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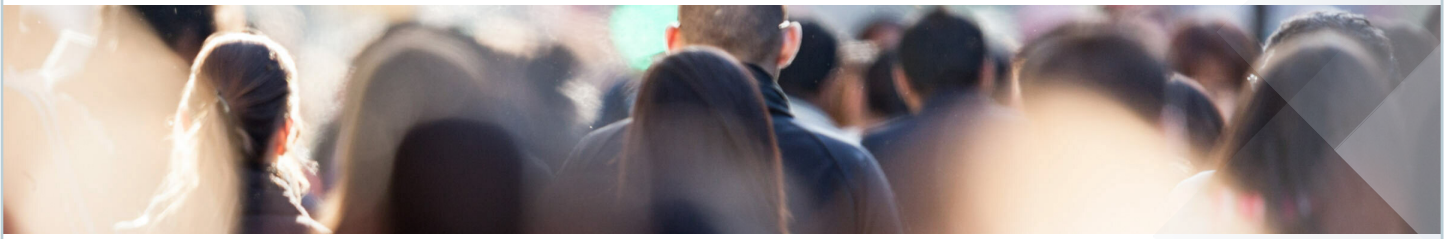

Do I Believe You? Scienter Standard in a FCA Case

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Two False Claims Act ("FCA") cases have recently been decided by the United State Supreme Court, further clarifying one aspect of the FCA. In the recent decisions in U.S. ex rel Proctor v. Safeway, Inc. and U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., the Supreme Court ruled that FCA liability will depend, in part, on whether the defendant subjectively (not objectively) believed the claim was false, focusing on the scienter requirement of the FCA.

In these two sister FCA cases, the whistleblowers accused the supermarkets of wrongly and knowingly failing to offer all discounts when computing the pharmacies' "usual and customary," or "U&C", prices they offered to Medicaid and Medicare beneficiaries for generic drugs. The whistleblowers alleged that the supermarkets' generic drug sales to retail customers used the price of $4.00 for a 30-day supply. However, the U&C prices charged to Medicare and Medicaid did not take into consideration the $4.00 price when calculating the "usual and customary" charge for the drugs. Thus, arguably, the U&C charges to Medicare and Medicaid were artificially high.

A district court agreed that SuperValu's discounted prices were its U&C prices and that by not reporting them, it had made false claims. However, the FCA requires not only falsity but also scienter. The district court found that the supermarket had not acted with the requisite scienter. On appeal, the Seventh Circuit subsequently affirmed the rulings, saying that the retailers had made "objectively

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reasonable" interpretations of ambiguous law that they were not otherwise warned away from by "authoritative guidance," and, thus, did not possess the requisite scienter.

The United States Supreme Court reversed the Seventh Circuit Court of Appeals "objective reasonable" standard and replaced it with the defendant's subjective belief. In order for liability to exist under the FCA, not only must the claim be false, but the actor-defendant must act with "actual knowledge" of falsity or act with "reckless disregard" or "deliberate ignorance" of the truth otherwise referred to as "scienter." According to the recent opinions, reckless disregard includes defendants "who are conscious of a substantial and justifiable risk that their claims are false, but submit the claims anyway." Left unanswered in the opinion is what constitutes a "substantial and unjustifiable risk."

According to Justice Clarence Thomas, who drafted the unanimous opinions, "What matters for a 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." Under this standard, determining scienter in a FCA case will require analyzing the defendant's knowledge and subjective belief, not examining whether there was an objectively reasonable belief to support the defendant's actions.

Further, the opinions clarify that the belief that existed at the time the claim was filed is what is relevant, not the belief afterwards. This interpretation opens the door to fact-intensive inquiries and litigation discovery around intent and essentially shuts the door on dismissing a FCA case early in its lifecycle with a Motion for Summary Judgement based upon scienter, as proving or disproving subjective intent will almost certainly be a question of fact. Thus, due to the increased likelihood of discovery, providers must be careful when discussing billing issues, particularly in emails or other written documentation.

In light of these recent opinions, companies filing claims with the federal government need to closely scrutinize how to handle ambiguous law, guidance, or regulation, which is common in the highly-regulated healthcare industry. When it comes to billing issues associated with Medicare, it is oftentimes hard for providers to obtain guidance, even when requested. Further, by reaching out for guidance, a provider may actually be highlighting that it knows there is ambiguity and risks involved, and thus essentially prove for the government that it satisfies the scienter standard under the FCA. In light of these opinions, providers must exercise extreme caution in situations where the guidance is unclear. The provider must decide if it moves forward with what it believes to be a reasonable interpretation of the guidance, even though there is a doubt that the interpretation may be incorrect.

While the recent decision is significant, it leaves many questions unanswered and some items left to be litigated regarding the scienter requirement under the FCA.