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NEWSLETTER

A Banner Year for the False Claims Act at the Supreme Court

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The U.S. Supreme Court's October 2022 term was a blockbuster for the False Claims Act (FCA). The Court recently decided two cases poised to change the landscape of FCA cases in the lower courts: *United States ex rel. Schutte v. SuperValu Inc.* and *United States ex rel. Polansky v. Executive Health Resources Inc.* In the coming months, practitioners and those doing business with the Government will look to see how these decisions play out, and what FCA issue(s) the Supreme Court might take up next.

United States ex rel. Schutte v. SuperValu Inc.

Schutte involved two consolidated cases with similar allegations and decisions by the district courts. In both cases, the Seventh Circuit applied the Supreme Court's decision in *Safeco Ins. Co. of America v. Burr* and held that even if a defendant "might suspect, believe, or intend to file a false claim, [] it cannot know that its claim is false if the requirements for that claim are unknown." Accordingly, defendants' subjective intent when they submitted their claims was "irrelevant" to the scienter analysis. Because defendants showed at summary judgment that their acts complied with a *post hoc* reasonable interpretation of an ambiguous regulation, the Seventh Circuit affirmed that relators could not establish scienter.

The Supreme Court disagreed. It began by explaining the narrowness of the issue before it: whether a defendants' *post hoc* reasonable interpretation of an ambiguous regulation matters when determining scienter under the FCA. Justice Thomas, writing for a unanimous Court, held that the only relevant consideration under the FCA's scienter element is a defendant's "knowledge and subjective beliefs" at the time they submitted their claims to the Government. This is

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because each definition of "knowingly" under the FCA—actual knowledge, deliberate ignorance, and reckless disregard—"focus primarily on what [the defendant] thought and believed" at the time they acted. Thus, the Court rejected the application of *Safeco* in the FCA context.

Schutte will likely make it harder to secure dismissals on scienter grounds at the motion to dismiss and summary judgment stages, which was already a challenging prospect. FCA litigants can still press regulatory or contractual ambiguity arguments to defeat the statute's falsity element, neither of which were before the Court in *Schutte*. The impact of those ambiguity arguments may ultimately return to the Court. As the Justices recognized at oral argument, the "hard case"—which the Court did not provide guidance on—is where a defendant determined a regulation or contract provision was ambiguous and believed its interpretation was correct, but recognized there were other possible interpretations.

United States ex rel. Polansky v. Executive Health Resources Inc.

In *Polansky*, the relator continued litigating his *qui tam* action after the U.S. Department of Justice (DOJ) declined to intervene. After five years of litigation, DOJ moved to dismiss the case because the "burdens of the suit"—including "weighty privilege issues"—"outweighed its potential value," especially because DOJ doubted the relator's ability to prevail. The district court granted DOJ's motion to dismiss over the relator's objection, and the Third Circuit affirmed.

The Supreme Court sought to resolve two issues: (1) the scope of the Government's authority to seek dismissal of a *qui tam* action over a relator's objection, and (2) the standard that district courts must apply when ruling on such a motion. In doing so, the Court held that DOJ must first intervene before seeking a 31 U.S.C. § 3730 (c)(2)(A) dismissal. Thus, if the Government originally declines to intervene, it must satisfy § 3730(c)(3)'s "good cause" standard and obtain permission from the court to allow it to intervene at a later point. If the court grants DOJ's intervention motion, any dismissal brought over the relator's objection must be analyzed using Federal Rule of Civil Procedure 41(a). Under Rule 41(a), if the defendant has not served its answer or moved for summary judgment, the plaintiff (or the Government here) only needs to file a notice of dismissal. Otherwise, the court may dismiss the action "only by court order, on terms that the court considers proper." In the FCA context, "proper" terms require the court to weigh the relator's interests against the "Government's views" in seeking dismissal.

Despite entrenching procedural hurdles for the Government, the Supreme Court imposed a relatively low burden on the Government, noting that the Government's dismissal request should be honored "in all but the most exceptional cases," and that "a district court should think several times over before denying a motion to dismiss." If the "Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant" its dismissal motion—"even if the relator presents a credible assessment to the contrary." Justice Thomas dissented, arguing that the text, structure, and history of the FCA did not allow the Government to seek dismissal of a pending *qui tam* where it originally declined to intervene.

The immediate impact of *Polansky* will likely be muted. While dismissals under § 3730(c)(2)(A) could rise in the short term if DOJ paused or decreased dismissal requests pending the *Polansky* ruling, DOJ likely will not increase the overall frequency with which it uses its § 3730(c)(2)(A) dismissal authority. In the last five years, only 58 *qui tam* actions (out of more than 3,000 filed) have been dismissed under that authority.

The potentially broader impact of *Polansky* is what it may signal for the future of the FCA's *qui tam* provisions. The case resurrected an old defense—the direct challenge to the constitutionality of the FCA's *qui tam* provisions, which Justice Thomas addressed in his dissent. Justice Thomas argued that *qui tam* suits may violate Article II. In his view, because the executive power is vested in the president alone, representing the interests of the United States in civil litigation (an executive function) must be carried out by an "officer" of the United States, appointed and confirmed under Article II. Because private relators are not officers, they cannot be given the authority to represent the interests of the United States. A concurrence from Justice Kavanaugh, joined by Justice Barrett, agreed with the *Polansky* majority on the § 3730(c)(2)(A) issue before the Court, but noted they would also consider the constitutionality of the *qui tam* provisions in an appropriate case. While lower courts that have addressed similar constitutional challenges have almost unanimously upheld the *qui tam* provisions, defendants may be compelled to renew these arguments—and courts may give more weight to them—in light of the views from three of the Justices in *Polansky*.

Federal Rule of Civil Procedure 9(b)

It is likely additional scienter challenges based on regulatory and contractual ambiguity and challenges to the constitutionality of the *qui tam* structure will make their way to the Supreme Court. But another issue is more likely to be featured in the Court's upcoming October 2023 term: the pleading standard FCA plaintiffs must meet to plead fraud with particularity under Rule 9(b). Five circuits require plaintiffs to plead specific false claims (e.g., an allegedly fraudulent claim's time, place, and content). Seven circuits, on the other hand, impose a less stringent standard, permitting courts to infer that a false claim was submitted to the Government if presented with sufficient details and reliable indicia of fraud. Several *certiorari* petitions this term asked the Supreme Court to resolve this split. The Court ultimately declined those invitations after the Solicitor General filed an amicus brief arguing that "courts have largely converged on" a single approach allowing for either standard to be met. Despite the Government's position, the Court may not be able to dodge the issue for long, especially given calls from both the defense and relators' bars to take up the issue.