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Insights

U.S. HEALTH CARE INDUSTRY: RISK MITIGATION TIPS IN THE POST-SUPERVALU FCA LANDSCAPE

Jun 15, 2023

Last week the Supreme Court held that a business could be exposed to substantial damages under the False Claims Act (FCA) if it incorrectly applies ambiguous rules or regulations. The unanimity of the opinion—which we also foreshadowed in a published article—should concern all companies that interact with the federal government, especially those operating in the health care space.

By way of a quick summary, in *U.S. v. Supervalu* and *U.S. v. Safeway*, the Court overturned the Seventh Circuit and concluded that a business could be liable for incorrectly interpreting an ambiguous legal requirement even when its interpretation is objectively reasonable. The scienter requirement, the Court *held,* is not defeated in these circumstances if the business actually believed or was at least "aware of an unjustifiably high risk," that its interpretation was wrong. Justice Thomas made a simple analogy from everyday life that companies will struggle to apply: if a driver is informed driving over 50 mph is unreasonable, then she has no defense to receiving a speeding ticket for driving in the 50s even if the speed limit simply called for "reasonable" speed. Justice Thomas also invoked a hypothetical plumber who falsely tells a house owner that all his work complied with state law.

Health care companies are not drivers or plumbers unilaterally deciding whether to speed or skimp on a job; business decisions are collective, multi-faceted, and guided by legal and compliance departments. The Court's opinion may not sweep as broadly as some quick takes have suggested—it leaves much for the lower courts to hash out, especially with regard to what deliberate actions or omissions rise to the level of recklessness—but there will still be new scrutiny on non-privileged communications regarding ambiguous laws, rules and regulations. What should health care companies remember?

- Legal and compliance teams should discourage individuals in organizations from internal musings (particularly via email or text messaging) about the business's legal compliance. The Supreme Court has not provided guidance on what it means for a company to have a "subjective belief" about its legal compliance. Does one executive's belief matter? Is it dispositive? Businesses should not litigate to find out.

- It is important to remind business teams that adding lawyers to these discussions (*e.g.,* copying in-house or outside lawyers on emails) does not automatically imbue the discussions with privilege. Further, forwarding an attorney's interpretation of the law to those within the company who are not necessary to forming the legal opinion likely waives privilege.
- Lawyers should be careful too. Earlier this year, despite hearing oral arguments on the issue, the Supreme Court declined to rule on the "primary purpose test"—a framework for determining the scope of privilege in some jurisdictions, where dual-purpose communications (that is, communications by lawyers that have both business and legal components) are not necessarily protected. It is easy to imagine how in the FCA context, where health care companies are navigating business decisions in murky legal waters, even lawyers' opinions could be discovered as non-privileged and, after *U.S. v. Supervalu*, relevant to determining FCA scienter.

We hope our FCA insights have provided practical and strategic approaches for lawyers and compliance professionals alike. For deeper discussion and recommendations to navigate these new developments, please contact any member of the Health Care Practice Group.

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