Alert

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COZEN O'CONNOR

Supreme Court Appears Unlikely to Adopt "Objectively Reasonable" Test for False Claims Act Liability

On Tuesday, April 18, the Supreme Court heard oral argument in two consolidated, landmark False Claims Act (FCA) cases, *U.S. ex rel. Proctor v. Safeway Inc.* and *U.S. ex rel. Schutte et al. v. SuperValu Inc.* The Court's decision will ultimately clarify the standards for evaluating whether a defendant knowingly violated the FCA. The oral argument suggests that the Court will rule that a defendant's subjective intent will remain part of that *scienter* standard.

The two supermarket giants were accused of overcharging taxpayers for generic drugs. In response, they argued that their subjective intent was irrelevant to whether they knowingly submitted false claims to the government. Rather, they argued that — because they made objectively reasonable interpretations of their obligations under the law — they were not liable under the FCA regardless of whether they knew their representations were inaccurate. Split panels of the Seventh Circuit agreed with the defendants and affirmed judgment in their favor.

That may have all changed Tuesday, as several justices openly announced that it was an "easy" call to overturn the Seventh Circuit — in particular, doubting the proposition that a defendant's subjective intent could ever be irrelevant under a statute with a *scienter* or knowledge requirement. Counsel for the defendants expressed a fear that a ruling for the government would result in "open season" on government contractors. Still, the justices seemed troubled by the concept of ignoring subjective intent altogether and signaled that they would overturn the Seventh Circuit on a narrow ruling. As Justice Neil Gorsuch asked, "[W]hy wouldn't we reverse the Seventh Circuit on the narrow question presented because they failed to account for the fact that the statute has some *mens rea* attached to it?" Similarly, Justice Ketanji Brown Jackson questioned counsel for the defendants on their argument that the only thing relevant to assessing knowledge was objective, rather than subjective, intent. She and other justices characterized this case as an "easy" one.

A decision from the Court is expected before the end of June. Corporations and any current FCA defendants should prepare for a ruling endorsing examination of a defendant's subjective intent when submitting claims to the government. Thus, while solely *post hoc* efforts to justify a defendant's conduct may not be exculpatory (*i.e.,* a pure objectively reasonable *scienter* standard), the defendants' contemporaneous doubts and reasonable assumptions about ambiguous regulations/laws will remain highly relevant.

The key will be carefully documenting those doubts and assumptions to allow an FCA defendant to demonstrate its good faith years later. Whether documented in a memorandum, a collection of relevant correspondence, or an opinion letter from counsel, it will be advantageous for companies to have clear evidence of their intent to comply with regulations that are often ambiguous. Justice Gorsuch emphasized this point by noting that it would be an "excellent jury argument" to highlight a defendant's reasonable interpretation of its legal obligations. However, given that FCA cases overwhelmingly settle before trial, potential FCA defendants should strategize with counsel about the most effective and efficient manner for their particular business to create a record of their good-faith compliance efforts that can later be shared with government regulators if necessary.

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