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GUEST COLUMN

High court hears important case on False Claims Act's scienter

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On April 18, the Supreme Court heard oral argument in what has been billed as the most important False Claims Act (FCA) case in a decade. Since the FCA was enacted in the Civil War era, it has been the primary tool for the United States to combat alleged fraud by federal contractors. Especially since the law was amended in 1986, the FCA has served as a comprehensive anti-fraud statute applied broadly across numerous federal programs, including procurement contracts, Medicare and Medicaid, environmental services, government-backed mortgages and pandemic relief.

The Act imposes liability on anyone who "knowingly" presents false claims for payment to the government or makes false statements that are material to the government's payment of those claims. Although it does not require a specific intent to defraud, the Act specifies three ways for a plaintiff to establish that a defendant presented a "false" claim with the requisite scienter: "actual knowledge," "deliberate ignorance," or "reckless disregard of the falsity of the information." This scienter requirement may, in some cases, be a straightforward inquiry when a defendant, for example, bills the government for goods or services that it never provided. But establishing scienter is categorically different when the falsity of the claim rests on the defendant's interpretation of an ambiguous legal requirement pertaining to the claim.

In *United States ex rel. Schutte v. SuperValu*, out of the Seventh Circuit, the Supreme Court is faced with the following epistemological quandary: Can a defendant act "knowingly" under the FCA where the relevant legal requirement for payment is ambiguous and the defendant's interpretation of that requirement is objectively reasonable?

This is the situation, according to the respondent pharmacies in *SuperValu*, that they encountered when they began submitting reimbursement claims for prescription drugs sold through a price-matching discount program. Under Medicare and Medicaid rules, pharmacies cannot bill the government for more than the "usual and customary" (U&C) drug price, which had been understood in the industry to mean the cash price offered to customers net of any discounts.

But according to the whistleblower plaintiffs, after the pharmacies instituted the price-matching discounts, they should have amended their U&C reimbursement rates for government payors to match the discounted prices that reflected the majority of their sales. Instead, they allegedly overbilled the government by millions of dollars and, in some cases, charged the government up to fifteen times more than what most customers paid. The pharmacies countered that federal reimbursement regulations never authoritatively explained how to determine the U&C price when some, but not all, of the public receives a discount. At issue on summary judgment was whether plaintiffs could use evidence of the defendants' subjective intent regarding whether their reported prices comported with the best interpretation of the U&C reporting requirement.

After district court judgments for the pharmacies, the Seventh Circuit affirmed, holding that the defendants could not have the requisite knowledge. Relying on the Supreme Court's earlier interpretation of the "reckless disregard" scienter standard in *Safeco Insurance v. Burr*, a case addressing the Fair Credit Reporting Act, the Seventh Circuit held that a defendant could not have "knowledge" of falsity, even where it might believe it is presenting a false claim, if it acted (1) consistently with an objectively reasonable interpretation of an ambiguous legal requirement and (2) in the absence of authoritative guidance from the relevant agency or court of appeals.

The ramifications of a Supreme Court ruling on the Act's scienter requirement could be far-reaching. Since its modernization in 1986, the Department of Justice has recovered nearly $72 billion from enforcement of the Act. A significant portion of these recoveries have been paid out to whistleblower plain-

tiffs who sued under the FCA's *qui tam* provision. Accordingly, *SuperValu's* ascent to the Court has garnered significant anticipation across the legal industry, drawing amicus briefs from a number of key FCA players, including governments, industry groups, and even Senator Chuck Grassley, the primary architect of the 1986 amendments and a fierce defender of the law. Heading into argument, one concern for court-watchers was how the Court would interact with the FCA's text: In the past three decades, conservative justices have written all but one major FCA case, often leaning heavily into textualist approaches.

In last week's argument, Justice Gorsuch emphasized the statutory text, commenting that a reasonable textual interpretation of the statute challenged the Seventh Circuit's determination to read out subjective intent. Justices Jackson and Sotomayor each highlighted that a defendant's subjective intent is always at issue in a fraud statute under common law. Meanwhile, Justice Kagan repeatedly framed the case on narrow terms, suggesting that the case came to the Court on the understanding that the pharmacies knew their interpretation of the regulations was "wrong" and calling it "the easy case."

Recurring hypotheticals from Justices Kavanaugh and Alito demonstrated a concern for "the hard case," where a contractor makes a judgment call in a "51-49%" scenario under advice of counsel and submits a claim under a reasonable interpretation of ambiguous law. Counsel for the defendant pharmacies highlighted that a broad ruling for plain-tiffs-petitioners could undermine the attorney-client privilege by inviting litigation dynamics that could call for a waiver of confidential communications to establish that the defendant was acting in good faith. In response, Justice Gorsuch suggested that subjective knowledge could just as easily be established by non-privileged emails among non-lawyers.

Despite its billing as a high-stakes showdown, the line of the day was that *SuperValu* was "not a hard case." It also appeared to be common ground at last week's argument – among counsel for petitioners, the government, respondents, and the justices themselves – that subjective belief in an objectively reasonable interpretation of ambiguous legal requirements is a complete defense to liability under the statute. With an opinion expected in June, a key question is whether the Court will provide any meaningful guidance to lower courts and litigants regarding what plaintiffs need to plead to state a claim in light of that defense, and what defendants need to establish in discovery to sustain it.

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