LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Opens Up Uncertainty On FCA Recklessness

By **Daniel Wilson and Jeff Overley**

Law360 (June 1, 2023, 10:27 PM EDT) -- As the U.S. Supreme Court answered one pressing question about the False Claims Act's scienter requirement Thursday, it raised a new issue about what counts as a "substantial and unjustifiable risk" that a claim for payment is false, experts said.

Writing for a unanimous court, Justice Clarence Thomas said that proving FCA defendants acted with scienter, or knowledge of their alleged wrongdoing, requires an assessment of their subjective beliefs, rejecting the Seventh Circuit's finding that an "objectively reasonable" view of an ambiguous policy is enough to disprove scienter.

Scienter includes not only "actual knowledge" of falsity, but also "deliberate ignorance" or "reckless disregard" of the truth, and Justice Thomas also said that acting with reckless disregard includes defendants "who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway."

The court, however, did not define what it considers to be a substantial and unjustifiable risk. For example, it sidestepped whether "acting in the face of an unjustifiably high risk of illegality that was so obvious that it should have been known," even if a defendant wasn't consciously aware of that risk, would count, opening up a new area of uncertainty for FCA litigants.

"It would have been helpful if the opinion had included some guideposts. ... So often, the scienter analysis turns on an application of the reckless disregard standard," said Crowell & Moring LLP partner Jason Crawford.

In cases involving federal health care programs, which make up the bulk of False Claims Act cases, it is uncommon for defendants to be accused of actual knowledge of wrongdoing, said Hooper Lundy Bookman PC partner Jordan Kearney, a defendants' attorney.

"Recklessness, in my practice, is the world that we live in," she said.

That means that the high-profile decision, involving whether supermarket chains SuperValu Inc. and Safeway Inc. overcharged Medicare and Medicaid by not passing on all available discounts in their "usual and customary" pricing, contrasts significantly with the Supreme Court's other most high-profile recent FCA ruling, 2016's Universal Health Services v. U.S. ex rel. Escobar, according to Megan Mocho, an FCA defense attorney at Holland & Knight LLP.

Both cases have surface similarities, involving a contentious question of FCA law decided in a unanimous decision authored by Justice Thomas with a foundation in common law and the FCA itself.

Escobar was a ruling in favor of whistleblowers and the government on its central issue of "implied false certification," where a defendant impliedly misrepresents its compliance with a legal or contractual obligation. The high court found such misrepresentations could be a basis for FCA liability.

But Escobar also provided a "light of hope for defense counsel in how to manage unwieldy FCA cases" that the newer decision does not, through aspects such as a heightened standard set out by the court for determining whether an alleged false claim should be considered material to the government, Mocho said.

"The justices could have taken an opportunity to really clarify issues regarding falsity and what defendants should do when faced with truly ambiguous legal situations, and whether those could be addressed early procedurally in cases," she said. "But instead of going that route, they created a wider chasm when dealing with reckless disregard … There's going to be lots of interpretative decisions that come out [of courts]."

Attorneys for both whistleblowers and defendants agreed that the decision means that scienter disputes involving interpretations of ambiguous policies are now less likely to be resolved early in FCA cases, meaning defendants' understanding of those policies will be subject to discovery more often.

"From the vantage point of someone who has litigated numerous declined FCA cases, it is apparent that the question of intent is going to be a fact-sensitive inquiry, not susceptible to disposition on a motion to dismiss, where a close reading of emails and deposition testimony is going to be essential," said whistleblower attorney Reuben Guttman of Guttman Buschner & Brooks PLLC, referring to cases where the government declines to intervene.

For companies that face potential FCA liability, the decision also leaves them with significant uncertainty over the best course of action to take when trying to comply with an ambiguous law or regulation, a frequent occurrence in the heavily regulated industries where the FCA applies.

The ruling "seems to suggest that government contractors have a burden of inquiry," but it doesn't make clear what that process should involve, said Seyfarth Shaw LLP partner Teddie Arnold.

An opinion from an attorney that supports the company's view of an ambiguous policy, for example, could help to disprove scienter, but that isn't guaranteed, and trying to rely on an attorney's opinion could also open up thorny issues related to waiving attorney-client privilege, several attorneys said.

And although companies could try to proactively inquire with the relevant agency, agencies typically are not obliged to actually answer any of those questions, and that inquiry in itself could later be used against the company, said Bradley Arant Boult Cummings LLP partner Elisha J. Kobre, a former federal fraud prosecutor.

"There's no real process for many agencies to get clarity on potential ambiguous regulations, but by reaching out, it shows them that you are aware that there is a risk," he said.

However, engaging in federal contracting has always been a voluntary choice that essentially involves a representation that "you're going to engage in diligence to understand what's required," Guttman said.

"And I think it's a serious signal to the defense bar that they've got to advise their clients that when they step forward, it's the old Justice [Oliver Wendell] Holmes adage that you've got to 'turn square corners' with the government," he said, "It's not merely rhetoric — it's an obligation."

--Editing by Jill Coffey and Kelly Duncan.
