

Landmark Supreme Court Case Could Reshape the FCA Scienter Requirement

The U.S. Supreme Court will soon clarify the knowledge requirement for False Claims Act (FCA) cases. Specifically, the Court will determine whether FCA liability should be rejected wherever there is an objectively reasonable interpretation of the requirement at issue, regardless of a defendant's subjective intent. Considering that the FCA prescribes treble damages and is used to obtain billions of dollars in annual civil settlements and judgments, a decision impacting its requirements and availability will significantly impact companies that conduct any business with the federal government.

On January 13, 2023, the Supreme Court agreed to hear two FCA cases, *U.S. ex rel. Schutte et al. v. SuperValu Inc. et al.*, and *U.S. ex rel. Proctor v. Safeway Inc.* In each case, the Seventh Circuit issued 2-1 panel decisions shielding SuperValu and Safeway, respectively, from FCA liability for fraudulent billing practices related to the usual and customary pricing of pharmaceutical drugs.

The Seventh Circuit rejected FCA liability because the defendants' conduct conformed to objectively reasonable interpretations of ambiguous regulations, and there was no authoritative guidance to the contrary. In doing so, the Seventh Circuit imputed the standard articulated in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007) (the *Safeco* Standard), a case generally related to the Fair Credit Reporting Act (the FCRA), 15 U.S.C. § 1681n(a). Applying the *Safeco* standard to the FCA, the court explained that "it is not enough that a defendant suspect or believe that its claim was false" as long as the submission is consistent with an objectively reasonable interpretation of the requirements of the law.

The defense bar has long voiced concerns with the broad scope of the FCA, given its severe penalties. Government contractors are often required to comply with voluminous and complex regulations, and an objectively reasonable standard would avoid excessive liability where those regulations are ambiguous. Subjective intent is typically unclear, and treble damages can be a powerful incentive for even well-meaning companies to settle rather than fight potential claims. On the other hand, the government and whistleblower plaintiffs warn that disregarding subjective intent would allow intentional fraudsters to escape liability as long as their attorneys can come up with a plausible legal rationale afterward.

However the Supreme Court decides the issue, its ruling is certain to significantly impact the FCA's scope and its use in regulatory enforcement. Oral argument will occur in April, and the Court's ruling is expected by late June.



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