

Thomas Burnishes False Claims Act Crown With 9-0 Decree

By **Jeff Overley and Daniel Wilson**

Law360 (June 1, 2023, 11:35 PM EDT) -- Justice Clarence Thomas rallied the U.S. Supreme Court on Thursday to crush a corporate crusade against False Claims Act cases targeting improper yet "objectively reasonable" billing, and the resounding ruling cemented his status as the high court's king of FCA interpretation.

In a **unanimous opinion** that Justice Thomas authored, the high court laid waste to ambitious assertions from pharmacy retailers SuperValu Inc. and Safeway Inc., which claimed FCA immunity because their alleged overbilling of Medicare and Medicaid reflected reasonable readings of murky compliance duties — even if they had secretly doubted the veracity of those readings all along or had only concocted those readings after being sued.

Thursday's opinion almost unequivocally vanquished that view of the FCA's standard for scienter, or knowledge of wrongdoing. It found that the standard looks at a defendant's actual "knowledge and subjective beliefs — not to what an objectively reasonable person may have known or believed."

Thomas Leads the Way on FCA

Since the 1990s — early in the False Claims Act's modern era — Supreme Court opinions in FCA cases have been disproportionately written by conservatives, especially Justice Clarence Thomas.

Opinions in FCA cases

Clarence Thomas

7

Samuel Alito

2

Antonin Scalia

2

Anthony Kennedy

1

David Souter

1

John Paul Stevens

1

That finding pulverized a pair of Seventh Circuit rulings that **whistleblowers warned** would "undermine the [FCA's] efficacy by jettisoning all incentives for defendants to comply with the law and replacing them with incentives to pillage the public fisc whenever a clever attorney can rationalize the move."

Justice Thomas on Thursday alluded to that concern about artful attorneys — a **major theme** of briefing in the case — by writing that the focus of a scienter analysis "is not, as [the retailers] would have it, on post hoc interpretations that might have rendered their [billing] claims accurate," but rather "on what the defendant knew when presenting the claim."

The outcome is likely to reverberate deeply across the nation's mammoth FCA docket, which swells each year with hundreds of new cases, many of them premised on compliance lapses. But the

outcome was also important because it burnished Justice Thomas' little-noticed image as an FCA luminary.

For one thing, the veteran jurist has now written at least seven opinions involving the anti-fraud law since the late 1990s, when the modern era of aggressive FCA enforcement started accelerating. During that time, other conservatives have **written the bulk of other FCA opinions**, but no other justice has authored more than two FCA opinions.

"Justice Thomas has seemingly become the court's FCA scrivener," Guttman Buschner & Brooks PLLC founding member Reuben Guttman, who represents FCA whistleblowers, told Law360 on Thursday.

It's not clear why the justice has a penchant for the FCA, but one theory is that it stems from his "textualist" principles, which purport to adhere assiduously to statutory terms and eschew undue consideration of legislative history or intentions.


"Thomas is a textualist, and maybe he's taken it upon himself to define terms in the statute that often lack an obvious meaning," Jason D. Popp, the Atlanta-based chair of Alston & Bird LLP's health litigation and FCA teams, said in a Thursday interview. "Maybe he got the first one or two and then said, 'All right, this is an unusual statute with some imprecise writing — I'm going to be the one that clarifies the meaning and some otherwise hard-to-interpret terms.'"

Whatever the motivation, the upshot is that Justice Thomas' FCA affinity has led to a degree of continuity and stability in the law, observers say. And opinions from Justice Thomas tend to be tightly concentrated on the issue at hand, avoiding far-reaching pronouncements beyond the question presented, Arnold & Porter partner Christian D. Sheehan said Thursday.

"I don't know if he has a personal interest [in the FCA], but the effect is that we get narrow opinions," Sheehan said. "Even if the cases are resolved in the favor of the government or relators, the ramifications are somewhat confined."

Most of Justice Thomas' FCA decisions have been viewed as victories for the defense bar, but that view comes with caveats. One caveat is that those decisions usually attracted unanimous support and did so when the high court's membership included four liberals.

Additionally, when Justice Thomas has sided with FCA defendants, he has often done so in relatively minor matters. When the high court has entertained FCA questions of immense importance, Justice Thomas has not been as friendly to corporate interests.

In a 2016 case called **Universal Health Services v. Escobar** , for example, Justice Thomas penned a unanimous opinion that erected new evidentiary hurdles for whistleblowers to clear but also validated a crucial theory of the plaintiffs bar.

And on Thursday, in a case that was **expected to carry profound significance**, Justice Thomas **sent defense attorneys into exegesis mode**, parsing the opinion in hopes of spotting a few words or phrases that might serve as a silver lining in an obviously beneficial decision for FCA plaintiffs.

"Once the government and relators' counsel finish their well-deserved victory lap, the process of better understanding today's decision and its practical impact will begin in earnest," Nichols Liu LLP partner Bob Rhoad said Thursday. "In many ways, it is Escobar-esque — at first glance, appearing to be a nod to the government and relators, but as it is slowly digested by the courts, offering more and more to defendants who find themselves in the FCA's crosshairs."

Thursday's 9-0 opinion was especially remarkable because the underlying legal issue had **splintered lower courts sharply along ideological lines** — a relatively rare phenomenon for the FCA, which has for decades united lawmakers and judges who are typically political polar opposites. The fact that Justice Thomas — one of the high court's most conservative members — took on such a contentious case, and then wrote an opinion that produced zero dissents, struck many observers as impressive.

"I see him as anti-plaintiff where the issue is ... labor, or employment, or laced with religious issues," Guttman said. "But when it's protection of government money, he's been pretty true to the statute."

The fact that Sen. Chuck Grassley, R-Iowa, the congressional architect of the modern FCA, filed amicus briefs **assailing the Seventh Circuit's views**, might also have sent "a strong signal" to the justices about shedding philosophical differences, Guttman added.

Several experts on Thursday spotlighted the opinion's repeated references to common law and Justice Thomas' apparent view that it's vital to understanding the FCA's meaning.

"If you look at FCA case law more broadly, it doesn't tend to focus on common law issues — it tends to be really zoomed into narrow regulatory problems," Jordan Kearney, a partner at Hooper Lundy & Bookman PC, told Law360. "And both Escobar and this [decision] focus on the common law. When you start seeing that pattern repeated, it is, for me, a reminder that we should be focused more on making common law arguments in these FCA cases."

Sparacino PLLC partner Tejinder Singh, who successfully argued the combined SuperValu and Safeway case at the Supreme Court, made a similar point Thursday, telling Law360 he senses that "Justice Thomas believes strongly that the common law of fraud informs the proper interpretation of the False Claims Act's liability provisions."

"It's clear to anybody who does False Claims Act work that Justice Thomas is an incredibly influential jurist in this area," Singh added. "And so, any path to victory in the Supreme Court likely means securing his vote."

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 Michael Watanabe.