

TYPES NOT MAPPED YET July 24, 2023 | TTR not mapped yet | Joy Harris Hennessy, Nicole K. Jobe

Subjective Intent in False Claims Act: Navigating Ambiguity in Health Care Reimbursement Claims

At the intersection of law and business, ambiguity can present significant challenges. But one thing seems apparent under the False Claims Act (“FCA”) for health care entities submitting reimbursement claims to the government: if you subjectively believe that your claims are or might be false, you likely have the requisite intent to violate the FCA. And this principle may hold true even if there is technically some ambiguity about the facts underlying the representations inherent in presenting your claim to the government.

On June 1, 2023, in *U.S. ex rel. Schutte v. Supervalu Inc. and U.S. ex rel. Proctor v. Safeway, Inc.*, the U.S. Supreme Court unanimously confirmed the FCA’s intent standard, holding that the FCA’s scienter element turns on one’s subjective knowledge, rather than what an objectively reasonable person may have known or believed. The Court overturned the previous 7th Circuit decisions with similar but distinct *qui tams* actions brought against two retail chain pharmacies concerning the pharmacies’ reporting of their “usual and customary” prices. In those cases, the 7th Circuit applied the intent standard adopted by the Supreme Court under the Fair Credit Reporting Act in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007), holding that the defendant pharmacies could not be found to have acted with requisite intent under the FCA if their conduct was consistent with any objectively reasonable interpretation of the law. In each case, the defendant pharmacies argued that the industry definition of “usual and customary” is unclear. Because their actions were objectively reasonable given that ambiguity, according to the pharmacies and the 7th Circuit, the appellate court held that the defendant pharmacies could not have acted with intent under the FCA.

The Supreme Court disagreed. To violate the FCA, the Court first noted, a person must act with fraudulent intent. The FCA defines that intent three ways: actual knowledge, deliberate ignorance, or reckless disregard for the truth. In *Schutte & Proctor*, the Court reasoned that *only* subjective intent is relevant in determining liability under the FCA. Consequently, what an objectively reasonable person may have known or believed regarding the falsity of the claim is irrelevant for FCA liability and will not save the defendant who actually thought that its claims were or might be false when submitted, notwithstanding the acknowledged ambiguity about “usual and customary.”

The Court’s decision makes clear that a health care provider will be liable under the FCA if the provider submits a claim and actually knows such claim is false, is subjectively aware of a substantial risk that its claim is false, or is subjectively aware of such a substantial and unjustifiable risk of falsity but submits the claim anyway. Even if industry ambiguity might still exist in certain forms, such as in the complicated world of drug/pharmacy price reporting, an objectively reasonable person standard cannot save a provider from being found to have acted with the requisite fraudulent intent under the FCA.

Finally, although the Court made clear that it did not grant *certiorari* to decide the actual meaning of “usual and customary” pricing, it is noteworthy that the Court discussed some of the evidence cited by the relators as to the defendant pharmacies’ (alleged) knowledge about the falsity of the prices they reported. Among the potential facts that would be relevant to determining the pharmacies’ subjective intent under the Court’s decision are emails and other artifacts possibly suggesting that the defendants tried to hide certain pricing data when reporting other figures to the government. Although the Supreme Court did not hold that such evidence does, in fact, meet the subjective intent standard confirmed in *Schutte* and *Proctor*, it may be an uphill battle to overcome such evidence, and serves as a reminder about the potential impact of every day internal communications in FCA cases.

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