Alert

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COZEN O'CONNOR

Supreme Court Confirms: Subjective Beliefs of Falsity are Fair Game in FCA Lawsuits

On June 1, 2023, the Supreme Court unanimously held in two consolidated landmark cases, *U.S. ex rel. Proctor v. Safeway Inc.* and *U.S. ex rel. Schutte et al. v. SuperValu Inc.*, that a defendant's subjective beliefs must be considered in determining whether they "knowingly" violated the False Claims Act (FCA). This ruling will have far-reaching and immediate ramifications in FCA litigation.

The FCA's knowledge requirement first became complicated when retail giants, such as Walmart, started offering cash-paying customers steep discounts on frequently-used generic drugs. This forced others in the retail pharmacy industry to quickly compete and offer competitor-matched pricing to individuals. While some retailers reported the much lower discounted price as the "usual and customary price" to Medicare and Medicaid when seeking reimbursement, other retailers reported the full price as usual and customary. The whistleblowers who initiated these suits claimed these pharmaceutical giants overcharged taxpayers by $200 million. They presented evidence that the retailers considered the full prices they actually reported to the government as false. Specifically, the whistleblowers cited testimony from industry executives and experts that their "personal" definitions of usual and customary meant the cheaper, discounted price charged to the general public rather than the full price. This evidence also included emails between executives expressing concerns about the financial losses the organizations would suffer if they had to report the competitor-matched prices as their usual and customary prices.

Then came the question: Does it matter if someone seeking reimbursement from a government program believes the numbers they are reporting are false? The Seventh Circuit held that because reporting the full price of the generic drugs was an objectively reasonable interpretation of an ambiguous legal requirement, these retailers did not violate the FCA, and the actual beliefs of their executives were immaterial to this determination. However, Justice Thomas, writing for a unanimous court, was quick to strike the Seventh Circuit's reasoning down. "What matters for an FCA case is whether the defendant knew the claim was false," he wrote. Therefore, those doing business with the government can be found liable under the FCA if they simply "believed that their claims were not accurate."

Therefore, even if an FCA defendant correctly interprets the statutory requirement but subjectively believes their claim is false, under the Supreme Court's clarifying holding, they could "know" their claims are false under the statute. This decision will have a large impact on the health care industry, with some predicting that even more companies will decide to settle to avoid high discovery costs. Now more than ever, FCA defendants are advised to consult with counsel on creating an unquestionable record of good-faith efforts to comply with the FCA, ambiguous regulations, and all. For those in the health care industry, a cautious and conscious approach in reporting drug prices to the government is advised — what a defendant subjectively believes about the numbers they report to the government can now be used against them.

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