LEGAL UPDATES

PUBLISHED: JANUARY 17, 2023

U.S. Supreme Court Grants Cert in Pair of Key False Claims Act Cases

Services

Appellate

Government Contracts

Litigation & Alternative Dispute Resolution

White Collar, Internal Investigations, & Compliance

Industry

Healthcare

Professionals

JONATHAN A. PORTER
WASHINGTON:
202.378.2300
JONATHAN.PORTER@
HUSCHBLACKWELL.COM

JODY L. RUDMAN
AUSTIN:
512.703.5716
JODY.RUDMAN@
HUSCHBLACKWELL.COM

The United States Supreme Court started the long weekend on Friday evening by announcing it would hear a consolidated pair of cases that should clarify a critical aspect of the False Claims Act (FCA). These cases are worth knowing for any company that does business with the federal government (healthcare companies, defense and government contractors, tariff payors, etc.). This client alert addresses the issues to be decided.

What is the issue in these cases?

It's no secret that doing business with the federal government requires wading into a sea of government regulations. Companies that submit claims to the government are required to certify compliance with applicable regulations. But on occasion the government promulgates ambiguous regulations and gives no clarifying guidance. What happens when a company considers the ambiguous regulation, arrives at a reasonable interpretation of the ambiguous regulation, and then acts on its interpretation, believing it is being compliant, only to later find out its interpretation was incorrect?

That is the situation in *United States ex rel. Schutte et al. v. Supervalu Inc. et al.* and *United States ex rel. Proctor v. Safeway, Inc.* In those cases, the companies interpreted ambiguity in favor of their own compliance but are now being said to have "knowingly" submitted false claims to the government because their compliance-friendly interpretation was alleged to be incorrect.

But there is a wrinkle

The wrinkle is that Supervalu might not have held its interpretation at the time it was submitting claims. Supervalu's interpretation might have been a rationale after the fact. Both the trial court and the appeals court found that an

after-the-fact reasonable interpretation was still enough for Supervalu to win on the issue of a "knowing" submission of false claims.

It's that wrinkle that caused the government to ask the Supreme Court to hear the case. The government argued that an after-the-fact reasonable interpretation of an ambiguous regulation would essentially create what the dissent labeled "a safe harbor for deliberate or reckless fraudsters whose lawyers can concoct a *post hoc* legal rationale that can pass a laugh test."

What could come from *Supervalu* and *Safeway*?

The Supreme Court will be presented with an opportunity to choose between a narrow ruling—i.e., that the company must have actually held the reasonable interpretation contemporaneous with its submission of claims—and a broad one, i.e., that a violation of the False Claims Act must be based on the knowing violation of an *unambiguous* known legal obligation, such that regulatory ambiguity essentially bars FCA liability. At this stage, it's too early to know whether those will be the issues seized upon by the Supreme Court, or whether the Court will take the cases in another direction. But there is the potential for a decision with major ramifications for companies doing business with the government.

What this means to you

A narrow ruling—which asks whether the company actually held its claimed reasonable interpretation at the time it was submitting claims—should cause companies to think closely about how they paper their interpretations of regulations. The concept of corporate-level knowledge is already complex under the FCA. At least one Circuit has held that the knowledge of even low-level employees is imputed to a corporation. Stacking additional complexities on the existing law around the "knowing" requirement for companies could cause some major shifts in how companies do business. Companies with concerns in highly regulated industries like healthcare should follow these developments to be prepared for any shift in the law that could be coming.

Contact us

If you have questions about these cases or the matters at issue and how they might apply to your business, please contact Jonathan Porter, Jody Rudman or your Husch Blackwell attorney.