

Unanimous Supreme Court Holds (Reaffirms) False Claims Act Responsibility Requires Offender's Belief of Lie

On June 1, 2023, the U.S. Supreme Court issued its ruling in two consolidated cases concerning the False Claims Act (FCA), *United States ex rel. Schutte et al. v. SuperValu Inc. et al.*, Case No. 21-1326, and *United States ex rel. Proctor v. Safeway*, Case No. 22-111. The Court's opinion has substantial implications for health care, construction, and other government contracting companies faced with navigating ambiguous government regulations that are often the basis for FCA prosecutions. Writing for a unanimous court, Justice Clarence Thomas emphasized the importance of a defendant's subjective beliefs about compliance in applying the FCA's knowledge requirement and rejected the argument that a violation of the FCA was precluded if a defendant's conduct was consistent with an "objectively reasonable" interpretation under the law. In light of the Court's ruling, contractors would be wise to document their good-faith compliance efforts contemporaneously and in a non-privileged manner, should their efforts at compliance be questioned during a later government investigation. This case reinforces and further refines a prior unanimous decision issued by the Court and drafted by Justice Thomas in *Universal Health Services v. United States ex rel. Escobar*, 579 U.S. 176 (2016).

Prior to the Court's ruling on June 1, under the FCA, for a defendant to be held liable for submitting a false claim to the government for payment, the government stood on the standard or burden of proving that the defendant acted objectively "knowingly." The FCA defines knowingly as an individual or entity having actual knowledge, deliberate ignorance, or reckless disregard. Since the FCA's inception, the government (and relators) has relied on the legislation to prosecute and hold accountable individuals and entities who submit false requests for payment to the government. Two cases were considered by the U.S. Supreme Court during its current term in an attempt to shift this standard and to carve away at how the government's interpretation of knowingly was being applied to make the pursuit of FCA claims more difficult.

In April, the Court heard oral arguments in two cases attempting to heighten the required knowledge in a FCA case. These two cases centered around three individual whistleblower relators who sued on behalf of the government under the FCA *qui tam* provisions. The whistleblowers accused multiple supermarkets and pharmacies of overcharging multiple government agencies, entities, or programs, including Medicare, Medicaid, and the Federal Employee Health Benefits Program, for the price and cost of certain prescription drugs. Medicare, Medicaid, and the Federal Employee Health Benefits Programs all bar pharmacies from collecting more from a government entity than the "usual and customary" price of a given prescription drug. The usual and customary price is defined as the cash price available to the general public. The whistleblowers claimed that the pharmacies overbilled the government by millions of dollars related to Medicaid and Medicare beneficiaries or for participants in the Federal Employee Health Benefits Program for certain generic drugs. The whistleblowers' allegations were tied to price-match programs designed to compete with other pharmacies to drive the market prices down. However, the whistleblowers alleged that the pharmacies' failures to offer the discounts for the usual and customary prices created a higher price than the discounted prices available to the government. The whistleblowers' alleged that this submission of the payments for the more than usual and customary priced prescriptions to the government created an FCA violation.

The trial court held that the pharmacies discounted prices were not usual and customary, and the failure to report those prices created false claims. However, the district court held that the pharmacies did not knowingly submit false claims, and thus, an FCA violation did not occur. The U.S. Court of Appeals for Seventh Circuit affirmed the lower court ruling, finding that, as long as the pharmacies' actions were consistent with an objectively reasonable interpretation of the law at issue, the pharmacies' acts were not knowingly made as a result. Therefore a violation of the FCA



Lawrence M. Prosen

Member

lprosen@cozen.com
Phone: (202) 304-1449
Fax: (202) 861-1905



Josephine M. Bahn

Associate

jbahn@cozen.com
Phone: (202) 280-6484
Fax: (202) 861-1905

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did not occur.

Critically since *Escobar*, there has been a significant split among the Circuit Courts of Appeal in interpreting whether the fraud or, more critically, type and level of *scienter* (the intent to defraud or commit fraud) standard that must be alleged and prove. Is it objective — namely, what would a reasonable person believe or expect — or subjective — what did the defendant know and believe. This decision lays those different findings to rest, unifying the burden of proof.

The Supreme Court has now answered this question. In its decision, the Court disagreed with both lower courts' findings that the pharmacies' submissions of the false claims were sufficient to establish a violation of the FCA. The Court contemplated whether the pharmacies "could have the *scienter* required by the FCA if they correctly understood that standard and thought that their claims were inaccurate." Specifically, writing for the majority, Thomas held that "[w]hat matters for an FCA case is whether the defendant knew the claim was false. Thus, if respondents correctly interpreted the relevant phrase and believed their claims were false, then they could have known their claims were false."

As a result, the Court has concluded that in order to bring and prove an FCA case, the government or relators must prove that the defendants knowingly committed (or intended to commit) fraud against the government. This is a higher standard than what the government claimed, namely, would a reasonable person know or believe it was seeking to defraud the government? When submitting a claim or application for payment to the government, an individual or entity must believe that the claim they are making is truthful and accurate. The Court's established and expanded standard contemplates that the failure to submit truthful claims – and ones that individuals and entities should know to be true – avoids exposure and liability to FCA prosecution. That being said, there is little doubt that the Department of Justice and its attorneys will continue to investigate and pursue FCA claims and violations. The best defense has always been, and now is reinforced by the Court, to not submit false claims.
