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Landmark FCA Showdown Looking Like Defense Bar Letdown

By **Jeff Overley and Daniel Wilson**

Law360 (April 19, 2023, 12:20 AM EDT) -- After months of anticipation that the U.S. Supreme Court might strengthen corporate America's hand in False Claims Act litigation, the high court on Tuesday abruptly deflated defense bar buoyancy by foreshadowing an outcome that's not only narrow but also largely favorable to whistleblowers and the U.S. Department of Justice.

The sudden shattering of hopes occurred at **oral arguments** over the need for FCA cases to prove scienter, or "knowingly" fraudulent billing of Uncle Sam. The justices were specifically examining whether it matters if someone suspected they were flouting compliance obligations — and really was noncompliant — while technically adhering to reasonable views of those obligations.

Ever since the high court in January **agreed to examine** the Seventh Circuit's conclusion that "subjective intent" isn't relevant in such situations, many defense lawyers had voiced cautious optimism and had even begun **touting the conclusion** to discourage the DOJ from joining whistleblower-led FCA cases premised on compliance lapses. But on Tuesday, the outlook quickly went from cheery to dreary as one justice after another recoiled at the idea of ignoring someone's intentions.

"I don't think the court is going to come out with a decision that's going to make the defense bar do cartwheels and back-handsprings," Nichols Liu LLP partner Bob Rhoad told Law360 in a Tuesday afternoon interview.

Scott Oswald, managing principal of The Employment Law Group PC, echoed that prediction and also channeled the relief felt by many of his fellow whistleblower attorneys on Tuesday.

"I thought this was going to be a much closer call for the justices than it ultimately came out to be," Oswald said in an interview.

Numerous other attorneys representing FCA defendants and plaintiffs expressed similar sentiments in conversations with Law360 after Tuesday's arguments. A majority of the Supreme Court seemed to see a straightforward case, and those signals were so strong that the Seventh Circuit might get reversed with few dissenting votes, several sources said.

"The reference periodically to this being an easy case shows that there's likely to be a nearly unanimous ruling on this," Miles & Stockbridge PC principal Holly Drumheller Butler told Law360.

A near-unanimous ruling from the conservative-dominated Supreme Court would be especially noteworthy because lower courts have splintered along ideological lines over the idea of imposing FCA liability for flawed but "objectively reasonable" compliance efforts. Right-leaning judges have largely sided with defendants, and left-leaning judges have largely sided with plaintiffs.

Moreover, in the baker's dozen of significant FCA decisions from the Supreme Court since the late 1990s, eight have been unanimous, but every dissenting vote in the other five cases came from a justice aligned with the high court's liberal bloc. Despite that backdrop, the high court's six conservatives on Tuesday offered little in the way of clear and sustained sympathy for the defense perspective.

As one example, Sidley Austin LLP partner Carter G. Phillips at the oral arguments on Tuesday

insisted that pharmacy retailers SuperValu and Safeway deservedly won summary judgment because their interpretations of Medicare and Medicaid billing obligations were "absolutely correct," reflected "a reasonable approach" and occurred with "nothing, not even remotely, in the category of definitive guidance" to the contrary from government officials.

But Justice Neil Gorsuch responded by saying, "Mr. Phillips, it sounds to me like an excellent jury argument."

Justice Gorsuch also allowed that Phillips' comments were "maybe even a good summary judgment argument," but quickly added that "the question before us is a narrow one." When it comes to the assertion that subjective intent doesn't matter, "the statute makes that argument pretty hard," Justice Gorsuch said.

Several liberal justices offered comparable observations.

"I'm over here struggling as to why this is a hard case," Justice Ketanji Brown Jackson said. She then suggested that "if we're trying to figure out what the scienter is in this case," then perhaps "the jury can take into account evidence concerning their actual beliefs — what they subjectively believed."

Reuben Guttman, an FCA plaintiffs lawyer at Guttman Buschner & Brooks PLLC, told Law360 on Tuesday that "the questions from the bench seemed to confirm that the FCA still has bipartisan support, and hence, differences between the justices [are] not rooted in deep-seated ideology."

In an **interview with Law360** last week, plaintiffs counsel Tejinder Singh of Sparacino PLLC acknowledged the existence of ideological divisions in lower courts. Singh added, however, that "some of the lower courts split ... because they believed they were bound" by the Supreme Court's 2007 decision in Safeco Insurance Co. of America v. Burr, a Fair Credit Reporting Act case in which the justices said "objectively reasonable" compliance lapses aren't "willful" violations.

"The Supreme Court itself has a more contextual understanding of its own precedent and ... is likely to rule that Safeco is not the relevant framework for establishing scienter in this circumstance," Singh said last week.

Prior to Tuesday, lawyers and interest groups on each side of the case **floated dire predictions** about the implications if their side were to lose. Whistleblower advocates fretted about companies **fleecing taxpayers with impunity** by exploiting ambiguous legal language, and business organizations worried about **gotcha-style FCA suits** brought by whistleblowers deliberately searching for ambiguous laws and then accusing companies of noncompliance.

Shayne Stevenson, a partner at Hagens Berman Sobol Shapiro LLP who represents whistleblowers, told Law360 that Justice Jackson's comments Tuesday played a key role in focusing the Supreme Court on the narrow question it officially agreed to examine: "Whether and when a defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it 'knowingly' violated the False Claims Act."

"Justice Jackson certainly did a nice job of trying to cut right through to the basic reason they're there. ... She seemed very focused on cutting to the heart of it," Stevenson said.

With lawyers largely in agreement Tuesday that the Supreme Court is likely to deem subjective intent relevant in some circumstances, speculation turned to whether the high court would offer any other guidelines, or instead rule as narrowly as possible. A narrow ruling might simply seek to prevent companies from devising after-the-fact, made-for-litigation interpretations aimed at portraying their compliance efforts as reasonable.

"The tenor of the argument today suggests that the [Supreme] Court may determine that the lower court should have considered the defendants' contemporaneous subjective understanding," George B. Breen, an FCA defense lawyer at Epstein Becker Green, said Tuesday.

A broader ruling could spell out factors that lower courts should consider when weighing evidence about internal compliance efforts, and perhaps explain when guidance is sufficient to put someone on notice of their compliance duties.

"The interesting question will be what guidance they provide for lower courts on how to balance proof of subjective intent against more objective evidence," MoloLamken LLP lawyer Caleb Hayes-Deats, who represents both plaintiffs and defendants in civil litigation, told Law360.

Malcolm L. Stewart, a deputy U.S. solicitor general who argued Tuesday in support of the whistleblowers, told the justices that remanding the case on the issue of subjective intent would be "a step in the right direction." But he added that the government would "prefer greater clarification about what the rules are" when an entity "thought it was wrong" about something "and said it anyway."

But there is reason to believe the high court will indeed rule in a focused manner. That's because Tuesday's arguments produced criticism from the bench of the high court's decision in Universal Health Services v. Escobar, a landmark FCA decision in 2016 that laid out a complicated approach to the "materiality" of compliance violations.

"The problem is Escobar. Mixed legal questions with fact are a different thing altogether," Justice Sonia Sotomayor said Tuesday. "Every time we try to tease out that issue, we fail. When it's not pure legal, when it's not pure fact, but it's mixed, that's a harder standard to define."

Oswald on Tuesday told Law360 that after Escobar, "it became much harder for courts to draw some bright lines ... and much easier, quite frankly, for fraudsters to get away with thieving the federal fisc." Some justices "are mindful of that and don't want to wade into that quagmire again," he said.

Nonetheless, some lawyers are counting on more guidance, which could be a silver lining for defense counsel in a decision that now appears unlikely to go their way. Megan Mocho, an FCA defense lawyer at Holland & Knight LLP, noted in a Tuesday interview that the justices discussed hypotheticals where it's a "51%-49%" situation over how to interpret a compliance duty.

"Hopefully that means that the decision, even if it comes out as we read the tea leaves here, will still provide a light for defendants," Mocho said.

Additional details could give companies a compliance roadmap, leading to in-house counsel "quickly putting together checklists" and adding "more written legal opinions" to their internal files, Buttaci Leardi & Werner LLC member Paul D. Werner told Law360.

It remains to be seen whether such details emerge in the eventual opinion. But it already seems clear that the case's impact will likely be quite a bit different from what most observers expected.

"This had the potential to be [a] landmark case, with a huge ruling that was going to either shut the door on things or blow things wide open," Werner said. "The justices made it pretty clear that they were not inclined to take things beyond the limited scope of the question presented. They routinely kept asking the lawyers ... why are we making this difficult? Why are we making this easy case difficult?"

The cases are U.S. ex rel. Proctor v. Safeway Inc., case number 22-111, and U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., case number 21-1326, each before the Supreme Court of the United States.

--Editing by Emily Kokoll and Jay Jackson Jr.