accounted for the discount prices, and that the pharmacies' claims to the government accordingly were false—but granted summary judgment for the pharmacies on the ground that the pharmacies could not have acted with knowledge, as required by the FCA.

The Seventh Circuit affirmed, ruling as a matter of law that the pharmacies could not have acted "knowingly," because interpreting the phrase "usual and customary" to refer to retail prices, rather than discount prices, was objectively reasonable—regardless of what the pharmacies themselves actually believed at the time of the claims they made to the government.

Issue:

Whether an objectively reasonable interpretation of an ambiguous

"The FCA's scienter element refers to respondents' knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed."

Justice Thomas,
writing for the Court

statutory or regulatory requirement precludes a finding of knowledge under the FCA as a matter of law—regardless of the defendant's subjective belief at the time of the defendant's claims for payment.

Court's Holding:

No. The FCA's knowledge requirement turns on a defendant's knowledge and subjective beliefs at the time of the alleged conduct—not on an objectively reasonable interpretation the defendant may have had after the fact.

What It Means:

- By ruling that the facial ambiguity of a statute or regulation alone isn't sufficient to preclude a finding of scienter, this decision will potentially remove a way for courts to resolve FCA cases at the pleading stage because the Court's yardstick for measuring scienter—contemporaneous subjective knowledge—may prove too fact-intensive an inquiry in some cases. That said, the decision is unlikely to amount to a sea change in FCA law. The significant majority of federal appellate courts had already held that a *post hoc* legal interpretation cannot vitiate a defendant's contemporaneous, subjective belief.

- Consistent with its decision in *Universal Health Services v. United States ex rel. Escobar*, 579 U.S. 176 (2016), the Court grounded its interpretation of the FCA's scienter requirement in the FCA's text and common-law principles. Because the statutory text and common-law principles both focus on a defendant's subjective, contemporaneous knowledge, the Court held that "*post hoc* interpretations that might have rendered [a defendant's] claims accurate" are irrelevant.

- This decision is likely to be as significant for the issues it left open as for the ones it decided. Two undecided questions in particular stand out. *First*, the Court wrote that "reckless disregard"—the minimum level of scienter required under the FCA—"captures defendants who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway," but did not elaborate on when a risk is "substantial" or "unjustifiable." *Second*, the Court "assume[d] without deciding that the FCA incorporates some version of th[e] rule" that "misrepresentations of law are not actionable" as fraud.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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