



Supreme Court Justices Hear False Claims Act Cases

On April 18, 2023, the U.S. Supreme Court heard oral arguments in two False Claims Act (FCA) cases, which cases center on the necessary state of mind needed to violate the FCA.¹ This Health Capital Topics article will review the oral arguments in the combined cases and how the justices seem posed to rule based on their questions and comments during the session.

The FCA is a Civil War-era federal statute that prohibits any person from “knowingly” submitting false claims to the government. Violators are liable for triple the government’s damages (treble damages), plus a penalty linked to inflation.² Not only does the FCA give the U.S. government the ability to pursue fraud, it also enables private citizens to file suit on behalf of the federal government through what is known as a *qui tam* or “whistleblower” suit.³

For one to be held liable under the FCA, the perpetrator must act with “scienter,” i.e., “knowingly,” which is defined as acting with actual knowledge, deliberate ignorance, or in reckless disregard to the truth or falsity of the information.⁴ Notably, “specific intent to defraud” is not required.⁵ Defendants in such cases will often argue that their interpretation of complex statutes and regulations was reasonable, and not rising to the level of scienter.⁶

The Supreme Court’s review centers on two decisions out of the 7th Circuit – *Schutte v. SuperValu* and *Proctor v. Safeway*.⁷ In *Schutte v. SuperValu*, two private citizen plaintiffs allege that SuperValu, a grocery store chain with 2,500 locations, knowingly submitted false payment claims to federal healthcare programs, and incorrectly reported drug prices.⁸ SuperValu had implemented a price matching program for customers, but did not report the price match amounts as their customary pricing, violating Medicaid regulations. In *Proctor v. Safeway*, the *qui tam* plaintiff alleged that Safeway, a grocery chain with over 900 locations, reported retail prices to government healthcare programs for certain drugs when customers actually paid less through price-matching and discounts.⁹ In both cases, different judges within the 7th Circuit found for the defendants, holding that the defendants’ subjective belief is never relevant to the determination of scienter. In fact, “[u]nder the 7th Circuit’s view, even a post hoc objectively reasonable interpretation that was never considered by the defendant would seemingly immunize them from FCA liability.”¹⁰

On January 13, 2023, the Supreme Court agreed to hear the cases and determine “[w]hether and when a defendant’s contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it ‘knowingly’ violated the False Claims Act,”¹¹ or as Justice Elena Kagan framed it: “whether the intent of someone to make a false statement is actionable even if later they come up with a different...objectively reasonable argument.”¹²

During the April 18, 2023 oral arguments, the Supreme Court appeared likely to reverse the lower court.¹³ Justices Kagan, Sonia Sotomayor, and Ketanji Brown Jackson indicated their intent to affirm that evidence of subjective intent was relevant to the inquiry of scienter, with Justice Neil Gorsuch agreeing.¹⁴ Justices Clarence Thomas, Brett Kavanaugh, and Samuel Alito suggested that the issue may not be as straightforward as “a statement requiring an interpretation of law cannot be ‘false,’ let alone knowingly false, if the law is subject to more than one reasonable interpretation.”¹⁵ While the justices largely expressed skepticism regarding lower courts’ ruling that subjective intent is irrelevant, some of the justices outright suggested a potential decision that subjective intent could be relevant in certain cases.¹⁶

Despite the fairly clear message sent by the justices during argument as to their interpretation of the objectively reasonable standard in these two particular cases, it remains to be seen whether the Court’s opinion expands beyond this case and delves into the various nuances within the FCA scienter standard, such as when there are multiple objectively reasonable interpretations. For example, Justice Kavanaugh posited a hypothetical that was the focus for a substantial portion of the oral argument: “At the time, you have three different interpretations possible, and one’s clearly safe, one’s a little more aggressive, and the third’s really aggressive, but you still think it’s reasonable, and you go with that third one, and it’s later – [the courts] don’t agree later on, so it’s ‘false.’”¹⁷ While the justices seemed to generally agree that the cases at issue fell under the third interpretation in Justice Kavanaugh’s hypothetical, there was some discussion as to whether the court should go further and decide the legality of first two interpretations, and if so, what the rules would be for those two hypothetical interpretations.¹⁸

The plaintiffs welcomed the additional clarification, and asserted that the Court should do more than send the case

back to the lower court to reconsider the defendants' conduct in light of their subjective belief.¹⁹ The defendants were similarly interested in an expanded ruling, so as to provide clarity to the business community.²⁰

The U.S. Supreme Court's ultimate decision (and the scope of that decision) will likely have a significant

impact on future FCA claims. If the Court were to affirm the lower court holdings that objective reasonability negates scienter, the standard would remain as a powerful defense.²¹ If the Court decides that the subjective intent of a defendant should be a factor to consider, it would be more difficult to dismiss on the grounds of scienter.²²

1 "Supreme Court to Consider False Claims Act 'Objectively Reasonable' Knowledge Standard" National Law Review, January 24, 2023, <https://www.natlawreview.com/article/supreme-court-to-consider-false-claims-act-objectively-reasonable-knowledge-standard>, (Accessed 1/30/23).

2 "The False Claims Act" U.S. Department of Justice, February 2, 2022, <https://www.justice.gov/civil/false-claims-act> (Accessed 1/30/23).

3 *Ibid.*

4 "False Claims" 31 U.S.C. § 3729(b)(1).

5 "False Claims" 31 U.S.C. § 3729(b)(1)(B).

6 "US Supreme Court to Address Scienter Standard Under False Claims Act" Morgan Lewis, January 17, 2023, <https://www.morganlewis.com/pubs/2023/01/us-supreme-court-to-address-scienter-standard-under-false-claims-act> (Accessed 2/1/23).

7 "Supreme Court to Consider False Claims Act 'Objectively Reasonable' Knowledge Standard" National Law Review, January 24, 2023, <https://www.natlawreview.com/article/supreme-court-to-consider-false-claims-act-objectively-reasonable-knowledge-standard>, (Accessed 1/30/23).

8 "U.S. ex rel. Schutte v. SuperValu Inc." No. 21-1326 (7th Cir. 2022), available at: <https://www.oyez.org/cases/2022/21-1326> (Accessed 2/1/23).

9 "Proctor v. Safeway, Inc." No. 20-3425 (7th Cir. 2022), available at: <https://law.justia.com/cases/federal/appellate-courts/ca7/20-3425/20-3425-2022-04-05.html> (Accessed 2/1/23).

10 "The court appears likely to preserve theory of liability in False Claims Act cases" By Jacob Elberg, SCOTUS Blog, April 20, 2023, <https://www.scotusblog.com/2023/04/the-court-appears-likely-to-preserve-theory-of-liability-in-false-claims-act-cases/> (Accessed 4/24/23).

11 "U.S. ex rel. Schutte v. SuperValu Inc." SCOTUS Blog, <https://www.scotusblog.com/case-files/cases/u-s-ex-rel-schutte-v-supervalu-inc/> (Accessed 4/24/23); "U.S. ex rel. Proctor v. Safeway, Inc." SCOTUS Blog, <https://www.scotusblog.com/case-files/cases/united-states-ex-rel-thomas-proctor-v-safeway-inc/> (Accessed 4/24/23).

12 "In the Supreme Court of the United States: United States, et al., ex. Rel. Tracy Schutte, et al., v. SuperValu Inc., et al., United States, et al, ex rel. Thomas Proctor v. Safeway, Inc.," Oral Argument Transcript, April 18, 2023, available at:

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1326_10n2.pdf (Accessed 4/24/23), p. 21-22.

13 Elberg, SCOTUS Blog, April 20, 2023.

14 "U.S. Supreme Court Justices Consider Relevance Of Subjective Knowledge Under False Claims Act" Barnes & Thornburg LLP, April 19, 2023, <https://btlaw.com/insights/alerts/2023/us-supreme-court-justices-consider-relevance-of-subjective-knowledge-under-false-claims-act> (Accessed 4/24/23).

15 "US Supreme Court Evaluates False Claims Act Scienter Standard in Potentially Landmark Case" By Meredith S. Auten, Morgan Lewis, April 19, 2023, <https://www.morganlewis.com/pubs/2023/04/us-supreme-court-evaluates-false-claims-act-scienter-standard-in-potentially-landmark-case> (Accessed 4/24/23).

16 *Ibid.*

17 "In the Supreme Court of the United States: United States, et al., ex. Rel. Tracy Schutte, et al., v. SuperValu Inc., et al., United States, et al, ex rel. Thomas Proctor v. Safeway, Inc.," Oral Argument Transcript, April 18, 2023, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1326_10n2.pdf (Accessed 4/24/23), p. 17.

18 "The court appears likely to preserve theory of liability in False Claims Act cases" By Jacob Elberg, SCOTUS Blog, April 20, 2023, <https://www.scotusblog.com/2023/04/the-court-appears-likely-to-preserve-theory-of-liability-in-false-claims-act-cases/> (Accessed 4/24/23); "In the Supreme Court of the United States: United States, et al., ex. Rel. Tracy Schutte, et al., v. SuperValu Inc., et al., United States, et al, ex rel. Thomas Proctor v. Safeway, Inc.," Oral Argument Transcript, April 18, 2023, available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1326_10n2.pdf (Accessed 4/24/23), p. 23-24

19 "The court appears likely to preserve theory of liability in False Claims Act cases" By Jacob Elberg, SCOTUS Blog, April 20, 2023, <https://www.scotusblog.com/2023/04/the-court-appears-likely-to-preserve-theory-of-liability-in-false-claims-act-cases/> (Accessed 4/24/23).

20 "The court appears likely to preserve theory of liability in False Claims Act cases" By Jacob Elberg, SCOTUS Blog, April 20, 2023, <https://www.scotusblog.com/2023/04/the-court-appears-likely-to-preserve-theory-of-liability-in-false-claims-act-cases/> (Accessed 4/24/23).

21 Auten, Lewis, April 19, 2023.

22 *Ibid.*



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