

# Law360: A Review's Coverage Impact Likely Will Be Limited

The [REDACTED]'s review of whether the False Claims Act covers compliance lapses with "objectively reasonable" explanations will likely have limited impact on issues of insurance coverage despite its potential to drastically affect the underlying litigation, attorneys told Law360.

The justices' [REDACTED] cases accusing retailers [REDACTED] and [REDACTED] of overcharging government programs for generic drugs has the potential to reshape FCA litigation if it implements a new standard for scienter, or knowledge of wrongdoing. However, the eventual impact on coverage of FCA disputes is likely to be less monumental.

Should the justices agree with the Seventh Circuit [REDACTED] behind companies' actions does not matter, it might result in disputes over the application of fraud exclusions in insurance policies like directors and officers, professional liability, or errors and omissions policies, attorneys said. However, those disputes will only arise in cases in which there has been a final determination of liability, which are a minority as FCA cases are often settled, said Keith McKenna, a partner with [REDACTED] who represents policyholders.

"It obviously depends on how [the justices] frame it, but I don't think it's going to be a coverage-killing decision," McKenna said.

The [REDACTED] the Supreme Court's reputation for harmoniously handling bitter FCA battles began in January when it accepted two petitions in cases accusing retailers SuperValu Inc. and Safeway Inc. of overcharging Medicare and Medicaid. In each case, the Seventh Circuit issued 2-1

decisions rejecting FCA liability for the supermarket giants because they had adopted incorrect yet “objectively reasonable” interpretations of ambiguous regulations, and they were not warned away by “authoritative guidance” to the contrary.

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