

Supreme Court Finds that Subjective Awareness of an "Unjustifiably High Risk" of Falsity Can Satisfy False Claims Act Scienter Requirement

Litigation Alert

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On June 1, 2023, the U.S. Supreme Court issued its much-anticipated decision in *United States ex rel. Schutte v. SuperValu Inc.*,¹ addressing the scienter element for the False Claims Act (FCA).¹ The U.S. Court of Appeals for the Seventh Circuit had ruled that the defendants could not be found to have had the scienter required to establish FCA liability so long as their interpretation of the law was objectively reasonable, regardless of their subjective understanding at the time of the alleged FCA violation. The Supreme Court, in a unanimous decision, rejected that view and instead held that the scienter requirement is satisfied if an FCA defendant "actually knew" what a facially ambiguous legal requirement at issue in a given FCA case meant, or even if it was subjectively "aware of a substantial and unjustifiable risk" that its interpretation of the law was incorrect.

Background

The defendants in this case were chains of retail pharmacies – SuperValu and Safeway – who submitted reimbursement claims to Medicare and Medicaid. Under those programs, pharmacies can be reimbursed for certain amounts, one of which is the pharmacy's "usual and customary charge" to the public. The petitioners in this case alleged that the pharmacies submitted prices higher than their usual and customary charge due to various discount programs offered by the pharmacies. Petitioners presented evidence that the pharmacies knew that the discounted rates should have been their usual and customary price, but the defendants argued that the term "usual and customary" was ambiguous and could be interpreted to refer to the pharmacies' retail prices rather than the discounted prices.

The District Court granted summary judgment for the defendants and the Seventh Circuit affirmed, holding that because the defendants' interpretation of usual and customary was objectively reasonable and not ruled out by settled law, the defendants could not have acted with the requisite scienter to create FCA liability. The Supreme Court reversed, holding that: "The FCA's scienter element refers to respondents' knowledge and subjective beliefs — not to what an objectively reasonable person may have known or believed." Thus, if a defendant subjectively believes its claims are false, the scienter element of the FCA is satisfied. Because the FCA scienter element incorporates not just actual knowledge but also deliberate ignorance or reckless disregard of falsity, the Supreme Court said that the scienter element can also be met by showing that defendants were aware of a "substantial and unjustifiable risk" that the claims were false.

Key Takeaways

This is a significant development in FCA caselaw, as the Seventh Circuit's standard had also been the law in the Third, Fourth, Eighth, Ninth, and DC Circuits. Under the Supreme Court's standard, defendants will not be able to rely upon the argument that their interpretation of the law is objectively reasonable — regardless of what they may have subjectively believed at the time of the alleged false claims. As a practical matter, we expect this decision will make it less likely that FCA cases will be resolved through motions practice, since it will likely be difficult to demonstrate that, as a matter of law, a defendant's position on what a facially ambiguous requirement meant did not rise to the level of assuming an "unjustifiably high risk" of being wrong. We also expect the new standard articulated by the Court will lead to further litigation — at the very least, on the question of what it means for there to be an "unjustifiably high risk" of being wrong about what a facially ambiguous legal requirement actually means. The holding may resonate even beyond the FCA, as the Court's discussion of "fraud" and its common law roots follows shortly on the heels of recent cases where the Court again restrained federal prosecutor's use of the mail and wire fraud statutes.

Finally, this decision may also impact the interpretation of the various pricing disclosure requirements that can apply to

government contractors, such as the Truthful Cost or Pricing Data Statute (fka TINA) and the regulations/solicitation provisions governing the disclosure of historical pricing for commercial products and services. Although the Court made clear it was not resolving the question of what the phrase "usual and customary charges" means, the Court's decision can be read as sympathetic to the view that that phrase refers to the prices at which an entity actually sells its products on a regular basis, and not to its non-discounted list prices.

If you have any questions about the *SuperValu* decision or FCA cases in general, please contact one of the Miller & Chevalier attorneys listed below:

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¹Scienter is a required element of an FCA cause of action, as FCA liability attaches only to "knowing" FCA violations. 31 U.S.C. § 3729(a). While actual knowledge of falsity can satisfy this requirement, such actual knowledge is not required. Rather, this element can be satisfied by showing deliberate ignorance or reckless disregard of falsity. 31 U.S.C. § 3729(b)(1).

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