

ALERT

Supreme Court Rules FCA Scienter Element Focuses on Defendants' Subjective Beliefs Only

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WHAT: The U.S. Supreme Court this morning handed down its much-anticipated decision in *United States ex rel. Schutte v. SuperValu Inc.* The Court considered the narrow issue of whether the False Claims Act's (FCA) scienter requirement focuses on a defendant's subjective beliefs or what an objectively reasonable person may have known or believed. Justice Thomas, writing for a unanimous court, held that only a defendant's subjective beliefs, at the time they presented their claim to the Government, matter when determining scienter under the FCA. While that holding is unsurprising given the narrow issue before the Court, the decision renders after-the-fact interpretations of ambiguous provisions irrelevant in determining whether a defendant *knowingly* submitted a false claim in violation of the FCA.

BACKGROUND: Today's decision involves two consolidated cases with similar allegations and decisions by the lower courts. Relators alleged that defendants, which operate hundreds of retail drug pharmacies nationwide, violated the FCA by overcharging the Government for prescription drugs. Under Medicare and Medicaid, pharmacies cannot collect more from the Government than the "usual and customary" price they charge for a drug. "Usual and customary" is defined as the cash price charged to the public. Relators allege defendants overbilled the Government by offering discounted prices to customers under a "price-match program," yet failed to include those discounts in their "usual and customary" calculations. Importantly, relators claim that when defendants submitted their claims to the Government, they believed that their discounted prices should be reported as their "usual and customary" prices.

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In both cases, the district court granted summary judgment for defendants on the FCA's scienter requirement after concluding relators established falsity. The Seventh Circuit affirmed. The panel 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 at the time they submitted their claims was "irrelevant" to the analysis. Because defendants showed at summary judgment that their acts were consistent with a *post hoc* reasonable interpretation of "usual and customary," relators could not establish scienter.

The Supreme Court disagreed. It began by explaining the narrowness of the issue before it:

We are not reviewing the meaning of the phrase "usual and customary" or whether any of respondents' claims were, in fact, inaccurate or otherwise false. Nor are we reviewing whether respondents actually thought that the phrase "usual and customary" referred to their discounted prices. Nor, for that matter, are we reviewing any factual disputes about what respondents did or did not believe or do. These cases come to us from the grant of summary judgment to respondents on one discrete legal issue, and we granted certiorari to resolve only that issue.

Thus, the Court considered only defendants' *post hoc* interpretation of "usual and customary" under the FCA's scienter element. In doing so, the Court held that the only relevant consideration under the scienter element is a defendant's "knowledge and subjective beliefs" at the time they submitted their claims to the Government. Justice Thomas explained that each definition of "knowingly" under the FCA – actual knowledge, deliberate ignorance, and reckless disregard – "focus[es] primarily on what [the defendant] thought and believed." Whether a regulation is facially ambiguous does not alone preclude a finding of scienter. Instead, any ambiguity would be one factor for courts to consider in analyzing scienter under the statute. As a result, the Court also declined to read its decision in *Safeco* as broadly as the Seventh Circuit. It noted that *Safeco* did not extend to the FCA and nothing in the decision "suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted." Notably, however, because the district court had found falsity, the Court did not consider defendants' ambiguity argument in the context of the FCA's falsity element.

TAKEAWAYS: It remains to be seen how the Court's decision will play out in the lower courts. As the Justices recognized at oral argument, the "harder case" is when a defendant operates under a reasonable interpretation of an ambiguous provision at the time they submit their claim. Today's decision does not provide guidance on that question. One thing, however, is certain: after-the-fact interpretations of ambiguous regulations or contract provisions, no matter how reasonable, are irrelevant in evaluating scienter under the FCA. Today's decision will almost certainly make it harder to secure dismissals on scienter grounds at the motion to dismiss stage – already a challenging prospect. In response, companies can try to limit exposure when presented with regulatory or contractual ambiguities by actively resolving any such uncertainties with the Government before submitting a claim. And FCA litigants can still press regulatory or contractual ambiguity arguments to defeat the statute's falsity element – an argument not before the Court in *SuperValu*.