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U.S. HEALTH CARE INDUSTRY TAKES NOTE: U.S. SUPREME COURT 2023 ATTENTION ON FALSE CLAIMS ACT

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This Tuesday, April 18, 2023, the U.S. Supreme Court heard argument in U.S. v. SuperValu. SuperValu is the second – and more consequential – False Claims Act (FCA) case of the term. It's unusual for the Court to take two FCA cases in a single term, though not entirely unexpected in an environment in which billions of dollars a year have been recovered by whistleblowers – primarily in the healthcare sector – and the Department of Justice is aggressively prosecuting health care fraud, at times in parallel investigations. The case will decide whether companies can be liable under the FCA for claims submitted to the government, and thus exposed to immense treble damages and attorneys' fees, in addition to penalties as high as $25,000 per claim, even if they embrace an "objectively reasonable" view of the law that turns out to be incorrect. (BCLP's analysis of the issues and ramifications for the upcoming ruling are featured recently on Law360; subscription may be required.)

Health care companies continue to navigate complex regulations, especially in times where interpretation is required, without clear guidance. The Court's ruling will have an immediate impact across the sector. For example, health care companies commonly deal with this when submitting claims to Medicare and Medicaid and face potential fraud allegations related to the claims concerning medical necessity, compliance with various CMS requirements, or bundling and unbundling of services.

In SuperValu, emails exchanged by executives of the company suggested that they believed their own interpretation of an ambiguous phrase (“usual and customary”) conflicted with the one the company officially took when making federal payor claim submissions. In SuperValu, the company omitted in its report to Medicaid and Medicare the discounts it offered to some clients, concluding that because those discounts were not applied to all the clients, the reduced prices were not "usual and customary." That legal conclusion, the Seventh Circuit concluded, was incorrect, but not at all unreasonable at the time it was reached given the lack of guidance.

Questioning from the Court on Tuesday suggested that the Justices are ready to overturn the Seventh Circuit's view that these emails were irrelevant to show the company's state of mind. Even the traditionally conservative Justice Gorsuch brushed aside concerns that the ruling would result in

companies' having to waive privilege over communications about the meaning of certain laws and regulations. Many such conversations, Justice Gorsuch noted, could be among business people. He imagined them discussing a business position they recognized to be likely legally wrong, like what constitutes "usual and customary," but deciding "to do it anyway" to make more profit. A lawyer could subsequently explain that their conclusion was objectively reasonable, but if they believed, at the time, that it was wrong, many of the justices seemed to indicate that those beliefs should be relevant. In a potentially problematic sign for businesses, towards the end of the argument, Justice Kavanaugh observed that the Court could issue a broad ruling that would result in what company's counsel conceded would be a "full-out disaster" for the "business community."

BCLP's Global Health Care Practice will continue to monitor this case and other important False Claims Act developments for our health care clients. Health care attorneys in our False Claims Act Practice across the U.S. provide compliance advice, conduct investigations, advocate to the government not to intervene or to dismiss actions, and, when necessary, represent clients in litigation. We will offer some recommended practice points specifically tied to SuperValu in a forthcoming Practical Alert shortly; stay tuned!

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