SCOTUS clarifies intent requirement for False Claims Act cases

By Tanisha Palvia, Esq., and Alexandra S. Davidson, Esq., Moore & Van Allen

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The circuit courts of appeal have been split on the intent standard for False Claims Act violations. On June 1, 2023, the Supreme Court in *United States ex. rel. Schutte v. Supervalu Inc.* (*Schutte*) resolved the issue, holding that the FCA's scienter element refers to a defendant's knowledge and subjective belief, not what an objectively reasonable person may have known or believed.

The FCA punishes persons and companies — both civilly and criminally — who knowingly submit or cause someone to submit false claims to the government. For example, billing Medicaid or Medicare for services not rendered while knowing they were not rendered is a violation of the FCA.

What is clear is that moving forward, the strongest FCA cases will demonstrate that the wrongdoers knew or were at least conscious of a substantial or unjustifiable risk that their claims were false.

Anyone who violates the FCA is civilly liable for three times the government's damages and faces additional penalties per false claim submitted. If one is criminally convicted, imprisonment and additional criminal fines are possible.

While the United States government can pursue those who violate the FCA, private citizens may also do so by filing lawsuits on behalf of the government against those that have committed the fraud. These are called *qui tam* suits and may result in the Department of Justice taking over the case and/or DOJ's criminal fraud section initiating an investigation into the matter.

Qui tam suits provide significant motivation for citizens to blow the whistle against alleged wrongdoers because they permit private citizens to share in a portion of the government's recovery. DOJ has collected more than $2.2 billion in settlements and judgments related to the FCA in the 2022 fiscal year alone. In 2021, DOJ recovered a whopping $5.6 billion.

But for a private citizen or the government to prevail on a FCA claim, they must demonstrate that the defendant "knowingly" submitted false claims to the government. The FCA defines "knowingly" to include "actual knowledge," "deliberate ignorance" or "reckless disregard" of the falsity of the information submitted.

Generally, this meant that the defendant knew or *should have known* the submissions were false. Under the "should have known" component, a defendant can be liable under the FCA if a reasonable person would have known the submission was false — even if the defendant did not.

SCOTUS weighs in

On June 1, 2023, in *Schutte*, the United States Supreme Court raised the bar, holding that the defendant's actual knowledge and subjective belief, not what an objective, reasonable person would have thought, is the required proof for FCA violations.

Schutte involved two separate *qui tam* actions, where it was alleged that two retail pharmacies, SuperValu and Safeway, defrauded both Medicaid and Medicare. The programs permitted reimbursement for the "usual and customary" prices of certain prescription medications, but petitioners alleged that the pharmacies reported to the programs higher retail prices than the discounted prices they charged their customers.

Petitioners also presented evidence that the pharmacies knew their discounted prices were their usual and customary prices but tried to prevent regulators from finding out about their discounted prices. Essentially, petitioners claimed the pharmacies submitted to the government claims they knew were inaccurate at the time they submitted them.

In each case, the district courts granted summary judgment for the pharmacies on the issue of intent, holding that neither pharmacy could have acted "knowingly."

The 7th U.S. Circuit Court of Appeals agreed, applying the "objective reasonableness" standard from the 2007 Supreme Court case *Safeco Insurance Company of America v. Burr*, which evaluated the scienter requirement of the Fair Credit Reporting Act. The 7th Circuit held that the pharmacies could not have acted "knowingly" if their actions were consistent with how an objectively reasonable person defined the phrase "usual and customary" — even if the companies themselves believed their discounted prices were their "usual and customary" prices.

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The Supreme Court disagreed. The Court found that *Safeco* was distinguishable because it did not concern the FCA.

The Court held that intent for purposes of the FCA refers to a defendant's knowledge and subjective beliefs, not what an objectively reasonable person may have thought. It defined the three ways to establish intent as each having a subjective knowledge component: "actual knowledge" is whether a person is *aware* of information; "deliberate ignorance" is whether a person is *aware* of a substantial risk that his statement is false; and "reckless disregard" is whether a person is *conscious* of a substantial and unjustifiable risk that his claims are false but submits them anyways.

This shift in perspective will make establishing a defendant's subjective state of mind a top focus of discovery.

Because the evidence showed the pharmacies believed their discounted prices were their "usual and customary" prices but submitted retail prices instead, the Court held they had the requisite intent even though an objective, reasonable person may have interpreted the phrase to mean a company's retail prices. Thus, the Court reversed grant of summary judgment in favor of the pharmacies and remanded for further proceedings.

Implications

Post-*Schutte*, if a person or company knows their government submissions are false at the time they report them, it is no defense that an objective, reasonable person could have thought otherwise.

But is the opposite also true — that because a person or company believes their government submissions are true at the time they report them, it makes no difference that an objective, reasonable person could have thought otherwise?

While the *Schutte* holding may suggest a court would find no liability where the defendant believed his claims were true, even if there were other reasonable interpretations, the answer is not so straightforward. In a footnote, the Court recognized that there may be some civil contexts where a defendant did not know of a risk but could still be considered "reckless" if there was an unjustifiably high risk of illegality that was so obvious he should have known about it. Yet, the Court chose not to address how that objective form of recklessness relates to the FCA, if at all.

What is clear is that moving forward, the strongest FCA cases will demonstrate that the wrongdoers knew or were at least conscious of a substantial or unjustifiable risk that their claims were false. No longer should a complaint contain only objective evidence of scienter.

This shift in perspective will make establishing a defendant's subjective state of mind a top focus of discovery. Establishing a defendant's subjective belief will be difficult, but *Schutte* did provide guidance on how to prove a defendant's intent in the FCA context.

In finding the pharmacies may have known their claims were false when submitting them, the Court looked to evidence that defendants received notices that "usual and customary" referred to their discounted prices, that they understood those notices, and that they tried to hide their discounted prices anyways. Accordingly, litigants trying to establish a defendant's subjective state of mind should pursue discovery on anything that put defendants on notice that their claims were false, as well as on attempts by defendants to conceal the falsities, including requests for defendants' correspondence to establish defendants' efforts to hide the truth.

About the authors

Tanisha Palvia (L) is member of **Moore & Van Allen**'s litigation group, based in Charlotte. She calls on her experience as a prosecutor at the Manhattan District Attorney's Office to advise and represent individuals and corporations facing white-collar criminal prosecution and government enforcement actions. She also manages and conducts internal investigations for various organizations, including financial institutions, private and public universities and schools, and medical providers, on sensitive issues, including Title IX, financial fraud, and labor and employment concerns. She can be reached at tanishapalvia@mvalaw.com. **Alexandra S. Davidson** (R) is an associate in the firm's litigation group, based in Charlotte. She focuses on white collar criminal defense, government investigations, internal investigations, and complex civil litigation, and represents clients in matters involving investigations into possible bribery, public corruption, embezzlement, securities fraud, and other violations of federal law/ She also represents clients in business disputes, including securities fraud, breaches of contracts, and noncompete violations. She can be reached at allidavidson@mvalaw.com.

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