Supreme Court Issues Opinion Refining FCA's Scienter Requirement in Suits Involving Ambiguous Legal and Regulatory Requirements

On June 1, 2023, the Supreme Court issued an opinion in two consolidated cases, *U.S. ex rel. Schutte v. SuperValu Inc.*, and *U.S. ex rel. Proctor v. Safeway, Inc.*, involving application of the False Claims Act's ("FCA") scienter requirement to suits based on an entity's failure to comply with ambiguous legal or regulatory requirements.

As relevant here, the FCA's scienter provision limits civil liability to persons who "knowingly" submit false claims for payment to government programs. 31 U.S.C. § 3729(b)(1)(A). According to the statute, a person acts "knowingly" when he/she: (i) has "actual knowledge" of the truth or falsity; (ii) "acts in deliberate ignorance of the truth or falsity"; or (iii) "acts in reckless disregard of the truth or falsity." *Id.*

In the opening paragraph of its *SuperValu* opinion, the Court notes that the scienter analysis can be "straightforward" in the case of some factual statements, providing the following example: if "a doctor knows that he did five tests but submits a claim for ten, then he has knowingly submitted a false claim." *U.S. ex rel. Schutte v. Supervalu Inc.*, No. 21-1326, at 1 (U.S. June 1, 2023). However, the analysis is not always so clear when the statement goes beyond simple facts; for example, "some doctors might honestly mistake what [a required reporting] term means," whereas others "might correctly understand . . . and submit claims that were inaccurate anyway." *Id.*

An extreme version of that second, murkier analysis was presented to the Court in these two cases. In short, the Court distilled the question before it down to: if claims are false and actors actually believe them to be false, would those actors have "knowingly" submitted a false claim, or is it impossible to submit a false claim if a reasonable person could have thought the claims were lawful. *Id.* at 7-8.

The Court's answer:

> The FCA's scienter element refers to respondents' knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed. And, even though [a phrase] . . . may be ambiguous on its face, such facial ambiguity alone is not sufficient to preclude a finding that respondents knew their claims were false.

Id. at 8.

To arrive at this conclusion, the Court looked to common law fraud principles and corresponding passages from the Restatement (Third) of Torts and observed that their primary focus is on what an actor thinks and believes. *Id.* at 9-11. In other words, traditional fraud analyses "depend on a subjective test" and a defendant's "culpable state of mind" when presenting the claim. *Id.* at 11 (citations omitted).

The Court also rejected respondents' "three main arguments." *Id.* First, the Court rebuffed respondents' assertion that the inherent ambiguity in the regulation at issue made it categorically impossible to know what the regulation meant, with the Court observing that there were (at least theoretically) ways respondents could have learned the regulations' correct meaning. *Id.* at 12-13. Second, the Court disagreed with respondents' reliance on *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007)—in particular, *Safeco*'s interpretation of "the common law definitions of 'knowing' and 'reckless'"—because *Safeco* was interpreting a different statute and standard and therefore did not preclude liability under the particular circumstances at issue here. *Id.* at 13-14. Third, the Court disregarded respondents' argument that a misinterpretation of law could not be the basis for an FCA action, concluding that respondents' analysis of the regulation at issue was sufficiently based in fact. *Id.* at 14-16.

In sum, the Court felt it was "enough if respondents believed that their claims were not accurate." *Id.* at 16.

Given that narrow resolution, this case appears unlikely to have the sweeping implications that many followers of the FCA had predicted. For instance, petitioners in their briefing hyperbolically claimed that the application of the *Safeco* standard to the FCA would provide "contractors a license to defraud myriad government programs as long as they can find any way to rationalize their behavior." Pet. Writ Cert. at 3. Likewise, Senator Charles E. Grassley, the Godfather of the FCA himself, writing in his amicus brief, lamented that respondents' position would render the FCA "unusable." Grassley Brief at 3. The Court's decision ensures that those dire consequences (which were never particularly plausible) will not come to pass.

At the same time, the consequences for FCA defendants are likely to be minimal. Indeed, as practitioners who have represented all types of parties to FCA actions (relators, defendants, the government, amici, and recipients of third party subpoenas), we observe that this decision will have almost no discernable effect on the FCA space. The Court's deliberately narrow decision forecloses only one particular line of defense in one particular line of cases: defendants who actually knew that a claim was false will not be able to defend on the ground that an objective observer could have thought that the claim was true. But it is not clear that any real-world defendants (including those in this case) actually relied on such a defense, so the Court's holding seems to apply principally in the realm of hypotheticals.

Moreover, the "usual and customary" cases posed a challenge that exists for only a small subset of matters in which the government almost always declines intervention with relators usually following suit. And going forward, defendants will still be able to say that the applicable rule was

ambiguous with just as much ferocity, while relators and the government will be able to point to evidence of subjective intent. In short, FCA litigation will proceed much as it has for decades in this hotly contested area of the law with government contractors having to weigh the benefit of aggressively interpreting ambiguous laws against draconian penalties of treble damages and more than $25,000 in penalties per claim.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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