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D.C. CIRCUIT RULES ON “RECKLESS DISREGARD” UNDER FALSE CLAIMS ACT

by
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The U.S. Court of Appeals for the D.C. Circuit last month affirmed the dismissal of False Claims Act (“FCA”) allegations that were premised on what the court found to be ambiguous requirements in mortgage notes that were the basis of Federal claims, relying on the U.S. Supreme Court’s decision in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007), to define “reckless disregard” under the FCA. *United States ex rel. K & R P’ship v. Massachusetts Hous. Fin. Agency*, 530 F.3d 980 (D.C. Cir. 2008).

In a decision which may become more famous for its citation to Jimi Hendrix’s classic 1967 song “Love or Confusion,” Judge Janice Rogers Brown, writing for a unanimous panel, held that a finding of reckless disregard could not be supported because: (1) the requirements on which the *qui tam* relator based its argument of “falsity” were ambiguous; (2) the defendant’s interpretation of those requirements was reasonable; and (3) nothing warned the defendant away from its interpretation. By adopting, for the first time, the definition of reckless disregard announced by the Supreme Court last year in a non-FCA statutory scheme in *Safeco*, the Court of Appeals has made an important statement about the meaning of the FCA’s “reckless disregard” standard found in 31 U.S.C. § 3729(b) when applied to ambiguous regulations or funding requirements. This decision should pave the way for more summary dispositions of FCA cases based on ambiguous regulations or contractual requirements.

The Supreme Court’s Decision in Safeco. In *Safeco*, the Supreme Court found that “willful failure” under the Fair Credit Reporting Act (“FCRA”) was the same as “reckless disregard” under the federal common law. The Court found that this was an objective standard that was not met in circumstances where the statutory text of the disputed provision was ambiguous, where no authoritative guidance had been given on it, and where the defendant’s interpretation was reasonable. *K & R* extended the reasoning in *Safeco*, holding that reliance on a reasonable interpretation of an ambiguous requirement in FCA cases precludes the finding of “reckless disregard” under 31 U.S.C. § 3729(b)(3). The decision resolves an issue in FCA litigation that has been clouded by divergent opinions. Compare *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457 (9th Cir. 1999) (holding that the contractor’s reasonable interpretation of a regulation was subject to liability on the basis of intent), and *United States ex rel. Walker v. R & F Properties, Inc.*, 433 F.3d 1349 (11th Cir. 2005) (finding regulation ambiguous and relator’s interpretation reasonable without disputing defendant’s interpretation), with *United States ex rel. Bridges v. Zatica*, 244 F. App’x 799, No. 05-55747, 2007 WL 2193755 (9th Cir. Aug.1, 2007) (finding

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that defendant contractor chose one of two reasonable interpretations of ambiguous contract provision and therefore did not possess requisite scienter for violation of FCA), and *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333 (5th Cir. 2008) (concluding that defendants had not acted in "reckless disregard" of the truth in submitting claims that failed to comply with ambiguous provisions in regulations and granting summary judgment to defendants). By applying the Supreme Court's analysis to the assessment of the defendant's conduct under the reckless disregard standard of the False Claims Act, *K & R* clarifies that the approach to this issue by the courts in *Oliver* and *R & F Properties* is wrong.

Applying Safeco to the Reckless Disregard Issue under the FCA. In *K & R*, the relator alleged that the defendant, MassHousing, a non-profit organization dedicated to assisting low and moderate income families in obtaining affordable housing, certified in claims to HUD that interest reduction payments were calculated in accordance with interest rates established in mortgage notes. The *qui tam* relator alleged that MassHousing over-billed HUD in the amount of \$28 million (thus exposing MassHousing, according to Judge Brown, to a "potential liability around an eye-popping \$100 million" under the FCA when treble damages and penalties are calculated) because changes in its debt service varied the interest rate in the mortgage notes. *K & R*, 530 F.3d at 982. The D.C. Circuit noted that "the parties and the district court have spilt much ink in explaining the meaning of these notes, each parsing different language supporting its own 'unambiguous' interpretation." *Id.* The Court of Appeals disagreed both with the lower court and the parties, however, finding that the language in the mortgage notes was ambiguous and that both parties' interpretations of the ambiguous language were plausible.

Based on that conclusion, and applying the definition of reckless disregard in *Safeco*, the D.C. Circuit found that the relator did not explain why MassHousing's definition was unreasonable, did not point to anything that might have "warned [MassHousing] away from the view it took," and found that the evidence did not support the argument that MassHousing was reckless in its interpretation. *Id.* at 984 (quoting *Safeco*, 127 S. Ct. at 2216). In response to the relator's argument that MassHousing had a motive to submit false claims to HUD and undertook a 1993 bond refund with the specific intent of lowering its debt service, the court found that such evidence of subjective intent "does not mean MassHousing knew it did so unlawfully." *Id.* This is entirely consistent with the Supreme Court's view of the role of subjective intent in cases where the defendant's interpretation of an ambiguous provision is reasonable:

To the extent that they argue that evidence of subjective bad faith can support a willfulness finding even when the company's reading of the statute is objectively reasonable, their argument is unsound. Where . . . the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator.

Safeco, 127 S. Ct. at 2216 n. 20.

The authors of an article on the *Safeco* decision pointed out that basing the FCA's knowledge requirement on an evaluation of the defendant's subjective intent was a "heavily fact-dependent" enterprise that made it all but impossible for defendants to obtain summary judgment even though a claim was based on a reasonable interpretation of an ambiguous requirement. Roger S. Goldman, Katherine A. Lauer, & Eric S. Volkman, *The Real Good News from GEICO: Reasonable Interpretations Negate Scienter Under the False Claims Act*, GOVERNMENT CONTRACTOR, at 3 (Thompson/West) (Nov. 19, 2007). *Safeco* made such examinations of subjective intent unnecessary in cases of reasonable interpretations of ambiguous requirements. Now that the D.C. Circuit has adopted *Safeco*, more summary dispositions in FCA cases of ambiguous requirements should follow.