State attorneys general see wins in Supreme Court decision on False Claims Act

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On June 1, the Supreme Court decided two consolidated cases raising critical questions about the scope of the False Claims Act (FCA) — *United States et al. ex rel. Schutte et al. v. Supervalu Inc. et al.* and *United States, ex rel. Thomas Proctor v. Safeway, Inc*.

The FCA allows private-citizen whistleblowers — called relators in court — to file claims against individuals or entities alleging they have defrauded the government by submitting false claims. When such actions, known as *qui tam* suits, are successful, relators share in the government's recovery.

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The cases underlying the Supreme Court's recent decision involved relators' claims that retail pharmacies overcharged the government for Medicare and Medicaid refunds by citing as their "usual and customary" prices for prescription drugs prices that did not account for discounts most customers received. In the decision under review, the 7th U.S. Circuit Court of Appeals found that the pharmacies had not acted with the requisite knowledge to incur FCA liability because the definition of "usual and customary" underlying their claims was objectively reasonable.

Reversing the 7th Circuit, the Supreme Court unanimously held that an objectively reasonable interpretation of an ambiguous phrase like "usual and customary" does not preclude liability under the FCA if a defendant believes its interpretation is wrong and thus knows the claim being made is false.

Specifically, the Court explained that claimants may establish scienter (intent to deceive) under the FCA by "showing that [defendants] (1) actually knew that their reported prices were not their 'usual and customary' prices when they reported those prices, (2) were aware of a substantial risk that their higher, retail prices were not their 'usual and customary' prices and intentionally avoided learning whether their reports were accurate, or (3) were aware of such a substantial and unjustifiable risk but submitted the claims anyway."

The decision was a win for the United States, which recovers substantial sums through qui tam actions and argued as an amicus for the relators who brought the claims. It was also a win for State Attorneys General, 31 of which likewise filed an amicus brief in support of the relators.

The States' involvement in the case underscores the importance of False Claims Act suits to state economies, and in particular to the work of State AG offices. Led by Connecticut, the States' brief highlighted the importance of fair administration of Medicaid programs to state coffers.

As the AGs explained, the States have an interest in ensuring that courts correctly interpret the FCA, "not least because FCA recoveries generate a state share for the jointly financed federal-state Medicaid program." Moreover, the AGs noted, many states have passed their own statutes mirroring the FCA and those statutes are typically interpreted in parallel with the federal Act.

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Focusing on the knowledge provisions of the FCA, the AGs explained that state agencies (often with limited resources) issue guidance on common billing scenarios, provide compliance training, and offer avenues for clarification on the States' interpretation of relevant statutes and rules.

"Because the Seventh Circuit's rule ignores evidence of subjective intent when an interpretation of law is objectively reasonable," the State AGs warned, providers would be disincentivized from seeking the State's views on their legal interpretations and instead encouraged to "put on blinders, take the public's money, and ask questions (or seek forgiveness) later." That could not only undermine the role and influence of state agencies, it could deprive the States of substantial money they are rightly owed.

While the States' brief was notable for the state-specific perspective it brought to the case, it was equally notable for its bipartisan nature. Thirty-two State AGs signed the brief, including eight Republicans. Although State AGs frequently lead multistate amicus efforts, bipartisan briefs are becoming less common — a reflection of the current polarized political environment. Indeed, in the 2022 term, States filed bipartisan briefs in only a handful of the many cases in which they participated as either parties or amici.

The bipartisan interest in avoiding a defendant-friendly construction of the FCA is not surprising. As the AGs indicated in their brief, whether brought under the federal Act or a state analog, FCA cases are a significant source of recovery for States. For that reason (and others), false claims matters are largely non-partisan and suits are actively pursued by AGs across the political spectrum.

Like the claims in *Schutte* and *Proctor*, many of those cases are based on Medicaid fraud. All 50 states, plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have established Medicaid Fraud Control Units (MFCU) to investigate and prosecute Medicaid provider fraud and patient abuse and neglect, most of which are housed within AGs' offices.

According to the Inspector General for the Department of Health and Human Services, the entity tasked with overseeing the work of state MFCUs, the 53 units collectively recovered over $1.1 billion in criminal fines and civil damages and settlements in 2022 — more than $3 collected for every dollar spent.

In their brief to the Supreme Court, the AGs made clear that, while "the federal- and state-funded Medicaid program [might be] the leading ... example of the State['s] interest in protecting the integrity of taxpayer-funded programs and contracts," it is "by no means [the] only [one]." That observation is borne out in practice.

To be sure, many questions remain outstanding following the Supreme Court's decision in *Schutte*, including several that will be of keen interest to the States. Most notably, the Court did not flesh out what it means for a provider to "intentionally avoid[] learning whether their reports [are] accurate" or what constitutes a "substantial and unjustified risk" of inaccuracy. In light of the role state agencies play in providing guidance to providers, those questions are particularly relevant.

State AGs will continue to remain actively engaged in litigation seeking to answer those and other questions about the proper construction of the FCA. And, charged with protecting taxpayers and wanting to ensure the integrity of state programs and procurements, State AGs can likewise be expected to continue to pursue investigations and enforcement actions arising under the FCA and its state analogs.

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