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Qui Tam Section

Federal Bar Association

TURNING SQUARE CORNERS

In This Issue

Leadership Lane

By: Rachel V. Rose, JD, MBA – Co-Chair of the Education Committee and Editor

As the Qui Tam Section's Vice-Chair of Publications and a FBA National Board Member, I am thrilled to pen the inaugural Leadership Lane, a segment of our newsletter that provides an overview of the edition, as well as notable items that the Qui Tam Section and the FBA are facilitating. First, a show of gratitude is in order. Megan Mocho, Chair and Scott Oswald, Immediate Past Chair, along with the Education Committee, which consists of Michael Moore, Alex Canizares, Andrew Miller, Brittany Cambre, Caleb Hayes-Deats, Denise Barnes, Lynzi Archibald, Tama Kudman, Michael Stockham, Michael Goldsticker, and Brittany Combre, expended their time and talents to make this first edition possible. Their contributions and leadership, as well as the colleagues that they recruited to co-author or interview, made this concept a reality.

This edition is dedicated to exploring the False Claims Act's scienter landscape post-United States ex rel. Schutte v. SuperValu,Inc., 598 U.S. 739 (2023) ("SuperValu"). Our goal was to present a collegial and balanced view from both the defense side and the relator/government side of the aisle on different cases and considerations that are playing out in litigation across the country. Additionally, there are articles devoted to key False Claims Act case issues in different United States District and Circuit Courts, so that readers can keep a pulse on other relevant issues. Michael Goldsticker, a former Assistant United States Attorney, scored an interview with Charlie Sinks, Trial Attorney and Assistant Attorney General for the District of Columbia. The District of Columbia has a False Claims Act statute and for those who are not familiar with it or the DC Attorney General's Office, there are many insightful take-aways.

Finally, both the Qui Tam Section and the FBA produce a number of quality programs related to whistleblower statutes. The Section strives to provide a respectful forum where exchanges between the bench, the government, relators' counsel, and defense counsel to give participants the benefit of learning from a variety of vantage points. Recent and upcoming webinars and events are highlighted at the end. As a reminder, don't forget to register for the hybrid 2024 Annual Conference, which is held in DC from February 22-24.

If members or potential members have suggestions or ideas, we encourage you to reach out!

Again, a significant thank you to our Members and Leadership for your contributions, which enable the FBA to stay abreast of the current landscape and offer meaningful content.

Rachel

Setting the Stage: Scienter and SuperValu, the Fight that Never Ends

By: Denise M. Barnes and Rachel V. Rose [1]

In the 2022 term, the U.S. Supreme Court heard and ruled on two cases that had the potential to drastically impact False Claims Act, 31 U.S.C. §§ 3729-3733, (the "FCA") jurisprudence and the Government's ability to pursue civil fraud cases. The U.S. Supreme Court decided both *U.S. ex rel. Schutte v. Supervalu Inc.* ("SuperValu") and *U.S. ex rel. Polansky v. Executive Health Resources, Inc.* ("Polansky") and largely maintained the *status quo*. But, dicta in the *Supervalu* case suggests that there may be other battles brewing in the future.

Background

Congress initially enacted *Lincoln's Law* or the False Claims Act ("FCA") in 1863 with the intention of combatting fraud against the U.S. Army during the Civil War. Since then, the FCA has become the Government's primary civil tool for combatting fraud on the government, resulting in billions in settlements, judgements and recoveries per year. Specifically, under the FCA, liability accrues for any person (or corporation) who knowingly submits a false claim to the government or causes the submission of a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. To establish a FCA violation, the plaintiff must demonstrate four (4) elements: (i) the defendant made a false or fraudulent claim; (ii) the claim was material to payment; (iii) the defendant presented the claim for payment or approval; and (iv) the defendant had the requisite scienter that the claim was false or fraudulent. [2]

As it relates to scienter—the element at issue in *United States ex rel. Tracy Schutte v. SuperValu Inc. and United States ex rel. Thomas Proctor v. Safeway, Inc. ("SuperValu")*—courts require that the individual "knowingly submit" or "knowingly cause the submission of a false claim." Section 3729(b)(1) of the FCA defines "knowledge of false information … as being (1) actual knowledge, (2) deliberate ignorance of the truth or falsity of the information, or reckless disregard of the truth or falsity of the information." Importantly, while "knowledge" is required, §3729(b)(1)(B) FCA expressly states that "'knowingly' … require[s] no proof of specific intent to defraud."

Specifically, in *SuperValu*, the Supreme Court addressed whether, when a regulation is ambiguous, there is a violation of the FCA for submitting a claim consistent with one reasonable interpretation of the underlying regulation if the defendant did not actually believe that that interpretation was correct at the time. In other words, the Court addressed whether subjective intent is relevant to the determination of whether person of corporation submitted a claim with the knowledge that the claim was false or fraudulent even when the regulation is ambiguous. On June 1, 2023, The Supreme Court answered yes—subjective intent matters in relation to recklessness. Despite the Supreme Court's unanimous decision in *SuperValu,* we anticipate that lower courts may see a lot of play and, unsurprisingly,differing arguments from the relator/government side of the aisle and the defense side of the aisle about what *SuperValu* actually means for the FCA's scienter standard.

History of SuperValu

In the underlying consolidated cases *U.S. ex rel. Schutte v. SuperValu, Inc.* and *U.S. ex rel. Proctor v. Safeway, Inc.*, 143 S. Ct. 1391 (2023) (*"SuperValu"*), the relators argued that SuperValu and Safeway violated the FCA by reporting the full retail price as their "usual and customary" price, despite providing them at a significantly lower price to patients that paid cash. The relators generally alleged that the pharmacies were required to report the lower prices to the Government, knew that they were required to do so, and did not.

In SuperValu's case, the lower court ruled against SuperValu on the falsity element, noting that its discounted prices were its "usual and customary" prices and that, by not reporting them, SuperValu submitted false claims. But, the court then granted summary judgment for SuperValu based on the scienter element, holding SuperValu could not have acted "knowingly" because the defendant's actions were consistent with a reasonable interpretation of the law, despite what the defendant actually believed. The court also ruled similarly in the Safeway case.

On appeal, U.S. Court of Appeals for the Seventh Circuit affirmed, citing to the U.S. Supreme Court's analysis from *Safeco Ins. Co. of Am. V. Burr*, 551 U.S. 47, 68 (2007) which addressed the recklessness standard in the context of the Fair Credit Reporting Act ("FCRA"). In particular, the Seventh Circuit noted that the pharmacies could not have acted ***knowingly*** if their actions comported with an objectively reasonable interpretation of the law, despite their own interpretations at the time.

The Supreme Court, however, ultimately disagreed with the Seventh Circuit, noting that "[f]or scienter, it is enough if respondents believed that their claims were not accurate." *SuperValu* at 1404. In particular, the Court clarified that under the FCA, plaintiffs may establish scienter three ways: by showing that the defendants (i) actually knew that the prices reported to the Government were not their "usual and customary" prices; (ii) were aware of a **substantial risk** that their higher retail prices were not "usual and customary" and intentionally avoided learning whether their reports were accurate, or (iii) were aware of such a **substantial unjustifiable risk** but submitted the claims anyway. *Id.* at 1400-01. In short, the Supreme Court reiterated that the scienter element may be met by demonstrating either actual knowledge, deliberate ignorance or reckless disregard for the truth.

SuperValu Presents More Questions

By many practitioners, the Supreme Court's decision in SuperValu is largely viewed as consistent with years of precedent that one's subjective beliefs should be relevant in demonstrating whether one indeed intended to commit fraud. Simply put, a perpetrator's belief that he was engaging in fraud by submitting a false claim and his decision to continue to do so in light of that view is necessarily relevant to the question of whether he intended to submit a false claim to the Government. For the Government and whistleblower counsel, this finding was largely a return to the status quo.

Nonetheless, the Supreme Court may have also laid the groundwork for the next legal FCA scuffle: what amounts to recklessness. Although the FCA's recklessness standard is generally viewed as the least onerous of the scienter standards, by describing recklessness as engaging in conduct despite one's awareness of a "substantial unjustifiable risk," the Government and relators may argue that Justice Thomas may have heightened the standard in a way that is inconsistent with past precedence.

Under the FCA, "knowingly" includes "acts in reckless disregard of the truth or falsity of the information." *See* § 3729(b)(A)(iii). Indeed, in 1986, Congress amended the FCA to expand the scienter standard to include deliberate ignorance and recklessness. A sponsor of the 1986 amendments noted that:

Subsection 3 of Section 3729(c) uses the term 'reckless disregard of the truth or falsity of the information' which is no different than and has the same meaning as a gross negligence standard that has been applied in other cases.

132 Cong. Rec. H9382-03 (daily ed. Oct. 7, 1986) (statement of Rep. Berman). In reviewing the legislative history as it relates to the 1986 amendment, the D.C. Circuit noted that "the best reading of the Act defines reckless disregard as an extension of gross negligence." See *U.S. v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997). Simply put, the legislative history makes no mention of a defendant's awareness of "substantial unjustifiable risk" in describing the recklessness standard.

And, prior to *SuperValu*, courts specifically rejected arguments that that a defendant must have actual knowledge of the falsity in order to meet the recklessness standard. *See Strom ex rel. U.S. v. Scios, Inc.*, 676 F.Supp. 2d 884 (N.D. Cal. 2009) (rejecting defendants' arguments that to satisfy the recklessness scienter standard, one must show proof of "an objective lie" that a defendant "knows to be false"); *see Horn & Assocs. v. U.S.*, 123 Fed. Cl. 728, 765 (2015) ("A failure to make a minimal examination of records can constitute deliberate ignorance or reckless disregard, and a contractor that deliberately ignores false information submitted as part of a claim can be found liable under the False Claims Act.").

On the other hand, arguably, in order for recklessness to amount to more than mere negligence, there should be some awareness of warning signs or risks associated with the falsity of the claims submitted. For example, in *U.S. ex rel. Ormsby v. Sutter Health*, 444 F. Supp. 3d 1010, (N.D. Cal. 2020), the court noted a defendant exhibits reckless disregard and deliberate ignorance where "an organization turns a blind eye to diagnostic-code overreporting errors." (internal citations omitted).

Moreover, outside the context of the FCA, recklessness is often defined by engaging in an action despite a known risk or red flags. For example, in the securities fraud context, reckless disregard for the truth refers to "an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it . . . ." *Shemian v. Research in Motion Ltd.*, No. 11-cv-4068, 2013 U.S. Dist. LEXIS 49699, at *34-35 (S.D.N.Y. March 28, 2013). Likewise, in the context of the FCRA, in Safeco, the Supreme Court defined recklessness as "action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *See Safeco*, 551 U.S. at 68.

Ironically, bringing us full circle, although it was the Seventh Circuit's application of Safeco's view of subjective intent that the Supreme Court struck down in *SuperValu*, the dicta in *SuperValu* clarifying the recklessness standard (incorporating language set forth in *Safeco*) may actually prove to be a win for defense counsel and potential FCA defendants. In response, relators and the Government may argue two points: (i) the express language in *SuperValu* that "*Safeco* did not purport to set forth the purely objective safe harbor that respondents invoke; and (ii) "*Safeco* interpreted a different statute, the FCRA, which had a different *mens rea* standard, 'willfully.'" [insert cite to SuperValu] (citations omitted). Regardless of whether one is advocating for a relator or a defendant, we can expect creative arguments and interesting opinions as *SuperValu* is applied in the lower courts. In other words, stay tuned!

Footnotes

1 Denise Barnes, JD, is a former U.S. Department of Justice ("DOJ") Trial Attorney who focuses her practice on compliance, white collar and regulatory investigations, and complex commercial litigation. During Denise's time at DOJ, she led a myriad of multi-district investigations resulting in over $2.7 Billion in recoveries to federal taxpayers. Now, back in private practice, Denise's represents clients in both public and non-public investigations, regulatory inquiries, and other proceedings involving federal and state agencies related to allegations arising under the False Claims Act, Anti-Kickback Statute, Stark Law, and FIRREA.

Rachel V. Rose, JD, MBA, advises clients on compliance, transactions, government administrative actions, and litigation involving healthcare, cybersecurity, corporate and securities law, as well as False Claims Act and Dodd-Frank whistleblower cases. She also teaches bioethics at Baylor College of Medicine in Houston. Ms. Rose is an active Member of the Federal Bar Association, serving as a Director on the National Board, Member of the Government Relations Committee and Vice-Chair of the *Qui Tam* Section's Education Committee. Rachel can be reached through her website, www.rvrose.com..

2 *See U.S. ex rel. Hooper v. Lockheed Martin Corp.,* No. 08-cv-00561, 2014 U.S. Dist. LEXIS 190530, at *12 (C.D. Cal. Jan. 17, 2014); *see also U.S. ex rel Campie v. Gilead Scis.*, 862 F.3d 890, 898-899 (9th Cir. 2017)

Denise M. Barnes

Rachel V. Rose

Member Spotlight – Roderick ("Rod") Thomas

Roderick ("Rod") Thomas

Mr. Thomas was interviewed by Andrew Miller, Shareholder, Baron and Budd (Washington, DC). Mr. Miller is a Member of the Qui Tam Section's Education Committee.

Work-Related Questions

What firm do you work at right now?

I am a partner in the White Collar & Government Investigations practice at Wiley Rein, LLP in Washington, D.C. I specialize in criminal and civil government investigations and litigation, internal investigations, and civil fraud allegations.

As for the False Claims Act, I have been fortunate to have litigated and defended False Claims Act cases for more than 25 years in both the government and private practice. Before coming to Wiley, I served more than 10 years in the U.S. Attorney's Office in Washington, DC and was lead counsel on numerous criminal and civil trials. Because many fraud investigations involve potential criminal and civil issues, I believe my experience in both the criminal and civil divisions of the Department of Justice has been invaluable in private practice.

What is the biggest career challenge you've had to overcome?

Because I spent ten terrific and interesting years at the United States Attorney's Office, I did not join Wiley with a "book of business" – that's common for someone leaving the government, of course. There was no shortage of cases and investigations in government!

I quickly learned in private practice that internal and external business development was key. Not only was it important that your internal fellow lawyers understood your government experience and skills, but it was critical to develop genuine external connections and visibility in the government investigations space. The FBA's qui tam section – and the annual conference – certainly has been a great part of that goal.

I have also been a regular commenter on the False Claims Act in the press, at conferences, and at other events. I am also Co-Chair of the D.C. Bar's Criminal Law and Individual Rights Community, White Collar Subcommittee, a Vice-Chair of the ABA Procurement Fraud Subcommittee, a periodic host for FCA roundtables for the ABA, and a member of the Steering Committee for the Criminal Law Section of the D.C. Bar, among other activities. I am also the immediate past President of the Assistant United States Attorneys Association for the District of Columbia. In short, these opportunities and others have been very helpful for engagement with fellow lawyers, as well as current and potential clients. In short, these activities have not only been helpful to increasing connectedness to the legal and client community, but they have substantially contributed to my enjoyment of the practice of law.

Any recent interesting projects?

I am the immediate past President of the Assistant United States Attorneys Association for the District of Columbia. As part of the Association, the officers and I hosted a fireside chat with United States Attorney General Merrick Garland, United States Deputy Attorney General Lisa Monaco, and the United States Attorney for the District of Columbia, Matthew Graves. We held it in the Ceremonial Courtroom, in the United States District Court for the District of Columbia. Chief Judge James E. Boasberg, as well as other Federal District Court and Superior Court judges joined us. All three senior officials are former AUSAs in the D.C. office and the event was a terrific discussion on their tenure in their office, the benefits of public service, and the Department of Justice.

What has been your biggest professional achievement?

I see "biggest professional achievement" – hopefully – as a moving target that changes over time during the progressive stages of one's career. Coming from a very modest background and the son of two teachers, my initial biggest achievement was becoming a lawyer. No one in the family was a lawyer, and yet this six year old nerd announced that was his plan.

Shortly after law school, and before the U.S. Attorney's Office, came my next valued achievement. While a junior associate, I spearheaded state amici briefs – and ultimately a United States Supreme Court amici brief – on an important issue. At that time, gender based peremptory jury strikes were permissible both at the state level and federally. I represented the National Women's Law Center and sixteen other civil rights groups, and met with the Solicitor General's Office, all to further the goal of changing the law, and we were successful.

In the next phase of my career, the U.S. Attorney's Office brought many big professional achievements, at least in my eyes – but not because they were headline grabbing. Rather, the great many of the day-to-day prosecutions in Federal and Superior Court sought to ensure that victims, their families, the community – and the accused – were treated fairly by all of the participants in the criminal justice system.

Finally, while in private practice, I could discuss helping clients with challenging or thorny issues, but I believe mentorship of more junior attorneys is an over-arching achievement that I highly value and try to meet – perhaps because both of my parents were teachers. That is how I value success – client success (however defined) and a diverse legal team that contributes to those ultimate goals while furthering their professional education and skills.

Outside the Firm – Get to Know You Questions

Fun fact that people probably don't know about you.

Growing up, I lived in three very different environments. Both of my parents were teachers for children with special needs. My family first lived in downtown Detroit while running a group home. We then moved to the Navajo Indian Reservation in Chinle, Arizona, where my parents taught. And finally we lived on a farm in West Virginia, where my mother ran a facility for special needs children. In short, we were always the new kids in town.

Do you have any hobbies?

My "hobby" is probably everyone else's chore. I seem to constantly have a home renovation project going on. Whether dealing with the surprise water leaks, or updating a room here or there, a one hundred year old house certainly is a demanding child. My COVID project was probably the most entertaining – I created a speakeasy out of a utility room – and hid it behind a moving bookcase. Of course, there is a hand cranked Victrola with shellac 78 records of Billie Holiday, Louis Armstrong, and other greats.

Favorite place you've traveled?

This is a difficult question. Maybe because I grew up in diverse places, I have always strived to visit many cultures – whether off the beaten path or not. Perhaps the most striking was deep in the Amazon jungle, around 1000 miles from the coast of Brazil. You can find all kinds of amazing creatures. To name just a few: pink fresh water dolphin, piranha, Uakari monkeys, caimans, and pirarucu – a prehistoric fish that gets to fifteen feet and must surface a few times an hour because it breathes air. And of course, nothing compares to visiting with the Amazonian people and learning about their culture and the Amazon basin.

Goverment Profile: Interview with Charlie Sinks, Office of the Attorney General for the District of Columbia

By: Michael Goldsticker [1]

What is your background with the Office of the Attorney General?

Since joining the Office of the Attorney General in January 2022, I have been a Trial Attorney and Assistant Attorney General. My job responsibilities include handling pre-suit investigations and litigation of False Claims Act and workers' rights enforcement matters on behalf of the District of Columbia.

How is the Office of the Attorney General structured with respect to False Claims Act cases?

I am a member of the Workers' Rights and Antifraud Section, part of the Office's Public Advocacy Division, which handles affirmative civil litigation on behalf of the District of Columbia. There are 10 government attorneys in my section and, while the mix of caseloads can vary somewhat for each attorney, we each typically handle a combination of False Claims Act matters and workers' rights cases.

What is the scope of the Office of the Attorney General's False Claims Act docket?

The Office of the Attorney General typically has a handful of DC-specific cases in active litigation in various forms and many more ongoing investigations. In addition, we are also party to scores of multistate qui tam cases that have been filed in various federal courts that have asserted District of Columbia False Claims Act claims. In those multistate cases, we coordinate with the applicable U.S. Attorney's Office and other state attorneys' general.

Over the past few years, the Office of Attorney General has recovered several million dollars in settlements and judgments annually.

Because we make interven
tion decisions on a case-by-case basis, the proportion of qui tam matters that we intervene in each year varies. However, qui tam matters have typically represented a minority of our recoveries in recent years.

Does the Office of Attorney General have any priorities, areas of focus, or initiatives in the False Claims Act space?

We evaluate each False Claims Act case on an individual basis. Overall, we are guided by the Office of Attorney General's statutory duty to uphold the public interest. Many False Claims Act cases involve healthcare and procurement fraud. The District's False Claims Act also authorizes tax-related claims and claims related to vacant properties, and our Office has also pursued these cases.

Are there any notable differences in the federal False Claims Act and the District of Columbia False Claims Act?

While the federal False Claims Act bars claims related to taxes, the District of Columbia has partially removed the tax bar from its statute. The District of Columbia False Claims Act permits claims arising from various violations of the District's tax laws, subject to certain statutory requirements.

What are OAG's primary considerations in evaluating whether to intervene?

We investigate every qui tam case that comes to our office. In determining whether to intervene, we consider a variety of factors, including our evaluation of the merits of the claims based on our office's pre-suit investigation, the size of the potential recovery, and whether the case presents important or novel legal or policy issues, among others.

To what extent does the Office of Attorney General remain involved in the prosecution of declined qui tam cases?

We remain involved in declined cases. As with the federal False Claims Act, the District of Columbia's statute authorizes the government to intervene after an initial declination decision, to settle or dismiss a case over a relator's objection, and requires the government to approve of any settlement. We carefully monitor the progress of litigation in all declined cases so that we can perform these statutory duties.

To what extent does the Office of Attorney General coordinate with other jurisdictions in prosecuting False Claims Act cases?

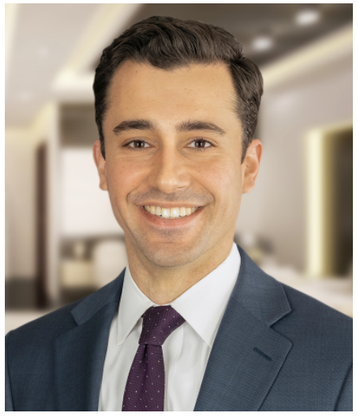
We coordinate with U.S. Attorneys' Offices and other state Attorneys General in multistate False Claims Act matters that assert DC FCA claims. In these cases, we meet frequently with our federal and state partners both during investigations during the seal period as well as in cases that proceed to litigation.

Is there any other inform ation that you would like to provide to the qui tam section of the Federal Bar Association or the public more broadly?

We value the contributions of the public to the work of our office enforcing the District's False Claims Act, and we encourage relators' counsel to file District of Columbia qui tam cases if they become aware of fraud against the District government. In addition, members of the public aware of fraud against the District can make a report at: reportfraud@dc.gov.

Footnotes

1 Michael Goldsticker is a commercial litigator and trial attorney. He handles, investigates, and litigates cases involving complex commercial disputes, including claims under the False Claims Act and other business fraud cases. Michael is a former assistant U.S. attorney with significant experience in large-scale investigations and has tried numerous cases as a prosecutor and on behalf of businesses and individuals before state and federal courts, juries, and arbitration panels throughout the country.



Michael Goldsticker

There You Go Again — No, There Is Not a New Reckless Disregard Inquiry After SuperValu

By: Andrew Miller [1]

Opinion days at the Supreme Court are some of the most exciting for attorneys. Chief among the reasons for excitement is the clarity these decisions offer on specific legal issues. But when that clarity does not align with desired outcomes, attorneys are presented with the opportunity to test novel arguments. And after the Court delivered the False Claims Act defense bar a shutout loss in *U.S. ex rel. Schutte v. SuperValu*, my colleagues on the other side of the "v" got busy with their creative ways.

Contrary to recent arguments lobbed in post-*SuperValu* litigation, the Court did not establish a new "three-part test" for reckless disregard. Instead, the Court made the straightforward point 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. And by simply summarizing each of the three elements in the FCA definition of "knowledge"—actual knowledge, deliberate ignorance, and reckless disregard—the Court did not intend to place new limitations on them. Don't believe it for yourself? Let's take closer look.

As a reminder, the decision was unanimous. This is not a case where the justices were splitting the baby or filing separate concurrences, carefully parsing out the elements of scienter. This was an easy case. At oral argument, Justice Kagan explicitly said so. And Justice Alito ultimately acknowledged the same. Easy cases do not breed new, extra-statutory, multi-pronged tests. A seven-word excerpt from the court's 5,000-word opinion does not give rise to an entirely new scienter requirement. But it's a nice try.

The attempt to make something of nothing harkens back to *Universal Health Services, Inc. v. United States ex rel. Escobar*, in which a unanimous Court affirmed the implied certification theory of liability under the FCA. But to take the defense bar's word for it, the decision was a game changer for an entirely different reason, latching onto Justice Thomas's characterization of materiality as "demanding" and "rigorous.". The only problem with that argument is materiality had long existed as an element of liability under the FCA, as defined in Section 3729(b)(4). And materiality is—by definition—rigorous. You would have thought that pre-*Escobar*, courts and practitioners had been treating the term "material" as a toothless requirement under the Act. But two adjectives later, here we are. And the effort has been largely successful, because when *Escobar* is cited in a legal brief or judicial opinion, it is usually with respect to materiality—not the implied certification issue that was the actual question presented for the Court. After its loss in Escobar, the defense bar manufactured a supposed heightened materiality requirement despite the fact that materiality already existed in the plain text of the statute. Now that the defense bar has lost in *SuperValu*, here we go again.

In July 2023, the Supreme Court roundly rejected the "objectively reasonable" standard employed in the Seventh Circuit's *Safeco* decision and made it easier for the government and relators to prove that defendants acted knowingly. In the wake of this loss, defense lawyers have seized on a few words from *SuperValu* to conjure a new, three-part test that manages to make it *harder* to establish knowledge.

For example, a recent brief filed in *United States ex rel. Miller v. Reckitt Benckiser* flips the script and argues the Supreme Court actually "clarified" the reckless disregard standard by now requiring a complaint to allege that defendants are (1) conscious of a (2) substantial and (3) unjustifiable risk that their claims are false but submit them anyway. Unsurprisingly, the relator's complaint failed this tripartite inquiry—an inquiry that did not exist when the complaint was filed—because it did not allege that the defendant consciously disregarded a substantial risk of noncompliance, let alone that it did so without justification. Recognizing that this argument misread the Supreme Court's opinion, the Department of Justice immediately filed a Statement of Interest rejecting this new formulation.

DOJ correctly identified that the Court used settled notions of reckless disregard to illustrate that a defendant's own subjective understanding, rather than another possible interpretation of the defendant's statement, is the essential feature of the kind of deception targeted by the FCA. DOJ further noted that the justices were not attempting to make FCA suits more difficult to plead. Rather, the Court was "simply drawing from and reaffirming existing standards for proving knowledge, and not establishing new and restrictive criteria." According to DOJ, the Court's "straightforward" decision left existing precedent on this point—which included an objective component—entirely intact.

And DOJ is right. The common-law conception of the recklessness inquiry adopted by *SuperValu* does not lend itself to the tidy, restrictive, three-part test advocated by the defense bar. *See, e.g., U.S. ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 750-53 (2023) (citing various sources stating that a defendant may be liable for fraud if it is "careless of whether [a statement] is true or false" or "lack[s an] honest belief in the statement's truth," "if a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them," or if a defendant is "aware of a substantial likelihood of the . . . correct meaning" of an ambiguous term (citations & internal quotation marks omitted)). And this inquiry can include both subjective and objective elements. *See Farmer v. Brennan*, 511 U.S. 825, 836 (1994), (cited with approval in *SuperValu*, 598 U.S. at 751). Were Reckitt Benckiser's novel arguments to prevail, relators and the government would bear a higher burden of proving scienter than they did before *SuperValu*. This new world does not align with the "easy case" or the "straightforward" application of the FCA's knowledge element that led the Supreme Court unanimously to rule in the relator's favor in that case.

We should all be thankful that the *SuperValu* decision brings clarity to the scienter standard—not just for advocates, but for those whose conduct is ultimately under review. The theories advanced in cases like *Reckitt Benckiser* are creative, and the law often rewards those who can be inventive. But the plain text of the statute and the Court's straightforward analysis do not support a new, defense-friendly conception of the reckless disregard test. Still, I don't begrudge my colleagues for trying to squeeze something out of nothing—again.

Footnotes

1 Andrew Miller is a shareholder at Baron & Budd, P.C. and practices in the firm's Washington, D.C. office. Andrew focuses on bringing fraud and abuse litigation under the federal False Claims Act. Andrew also represents clients with claims with the Whistleblower Offices of the Securities and Exchange Commission and the Internal Revenue Service. Among his recent matters, Andrew represented the relator in the historic $48.5 million settlement against TriMark USA, LLC and related entities—the largest amount ever recovered in the history of False Claims Act litigation involving allegations of small business fraud. The recovery eclipses the previous record settlement involving small business fraud—$37 million against Atlantic Diving Supply and related entities—which resulted from a whistleblower lawsuit also filed by Andrew and his colleagues at Baron & Budd.

Andrew Miller

Reasserting the Limits of Recklessness: A Meaningful Bar to FCA Cases

By:Jason Mehta[1]

Since the *US ex rel Schutte v. SuperValu* decision was handed down by the Supreme Court in June 2023, much ink has been spilt regarding the burden of proving a defendant's scienter. And, rightfully so. Not all claims—even those claims that are inaccurate—rise to the level of the FCA's punitive reach. Rather, it is only *knowingly* false claims that are subject to enforcement under the FCA.

As FCA practitioners are well

aware, the FCA's "knowing" standard is broad and includes not just actual knowledge, but also deliberate ignorance and reckless disregard. Since it is a rare case to find an FCA defendant with actual knowledge of fraudulent practice, relators and the government alike have often relied on the "reckless disregard" standard to establish FCA liability. The reckless disregard standard has been the backbone of many FCA cases over the years and the government and relators are right to try to point to that scienter burden, rather than actual knowledge, to prove their cases. And, defendants are equally right to suggest that standard must mean something more than mere disregarding of facts; it must be something that was indeed reckless.

Against this backdrop, the Supreme Court's decision in *SuperValu* reasserts a common-sense principle—conduct must be actually *recklessly* disregarded in order for plaintiffs to avail themselves of that definition of "knowingly" for FCA fraud cases to be actionable. And, recklessness means something in this context. As the Supreme Court put it in *SuperValu*, "the term 'reckless disregard' similarly captures defendants who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway." The citation for this basic concept is no less than Black's Law Dictionary and the Restatement of Torts.

Against this backdrop, FCA defendants are rightfully asserting that recklessness requires a showing of a "substantial and unjustifiable risk." In recent cases, such as *U.S. ex rel Cutler v. Cigna* and *United States ex rel. Miller v. Reckitt Benckiser Group* PLC, 1:15-cv-00017, Dkt. No. 149 at 10-11 (W.D. Va. July 7, 2023), FCA defendants have taken the government to task for not proving some disregard of this "substantial and unjustifiable risk."

The government has, so far, responded to these recent efforts by trying to cast defendants as creating or reading a new standard for recklessness. The government has argued that *SuperValu* did not create a new standard for recklessness and that something less than disregarding a "substantial and unjustifiable risk" may be actionable under the reckless disregard standard in the FCA context.

Yet, despite the government's position, it is clear that not all "disregarding" of risks are actionable under the FCA. Rather, it is plain from the text of the FCA that those actions that are "reckless" are viable for FCA enforcement. Recklessness, in the FCA context, must therefore be understood to mean something, as the *SuperValu* court suggested, akin to "track[ing] traditional common-law fraud." Accordingly, a disregard of facts or circumstances should only be actionable for the FCA's significant hefty penalties only when this disregard involves a "substantial and unjustifiable risk."

While what exactly is "substantial" and "unjustifiable" remains to be defined, it must mean something more than mere negligence or carelessness. FCA defendants will likely make this argument for years to come—and they will do so with the benefit of a unanimous Supreme Court opinion and with hundreds of years of traditional common-law understanding of what fraud is—and is not. Notwithstanding this position, this issue will likely elicit strong reactions from the government and relator bar, and with good reason. Courts will be thrust into resolving the limits and contours of recklessness—with significant repercussions on FCA cases in the future. For now, though, a unanimous Supreme Court has left the FCA bar with continued legal fodder and court battles.

Footnotes

1 Jason Mehta is a partner at Foley and Lardner where he advises companies and individuals in complex government investigations. He previously was an Assistant US Attorney in the Middle District of Florida where he focused on civil False Claims Act cases, primarily in the healthcare context. Jason resides in Tampa with his wife, nine year-old daughter, and seven year-old son.

Jason Mehta

Noteworthy Case Summaries

By:Caleb Hayes-Deats [1]

Public Disclosure Bar

U.S. ex rel. Silbersher v. Valeant Pharmaceuticals, 76 F.4th 843 (9th Cir. 2023) —Relator alleged that Valeant first defrauded the Patent and Trademark Office ("PTO") to improperly extend its monopoly over the drug Apriso and later falsely certified that Apriso's price was "fair and reasonable." The district court dismissed the complaint under the public disclosure bar, finding that a PTO proceeding that had invalidated the relevant patents (also brought by relator) disclosed similar allegations. The Ninth Circuit reversed, holding that the PTO proceeding was neither an "administrative hearing in which the Government or its agent is a party" under 31 U.S.C. §3730(e)(4)(A)(i), nor an investigative Federal hearing under §3730(e)(4)(A)(ii). It further held that *Law360* articles reporting on the PTO proceeding did not disclose "substantially the same allegations." Valeant has petitioned for rehearing. On October 25, 2023, Appellant Zachary Silbersher filed a response to Combo PFR Panel and En Banc for panel and en banc rehearing, for panel and en banc rehearing.

Damages

U.S. ex rel. Hendrix v. J-M Manufacturing Co., 76 F.4th 1164 (9th Cir. 2023) — A jury found that defendants falsely certified that PVC pipes for use in public water and sewer systems complied with industry standards, but was unable to reach a verdict on damages. The Ninth Circuit affirmed the district court's denial of damages and award of one FCA penalty for each construction project at issue. The Ninth Circuit held that defendants did not owe a penalty for each piece of pipe defendants sold. It further held plaintiffs could not recover the full value of the contracts because the pipe had not been removed or replaced. The Ninth Circuit concluded that plaintiffs had not submitted evidence sufficient to calculate the diminution in the pipes' value and defendants were thus entitled to judgment as a matter of law on damages.

Materiality

U.S. ex rel. Druding v. Care Alternatives, 81 F.4th 361 (3d Cir. 2023) — The Third Circuit reversed the district court's grant of summary judgment to a hospice provider based on the government's continued payment of claims following alleged discovery of deficiencies in the documentation supporting physician certifications of terminal illness. The district court found sufficient evidence of scienter, but granted summary judgment based on the lack of evidence that the government had ever refused any of defendant's claims. The Third Circuit reversed, holding that continued payment alone was not dispositive on the issue of materiality. The documentation defendant failed to collect was a condition of payment, CMS had identified the type of violation at issue as significant, and evidence showed the defendant's alleged violations, in particular, were neither minor nor insubstantial. In light of such evidence, the government's continued payment did not establish immateriality as a matter of law. In fact, it was not clear that the government had actual knowledge of the alleged violations at the time of payment, which meant that Defendant, as the moving party, had not met its burden.

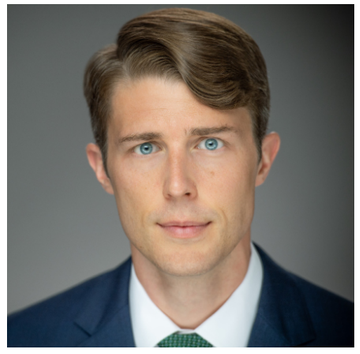
U.S. v. Walgreen Co., 78 F.4th 87 (4th Cir. 2023) — The United States and Virginia sued Walgreens for submitting false Medicaid claims requesting reimbursement for drugs used to treat Hepatitis C patients who had not passed a drug test. The district court dismissed on materiality grounds, finding that CMS had disapproved of Virginia's requirement of a drug test to establish eligibility for Hepatitis C drugs. The Fourth Circuit reversed. It held that the statements did in fact have a natural tendency to influence payment decisions, regardless of whether they should have had that influence. It further held that Walgreens could not escape FCA liability by collaterally attacking the legality of eligibility requirements. It relied on Supreme Court precedent holding that criminal-fraud defendants cannot escape liability by claiming that misstatements addressed illegal requirements, concluding that precedent applied equally to civil actions under the False Claims Act.

Statute of Limitations

U.S. ex rel. Aldridge v. Corporate Management, Inc., 78 F.4th 727 (5th Cir. 2023) — A jury found that defendants had defrauded Medicare and awarded $10 million in single damages. The Fifth Circuit affirmed the verdict on scienter and materiality, but shortened the applicable limitations period based on its determination that the government's complaint-in-intervention did not relate back to relator's original complaint. The government extended the seal eighteen times, and its ultimate complaint—filed eight years after relator's—faulted defendants for different conduct. Whereas relator had alleged that defendants improperly waived co-pays and deductibles, the government premised its claims on improper expenses (e.g., "luxury automobiles") submitted by defendants' principals. Nor could the government invoke §3731(b)(2)'s ten-year limitations period because it had not sued within three years of when it should have known the material facts. Information in the government's extension applications showed that it reasonably should have known those facts more than three years before it sued.

Footnotes

Caleb Hayes-Deats is a partner at MoloLamken LLP, where he represents companies and individuals in False Claims Act and other types of whistleblower litigation. He has been recognized as a "Rising Star" in D.C. by the *National Law Journal* and in New York by *Super Lawyers.* Previously, he served as an Assistant U.S. Attorney in the Southern District of New York.



Caleb Hayes-Deats

Cigna's Spin on High Court Ruling Ends with $172 Million Settlement

By: Tama B. Kudman and Jeremy E. Abay [A]

On June 1, the Supreme Court resolved a long-standing circuit split over how to judge scienter under the False Claims Act's "knowingly" element. [2]

Writing for a unanimous Court in *United States ex rel. Schutte v. SuperValu Inc.*, Justice Thomas held that "[t]he FCA's scienter element refers to [a defendant's] knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed."

SuperValu has already begun to reshape the FCA landscape for the Medicare Advantage sector, which absorbs a staggering $450 billion in annual government payments. Cigna Corp., for example, recently made headlines by settling a trio of FCA claims related to its Medicare Advantage plans for $172 million. As discussed below, the settlement marks a significant turning point in the government's enforcement efforts against Medicare advantage insurers and providers.

Background on SuperValu

The whistleblowers in *SuperValu* had accused two retail pharmacies—*SuperValu* and Safeway—of "knowingly" reporting to Medicare and Medicaid the full retail

price of prescription drugs as their "usual and customary" price, despite providing significant discounts to other payors.

The FCA defines "knowingly" to mean acting (1) with actual knowledge of the information; (2) deliberate ignorance of the truth or falsity of the information; or (3) in reckless disregard of the truth or falsity of the information. [3] The FCA does not require proof of specific intent to defraud.

Although evidence showed that SuperValu and Safeway had interpreted "usual and customary" to mean discounted prices, the retailers argued that it was "objectively reasonable" to read "usual and customary" to mean full retail prices. The district court agreed and dismissed the FCA suits, holding that the retailers had not acted "knowingly."

The Seventh Circuit affirmed dismissal, finding that the retailers had made "objectively reasonable" interpretations of ambiguous law. In other words, because the claims were objectively reasonable, the retailers' own subjective beliefs about what constituted "usual and customary" were irrelevant to scienter.

Vacating the Seventh Circuit decisions, Justice Thomas held that the FCA's scienter standard "tracks traditional common-law fraud," which depends on the defendant's knowledge and subjective beliefs. The "focus" is not "on post hoc interpretations that might have rendered their claims accurate" but "is instead on what the defendant knew when presenting the claim," he clarified.

Justice Thomas concluded that scienter could be established by showing that the retailers: "(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."

Sure enough, the Department of Justice and relators have cited *SuperValu* as lowering the scienter bar in other FCA matters.

Cigna's SuperValu Spin

In *United States, ex rel. Cutler v. Cigna Corp.*, an intervened case against Medicare Advantage insurer Cigna Corp., DOJ attorneys told the Middle District of Tennessee that *SuperValu* precluded "one of Cigna's principal arguments in its motion to dismiss." [4]

Hoping to turn the tables, Cigna countered that "the Supreme Court's opinion only highlights the fatal flaws" in the government's scienter theory. "Because the Government failed to plead facts *SuperValu* holds are essential—namely, facts showing that Cigna either actually knew or 'conscious[ly]' disregarded a 'substantial and unjustifiable risk' that its claims were false." [5]

The FCA suit, in which the federal government intervened in October 2022, accused Cigna of falsely certifying the accuracy of diagnosis data stemming from the insurer's "360 Program," in which contracted nurses performed at-home patient exams. False diagnoses caused Cigna to receive "tens of millions of dollars in risk adjustment payments" from the Centers for Medicare & Medicaid Services, DOJ alleged.

The case reflects increased enforcement against plans and providers that manipulate Medicare Advantage's so-called "risk adjustment" system. [6] Under this system, CMS pays Medicare Advantage plans a pre-determined monthly amount for each enrollee, no matter the enrollee's actual healthcare costs. CMS then adjusts these capitated payments based on each enrollee's risk score.

To calculate risk scores, CMS requires Medicare Advantage insurers to submit diagnosis codes that they collect from provider claims. Insurers that submit a diagnosis codes reflecting chronic medical conditions will generally receive increased capitated payments from CMS, intended to cover the increased cost of treating such conditions.

Because diagnosis data bear directly on payment, CMS requires Medicare Advantage insurers like Cigna to certify the validity of their diagnosis data. In fact, the chief executive officer, chief financial officer, or another authorized individual "must request payment . . . on a document that certifies (based on best knowledge, information, and belief) the accuracy, completeness, and truthfulness of relevant data that CMS requests." [7] CMS also requires that each diagnosis code be supported by a properly documented medical record in compliance with ICD Guidelines. [8]

In moving to dismiss the government's complaint-in-intervention, Cigna argued that it had an "objectively reasonable," even if incorrect, basis for coding the invalid diagnoses due to alleged ambiguities in the relevant ICD Guidelines. [8] According to the DOJ's June Notice of Supplemental Authority, *SuperValu* precluded this argument. DOJ also argued that the ICD Guidelines were unambiguous.

Cigna responded that the government's complaint-in-intervention had "failed to plead facts *SuperValu* holds are essential—namely, facts showing that Cigna either actually knew or 'conscious[ly]' disregarded a 'substantial and unjustifiable risk' that its claims were false."

Cigna also highlighted that the relators in *SuperValu* pointed to "notices" that "the pharmacies received that 'usual and customary' refers to discounted prices and company executives' internal emails 'rais[ing] concerns' about the need to conceal discounts from regulators."

"[T]he Government nowhere alleges that Cigna 'received notice' of the interpretations the Government advances or that Cigna was aware of an unjustifiably high risk that its conduct was unlawful," the insurer concluded.

Cigna's $172 Million Reckoning

The district court never resolved Cigna's motion to dismiss. Rather, Cigna opted to pay $172 million to settle three sets of claims.

Cigna paid $37 million to resolve the *Cutler* lawsuit in the Middle District of Tennessee. From that, Robert Cutler received a relator's award of around $8.1 million.

Two sets of claims—which together settled for $136 million—stemmed from a homegrown investigation by the United States Attorney's Office for the Eastern District of Pennsylvania.

Cigna paid $116 million to settle claims related to its "Chart Review" program, under which Cigna retained "retained professional healthcare coders to conduct retrospective reviews of those charts to identify all risk-adjusting medical conditions that the charts supported." Cigna allegedly used these diagnosis codes, some of which were unsubstantiated, to obtain additional payments from CMS.

Cigna paid $19.5 million to settle claims that it "knowingly submitted and/or failed to delete inaccurate and untruthful diagnosis codes for morbid obesity . . . to increase the payments it received from CMS for numerous beneficiaries enrolled in its MA plans." Although "individuals with a BMI below 35 cannot

properly be diagnosed as morbidly obese," Cigna allegedly submitted morbid obesity codes even when the "the highest reported BMI was less than 35 for the beneficiary[.]"

Cigna also agreed to a five-year corporate integrity agreement with the Office of Inspector General of the U.S. Department of Health and Human Services.

Cigna did not admit liability. But the insurer's decision to pay $172 million and to enter a corporate integrity agreement suggests that Cigna read *SuperValu* like most of the FCA bar: as lowering the threshold for scienter.

Even under its strained reading of *SuperValu*, Cigna's path was undeniably steep. Indeed, there is little to dispute that a morbid obesity code is knowingly false when the beneficiary's highest BMI was less than 35. And three separate OIG audits have found that Cigna's diagnosis codes "did not comply with Federal requirements," undermining the insurer's "notice" argument in *Cutler*. [9]

The bottom line is that *SuperValu* is likely to supercharge the government's enforcement efforts against Medicare Advantage insurers and providers.

"Over half of our nation's Medicare beneficiaries are now enrolled in Medicare Advantage plans, and the government pays private insurers over $450 billion each year to provide for their care," said Deputy Assistant Attorney General Michael D. Granston of the Justice Department's Civil Division. [10] "We will hold accountable those insurers who knowingly seek inflated Medicare payments by manipulating beneficiary diagnoses or any other applicable requirements."

Footnotes

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2 598 U.S. 739, 749 (2023).

3 31 U.S.C. § 3729(b)(1).

4 Notice of Supplemental Authority, ECF No. 242, *United States, ex rel. Cutler v. Cigna Corp.*, No. 3:21-cv-00478 (M.D. Tenn. June 5, 2023).

5 Defendants' Response to the Government's Notice Regarding *Supervalu*, ECF No. 253-1, *Cutler, supra*.

6 See Press Release Number: 22-83, U.S. Dep't of Just., *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021* (Feb. 1, 2022).

7 42 C.F.R. § 422.504(l).

8 See 45 C.F.R. §§ 162.1002(a)(1), (b)(1), (c)(2), (c)(3); 42 C.F.R. § 422.310(d)(1).

9 Defendants' Motion to Dismiss, ECF No. 195-197, 224, *Cutler, supra*.

10 *See* U.S. Dep't of Health Hum. Servs. Off. of Inspector Gen., *Medicare Advantage Compliance Audit of Diagnosis Codes That Cigna HealthSpring of Florida, Inc. (Contract H5410) Submitted to CMS*, Report No. A-03-18-00002 (Aug. 19, 2022); U.S. Dep't of Health Hum. Servs. Off. of Inspector Gen., *Medicare Advantage Compliance Audit of Specific Diagnosis Codes That Cigna-HealthSpring of Tennessee, Inc. (Contract H4454) Submitted to CMS*, Report No. A-07-19-01193 (Dec. 22, 2022); U.S. Dep't of Health Hum. Servs. Off. of Inspector Gen., *Medicare Advantage Compliance Audit of Specific Diagnosis Codes That Cigna-HealthSpring Life & Health Insurance Company, Inc. (Contract H4513) Submitted to CMS*, Report No. A-07-19-01192 (March 28, 2023).

11 *See* Press Release Number: 23-1082, U.S. Dep't of Just., *Cigna Group to Pay $172 Million to Resolve False Claims Act Allegations*, (Oct. 5, 2023).

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