

## Supreme Court Rules on False Claims Act Case

On June 1, 2023, the U.S. Supreme Court published their decision in two *False Claims Act* (FCA) lawsuits. The decision is one of the most significant developments for the FCA in recent history, as it resolves the necessary state of mind needed to violate the FCA.<sup>1</sup> This Health Capital Topics article will discuss the FCA cases and the Supreme Court's decision.

The FCA (a federal statute) was enacted in 1863 in response to fraud committed by a defense contractor during the Civil War.<sup>2</sup> The FCA established that any person who knowingly submitted false claims to the government was liable for double the government's damages, plus a penalty; since its enactment, the law has been amended several times. Now, violators are liable for treble damages, along with a penalty linked to inflation.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Notably, "specific intent to defraud" is not required.<sup>6</sup> 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.<sup>7</sup>

In determining the necessary state of mind required for liability under the FCA, the Supreme Court reviewed the lower court decisions of two cases: *Schutte v. SuperValu* and *Proctor v. Safeway*.<sup>8</sup> In both cases, the retail pharmacy defendants were required to bill Medicare and Medicaid for their "usual and customary" drug prices to the general public.<sup>9</sup> 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 by reporting higher drug prices than it typically charged customers.<sup>10</sup> SuperValu had implemented a price matching program for customers, but they did not report the price match amounts as their customary pricing (despite the popularity of the program, resulting in these lower process comprising the majority of sales for many drugs at the time, i.e., establishing a "usual and customary" price for those drugs), violating Medicaid regulations. The lower courts found that the plaintiffs

failed to prove the element of "scienter," i.e., they failed to demonstrate that SuperValu had an objectively unreasonable interpretation of the reporting requirement.<sup>11</sup>

In *Proctor v. Safeway*, the qui tam plaintiff alleged that Safeway, a grocery chain with over 900 locations, similarly reported retail (non-discounted) prices to government healthcare programs for certain drugs when customers actually paid less through price-matching and discounts.<sup>12</sup> The lower courts ruled against the plaintiff, finding they had failed to prove the element of "scienter," and affirmed that Safeway had not acted in disregard to regulations and the grocery chain's interpretation of the law was objectively reasonable.<sup>13</sup>

The Court sought to answer the following legal question: "If respondents' claims were false and they actually thought that their claims were false—because they believed that their reported prices were not actually their "usual and customary" prices—then would they have "knowingly" submitted a false claim within the FCA's meaning?"<sup>14</sup> In their highly anticipated ruling, the Supreme Court unanimously vacated the standards set by the lower courts, which had previously enabled defendants to avoid liability under the FCA as long as their interpretation after the fact was objectively reasonable, regardless of whether the defendant actually believed that interpretation.<sup>15</sup> In rejecting this view, the Court made it clear that the focus should be on what the defendant thought *at the time* of submission for a false claim.<sup>16</sup> The 9-0 opinion, authored by Justice Clarence Thomas, laid out three types of scienter that can result in FCA liability:

- (1) "Actual knowledge," which "refers to whether a person is 'aware of' information";
- (2) "Deliberate ignorance," which "encompasses defendants who are aware of a substantial risk that their statements are false, but intentionally avoid taking steps to confirm the statement's truth or falsity"; and
- (3) "Reckless disregard," which "similarly captures defendants who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway."<sup>17</sup>

The Court agreed that “the phrase ‘usual and customary’ on its face appears somewhat open to interpretation, but reasoned that “such facial ambiguity alone is not sufficient to preclude a finding that respondents knew their claims were false.”<sup>18</sup>

Further, the justices stated that:

“Under the FCA, petitioners may establish scienter by showing that respondents (1) actually knew that their reported prices were not their “usual and customary” prices when they reported those prices, (2) were aware of a substantial risk that their higher, retail prices were not their “usual and customary” prices and intentionally avoided learning whether their reports were accurate, or (3) were aware of such a substantial and unjustifiable risk but submitted the claims anyway. If petitioners can make that showing, then it does not matter whether some other, objectively reasonable interpretation of “usual and customary” would point to respondents’ higher prices. For scienter, it is enough if respondents believed that their claims were not accurate.”<sup>19</sup>

The Supreme Court’s decision will likely limit the ability of FCA defendants to pursue motions to dismiss based on the argument of objective reasonability.<sup>20</sup> Without

appropriate documentation to show compliance with the FCA at the time of the false claim submission, defendants may struggle to prevail.<sup>21</sup> However, on the other hand, a defendant may be able to prevail if they can produce documentation demonstrating good-faith subjective intent.<sup>22</sup> This reliance on documentation to substantiate the focus on the defendant’s intent at the time of the submission of a false claim may present challenges for relators and the government in identifying documents and witnesses that can attest to the defendant’s subjective intent at the time of the claim submission, particularly given the long timeframe of FCA cases – relators and the government have three years from the date of the alleged false claim to bring suit, the most FCA cases are sealed for years before being made public.<sup>23</sup>

Going forward, legal counsel recommends that stakeholders document their decision-making processes regarding compliance with FCA, so that such documentation will be readily available to demonstrate good-faith subjective intent.<sup>24</sup>

The Supreme Court vacated the lower court’s judgments and remanded the cases to the Seventh Circuit, for proceedings and rulings consistent with the Court’s decision.<sup>25</sup>

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 6/6/23).

2 “The False Claims Act” U.S. Department of Justice, February 2, 2022, <https://www.justice.gov/civil/false-claims-act> (Accessed 6/6/23).

3 *Ibid.*

4 *Ibid.*

5 “False Claims” 31 U.S.C. § 3729(b)(1).

6 *Ibid.*

7 “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 6/6/23).

8 “Supreme Court Reopens Fraud Suits Against SuperValu, Safeway (1)” By Daniel Seiden, Bloomberg Law, June 1, 2023, <https://news.bloomberglaw.com/federal-contracting/supreme-court-reopens-fraud-suits-against-supervalu-safeway> (Accessed 6/6/23).

9 “United States et al. ex rel. Schutte et al. v. Supervalu Inc. et al.” Slip Opinion, 598 U. S. \_\_\_\_, 3 (2023), available at: [https://www.supremecourt.gov/opinions/22pdf/21-1326\\_6jfl.pdf](https://www.supremecourt.gov/opinions/22pdf/21-1326_6jfl.pdf) (Accessed 6/6/23).

10 “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 6/6/23); “United States et al. ex rel. Schutte et al. v. Supervalu Inc. et al.” Slip Opinion, 598 U. S. \_\_\_\_, 3 (2023), available at: [https://www.supremecourt.gov/opinions/22pdf/21-1326\\_6jfl.pdf](https://www.supremecourt.gov/opinions/22pdf/21-1326_6jfl.pdf) (Accessed 6/6/23).

11 *Ibid.*

12 “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 6/6/23).

13 *Ibid.*

14 “United States et al. ex rel. Schutte et al. v. Supervalu Inc. et al.” Slip Opinion, 598 U. S. \_\_\_\_, 2-3 (2023), available at: [https://www.supremecourt.gov/opinions/22pdf/21-1326\\_6jfl.pdf](https://www.supremecourt.gov/opinions/22pdf/21-1326_6jfl.pdf) (Accessed 6/6/23).

15 “Supreme Court maintains focus on defendant’s subjective beliefs in False Claims Act cases” By Jacob Elberg, SCOTUS Blog, June 1, 2023, <https://www.scotusblog.com/2023/06/supreme-court-maintains-focus-on-defendants-subjective-beliefs-in-false-claims-act-cases/> (Accessed 6/6/23).

16 *Ibid.*

17 “United States et al. ex rel. Schutte et al. v. Supervalu Inc. et al.” Slip Opinion, 598 U. S. \_\_\_\_, 7 (2023), available at: [https://www.supremecourt.gov/opinions/22pdf/21-1326\\_6jfl.pdf](https://www.supremecourt.gov/opinions/22pdf/21-1326_6jfl.pdf) (Accessed 6/6/23).

18 *Ibid.*

19 *Ibid.*

20 “In Key FCA Scienter Opinion, US Supreme Court Turns Focus on Subjective Intent” By Meredith Auten et al., JD Supra, June 5, 2023, <https://www.jdsupra.com/legalnews/in-key-fca-scienter-opinion-us-supreme-4988145/> (Accessed 6/6/23).

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 See, e.g., “In Key FCA Scienter Opinion, US Supreme Court Turns Focus on Subjective Intent” By Meredith Auten et al., JD Supra, June 5, 2023, <https://www.jdsupra.com/legalnews/in-key-fca-scienter-opinion-us-supreme-4988145/> (Accessed 6/6/23); “Supreme Court Issues Decision Regarding False Claims Act’s Scienter Element” By G. Norman Acker III, et al., K&L Gates, June 8, 2023, <https://www.klgates.com/Supreme-Court-Issues-Anticipated-Decision-Regarding-False-Claims-Acts-Scienter-Element-6-8-2023> (Accessed 6/13/23).

25 “United States et al. ex rel. Schutte et al. v. Supervalu Inc. et al.” Slip Opinion, 598 U. S. \_\_\_\_, 17 (2023), available at: [https://www.supremecourt.gov/opinions/22pdf/21-1326\\_6jfl.pdf](https://www.supremecourt.gov/opinions/22pdf/21-1326_6jfl.pdf) (Accessed 6/6/23).



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