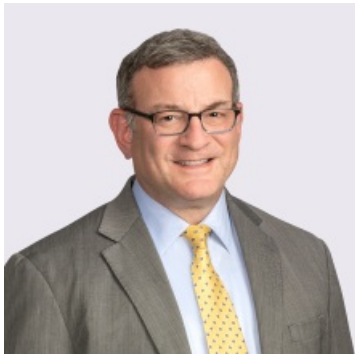


U.S. Supreme Court: False Claims Act Liability Depends on Defendant's Subjective Beliefs

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Liability in False Claims Act (FCA) suits depends on whether a defendant subjectively believed its claims were false, not on whether it can offer an objectively reasonable basis for its claims, the U.S. Supreme Court has held in a unanimous decision authored by Justice Clarence Thomas. *U.S. ex. rel. Schutte v. SuperValu Inc.*, No. 21-1326, together with *U.S. ex. rel. Proctor v. Safeway, Inc.*, No. 22-111 (June 1, 2023).

Following the Court's decision, Medicare and Medicaid providers and other federal contractors should practice caution when submitting claims to the U.S. government. An FCA defendant's subjective beliefs at the time claims were submitted may become subjected to intense scrutiny.

FCA

Under Medicare and Medicaid, reimbursement for certain prescription drugs is limited to the "usual and customary" price charged by the pharmacies submitting claims.

The FCA imposes liability on anyone who "knowingly" submits a "false" claim to the U.S. government, including fraudulent billing under Medicare or Medicaid. The two essential elements of an FCA violation are:

1. The falsity of the claim; and
2. The defendant's scienter — or knowledge — of the claim's falsity.

Background

Starting in 2006, SuperValu and Safeway began offering discounted prices for many drugs. The prices were applied to most sales paid in cash (not through insurance). However, the supermarkets reported their higher, non-discounted prices in their reimbursement claims to Medicare and Medicaid, even though they were informed that, and they believed, their lower, discounted prices were their "usual and customary" prices.

Three whistleblowers accused the supermarket chains of violating the FCA by overcharging Medicare and Medicaid when seeking reimbursement for prescription drugs. They also presented evidence that the supermarkets tried to hide their discounted prices from regulators and contractors.

The district court and the U.S. Court of Appeals for the Seventh Circuit ruled against the supermarkets on the first essential element of an FCA violation: falsity. The courts found that the discounted prices were their "usual and customary" prices and that the defendants submitted false claims by not reporting these prices. But both courts granted summary judgment to the supermarkets on the second essential element of an FCA violation: scienter. They held that the defendants could not have acted "knowingly."

The Seventh Circuit's decision relied heavily on *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, a 2007 U.S. Supreme Court decision interpreting the term "willfully" in the Fair Credit Reporting Act. The Seventh Circuit read *Safeco* to require a two-question analysis to determine whether a defendant acted recklessly or knowingly and applied this analysis to the FCA claims against the supermarkets.

The first question is whether a defendant's acts were consistent with any objectively reasonable interpretation of the relevant law that had not been ruled out by definitive legal authority or guidance, regardless of whether the defendant actually believed such an interpretation at the time of its claims. The second question (considered only if the defendant's acts were not consistent with any objectively reasonable interpretation) is whether the defendant subjectively believed its claims to be false. Thus, under the Seventh Circuit's reasoning, as long as any objectively reasonable basis exists for a defendant's claims, the defendant cannot act "knowingly" under the FCA.

Applying this reasoning to the supermarkets, the Seventh Circuit held that the defendants' reporting of non-discounted prices to Medicare and Medicaid was consistent with an objectively reasonable interpretation of the phrase "usual and customary" because the phrase could have been understood as referring to their retail prices, not their discounted prices.

U.S. Supreme Court Decision

The U.S. Supreme Court rejected the Seventh Circuit's adoption of the so-called *Safeco* standard. It held that, under the FCA, a defendant "knowingly" submits a false claim when it subjectively believes the claim to be false, regardless of whether an objectively reasonable person could have believed otherwise.

The Court analyzed the statutory language of the FCA and its ties to common-law fraud claims. Indeed, the Court found that the FCA's definition of "knowingly" largely tracks the traditional common-law scienter requirement for claims for fraud by encompassing three mental states. First, the person has *actual knowledge* of the information. Second, the person acts in *deliberate ignorance* of the truth or falsity of the information. Third, the person acts in *reckless disregard* of the truth or falsity of the information.

Finally, the Court noted that the text of the FCA and the common law point to what the defendant thought when submitting the false claim — not what the defendant may have thought *after* submitting it.

Thus, the Court put to bed any notion that a party that knew or should have known of a false claim can rely on the defense that its claim was objectively reasonable.

Takeaways for Healthcare Employers

If a healthcare provider or supplier, like a pharmacy, is aware it is submitting a false claim under Medicare or Medicaid, has deliberately avoided taking steps to determine whether the claim is false, or is aware of a substantial and unjustifiable risk that the claim is false but submits it anyway, the scienter element for a violation under the FCA would be met. Thus, if a law, rule, or regulation is ambiguous, providers or suppliers should seek advice of counsel to attempt to resolve that uncertainty. They cannot rely on that ambiguity when submitting a questionable claim if they can take steps to learn

the correct meaning of the law, rule, or regulation.

Please contact a Jackson Lewis attorney with any questions.

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