

The Supreme Court Clarifies the Meaning of “Knowingly” Under the False Claims Act

Article By:

Patrick M. Hagan

Jennifer Orr Mitchell

Joseph D. Wheeler

On June 1, 2023, the United States Supreme Court issued an important decision addressing the intent element of the False Claims Act (“FCA”) in *United States ex rel. Tracy Schutte v. SuperValu Inc.* and *United States ex rel. Thomas Proctor v. Safeway, Inc.* The FCA imposes liability on anyone who “knowingly” submits a false claim to the federal government and defines “knowingly” to include actual knowledge, deliberate ignorance, or recklessness.^[i] For companies that receive government funds, this case highlights the importance of contemporaneous documentation. Future FCA cases may turn on the existence of evidence regarding the company’s subjective beliefs about the correct interpretation of the law.

Several lower courts had adopted a defendant-friendly standard, holding that a defendant’s subjective intent was irrelevant if its interpretation of an ambiguous law or regulation was objectively reasonable. Writing for a unanimous Court, Justice Clarence Thomas rejected this approach and emphasized that the FCA’s text and common law roots required an evaluation of the defendant’s knowledge and subjective beliefs at the time the defendant requested payment.

Both cases involved a highly technical legal issue—the meaning of the phrase “usual and customary prices” for prescription drugs. The defendants in both cases were large pharmacy chains that participated in a variety of federally-funded programs, including Medicare and Medicaid. Federal regulations required pharmacies to offer the government their “usual and customary prices” for drugs, but did not provide guidance about whether, and when, certain price discounts should factor into the calculation. The relators alleged the defendants concealed various systematic discounts and overcharged the government. The Seventh Circuit Court of Appeals, relying heavily on a prior Supreme Court decision interpreting a different statute,^[ii] ruled in the defendants’ favor on the intent element because it found their views to be objectively reasonable and any subjective evidence of their actual beliefs to be irrelevant.

The Supreme Court disagreed and held that, for the purposes of the FCA, “knowingly” refers to the defendant’s subjective knowledge and beliefs at the time the defendant submits a claim for payment.

Justice Thomas continued the Court's reliance on principles of common law fraud in FCA cases, noting that the FCA's definition of "knowingly" largely tracks the common law definition. Under the common law, fraud is found when there is a "culpable state of mind" and where a false statement is made "without belief in its truth or recklessly, careless of whether it is true or false."^[iii] The Supreme Court explained that "ambiguity alone is not sufficient to preclude a finding of scienter" and the focus must be "on what the defendant knew when presenting the claim." The Court noted evidence that a defendant disregarded clues that the government or the general industry held a different interpretation, or that a defendant took active steps to hide its practices from the government, could support a finding that the defendant acted "knowingly."

Companies should consider documenting the basis for their interpretation of potentially ambiguous regulations as well as communications with the government that are relevant to that interpretation.

FOOTNOTES

[i] 31 USC 3729(b)(1)(A).

[ii] *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007) (interpreting "willfully" as used in the Fair Credit Reporting Act).

[iii] Second Restatement of Torts, 526, Comment e.

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