GUTNICKI LLP

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Expansion of FCA Liability Post-*Schutte*

Yesterday, on June 1, 2023, the Supreme Court issued perhaps the most pivotal ruling in False Claims Act (FCA) jurisprudence since its landmark *Escobar* decision in 2016. Healthcare providers especially should take note of how potential liability under the FCA has expanded as a result.

False Claims Act's "Knowingly" Scienter Requirement

The FCA imposes liability on anyone who "knowingly" submits a false claim to the government. However, FCA caselaw has grappled with whether a defendant's objectively reasonable (although legally incorrect) interpretation of applicable law serves as an outright shield against FCA liability, irrespective of the defendant's subjective belief regarding the accuracy of the claims submitted.

Via its decision in *United States ex rel. Schutte v. SuperValu Inc.* yesterday, the Supreme Court has determined with finality that no such shield exists.

United States ex rel. Schutte v. Supervalu Inc.

Schutte's FCA liability arose from allegedly fraudulent prescription drug billing practices. Specifically, to help administer Medicare Part D coverage, CMS awarded certain contracts to private plan sponsors, but permitted reimbursements only at the company's "usual and customary" rate. At the time, the companies in *Schutte* were charging two sets of prices for the same drugs – a higher retail price generally, and a lower discounted price for customers under certain of their programs. When submitting claims to CMS, the companies charged the higher retail price, later claiming that they had interpreted CMS's "usual and customary" condition as requiring it. However, they allegedly simultaneously also believed that their submitted claims were inaccurate because they knew they should have been charging their lower discounted price.

An integral part of the companies' defense was that their sensible interpretation of which pricing system was their "usual and customary" one served as an outright shield against FCA liability as a matter of law, irrespective of what their actual beliefs were when they submitted their

claims. After all, the theory went, they could not have "knowingly" submitted false claims if they were following an objectively reasonable interpretation of the operative standard.

Prior Integrity of the "Objectively Reasonable" Defense

The District Court and the Appellate Court had both held that indeed the phrase "usual and customary" *could* have been understood as referring to the companies' retail prices—even if the phrase, as correctly understood, actually referred to their discounted prices. With such an objectively reasonable interpretation available, the prior courts had held that, indeed, the scienter requirement of "knowingly" under the FCA could not be satisfied as a matter of law. Therefore, they had concluded, it was not necessary to examine if the companies had actually believed that their discounted prices were their "usual and customary" prices when they submitted their claims. Rather, the only thing that mattered was that someone else, standing in the companies' shoes, may have reasonably thought that the higher retail prices were what was required.

The Court's Reversal Keeps Only the Subjective Standard

Writing on behalf of a unanimous Court, Justice Clarence Thomas clarified that the "knowingly" scienter is founded only on the defendant's subjective belief; whether there was an objectively reasonable interpretation of the applicable law is irrelevant to any FCA analysis. Relying on basic statutory and common law interpretation of the word "knowingly," Justice Thomas set forth that this determination was "straightforward," as the FCA was rooted in what the defendant "thought and believed," and focused on the defendant's "culpable state of mind." The Court then reversed and remanded the case. In so doing, it did away with any and all future protections otherwise available for defendants who had relied on an objectively reasonable interpretation of the applicable law when preparing their government claims.

Best Practices Post-*Schutte*

All healthcare providers billing federal programs should note the *Schutte* ruling. Pre-*Schutte*, for FCA liability to attach, the government effectively was first required to affirmatively show that the defendant's interpretation of applicable law was patently incorrect, and only thereafter broach whether the defendant actually subjectively believed that their claims were inaccurate when filed. Post-*Schutte* however, the pre-submission period becomes that much more critical. At the very least, as always, providers should seek the advice of counsel and err on the side of caution whenever acting on their opinion of how to best comply with applicable law.

The Firm

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Noah Siegel is an associate attorney whose multi-layered practice concentrates on regulatory compliance, litigation, government investigations, private equity, mergers & acquisitions, corporate governance, nonprofit tax law, and real estate transactions, especially in the healthcare industry. Noah also has served as the long-term outside general counsel for a healthcare management company and its portfolio of eight skilled nursing facilities.