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SuperValu and Executive Health Resources: What to Know About the FCA Following the 2023 Term

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As we take stock of the Supreme Court's 2023 term, two landmark decisions shift our understanding of scienter and government intervention as it relates to the False Claims Act ("FCA"), 31 U.S.C. § 3729. First, on June 1, 2023, the Supreme Court unanimously held in *United States ex rel. Schulte v. SuperValu Inc.* that a defendant's own subjective belief at the time of submitting a claim determines whether the defendant acted "knowingly," even if an objectively reasonable interpretation to the contrary could be supported. Second, on June 16, 2023, the Supreme Court in an 8-1 decision held in *United States ex rel. Polansky v. Executive Health Resources, Inc.* that the federal government may move to dismiss an FCA lawsuit over objection from a relator so long as the government has intervened in the action. These decisions create new challenges and avenues for healthcare defendants: let's take a closer look.

***United States ex rel. Schulte v. SuperValu Inc.*: What Does One Know?**

SafeCo and the Objectively Reasonable Interpretation

At its core, the FCA creates liability for any person who knowingly submits, or causes to submit, false or fraudulent claims to the government.[1] Knowledge of a claim's falsity is key to FCA liability. In 2007, the Supreme Court interpreted the term "willfulness" as used in the Fair Credit Reporting Act to include "reckless" and "knowing" violations, and adopted an objective two-step test whereby a defendant cannot act with "knowledge" if (i) there is an objectively reasonable interpretation of the law that would permit the defendant's conduct, and (ii) the defendant had not been warned away from the interpretation by authoritative guidance.[2] Since that decision, courts have consistently applied the *SafeCo* objectively reasonable standard to the knowledge standard for FCA actions.

SuperValu Inc.: Subjective Knowledge Wins the Day

The question presented in the two consolidated cases comprising *SuperValu Inc.* was whether to continue using the *SafeCo* objectively reasonable standard in FCA cases, or more particularly, "whether respondents could have the scienter required by the FCA if they correctly understood that standard and thought that their claims were inaccurate."[3] The Court held that a defendant's subjective knowledge whether a claim is false rules the day, and in doing so jettisoned the *SafeCo* defense for FCA cases.

The two consolidated cases decided by the Court involved pharmacies' submission of prescription claims to Medicare and Medicaid. Medicare and Medicaid regulations required the pharmacies to report "usual and customary" prescription prices.[4] The lawsuits claimed that the pharmacies overwhelmingly offered discounted prices to customers, but had reported their retail prices to the government as "usual and customary" prices, despite actually knowing that they were required to report the discounted prices.[5]

In the decision below, the U.S. Court of Appeals for the Seventh Circuit had granted summary judgment in favor of the pharmacies for lack of scienter because the prices reported were within an objectively reasonable interpretation of "usual and customary," even if there was evidence that the pharmacies did not believe that interpretation at the time they submitted the claims.[6] The Supreme Court determined that this was incorrect: instead, a defendant's "knowledge and subjective beliefs" at the time a claim was submitted determines scienter.[7] The Court held that scienter may be established by showing that defendants: "(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."[8] While the Court defined "actual knowledge" as "refer[ring] to whether a person is aware of information,"[9] it did not decide whether the "actual knowledge" or any other enumerated prong was met, instead remanding for determination. Nevertheless, "[f]or scienter, it is enough [for liability] if respondents believed that their claims were not accurate."[10]

Implications for Defendants: Legal and Compliance Matter

SuperValu eliminates the powerful *SafeCo* defense whereby a defendant could win dismissal if an objectively reasonable person would not have known the claim was false, regardless of the defendant's intent. With the dawn of a new subjective scienter standard, it will be more difficult for a defendant to win dismissal without discovery regarding its subjective belief at the time of submission.

The federal program landscape is incredibly complex to navigate due to the countless ambiguous regulatory and legal areas lacking concrete guidance; the Court noted, however, that an ambiguous phrase or statute is "not sufficient to preclude a finding that respondents knew their claims were false,"[11] making it important to seek legal advice when conducting activities involving billing, reimbursements, or claims submissions to reduce risk exposure. Further, these decisions reaffirmed that strong compliance programs will continue to play a significant role in protecting against FCA liability given their mandate to identify and monitor compliance risks and assess compliance with applicable laws. Future cases will define what is needed to show awareness of a "substantial and unjustifiable risk"; until then, ensuring companies are (i) identifying risks, (ii) obtaining sound legal advice, and (iii) maintaining compliance programs capable of fulfilling their risk assessment, monitoring, and auditing duties will better protect against claims arising under the FCA.

***United States ex rel. Polansky v. Executive Health Resources, Inc.*: To Intervene Or Not To Intervene**

Relator's Relationship with the Government

The FCA permits private parties—known as "relators"—to assert FCA claims "for the person and for the United States Government" through relator-initiated suits known as private *qui tam* actions.[12] After a *qui tam* action is filed, the DOJ can "intervene"—meaning the government assumes "primary responsibility for prosecuting the action"[13]—during two statutorily defined periods: (1) within 60 days after the DOJ receives "both the complaint and the material evidence and information,"[14] or (2) at a

later date "[u]pon a showing of good cause."[15] If the DOJ declines to intervene, the relator has the right to litigate the action on the government's behalf.[16] If, however, the government intervenes, it "may dismiss the action notwithstanding the objections of the [relator]."[17]

Executive Health Resources, Inc.: Intervene and Dismiss

The question presented in *Executive Health Resources* was whether the federal government could move to dismiss an FCA suit over a relator's objections despite declining to intervene during the initial 60-day period. The Supreme Court held that the government could still proceed with its motion to dismiss, so long as it intervened prior to moving to dismiss.

In 2012, Dr. Jesse Polansky filed a *qui tam* suit accusing his former employer Executive Health Resources, Inc. of overbilling Medicare for covered services. The government declined to intervene during the initial 60-day period and the case subsequently spent "years in discovery," requiring the government to produce documents and provide deposition testimony.[18] By 2019, the government determined that its discovery obligations were too burdensome and "outweighed [the suit's] potential value [and] filed a motion [] to dismiss the action over Polansky's objection."[19] The Supreme Court agreed with the Third Circuit that the government's "motion to dismiss was reasonably construed to include a motion to intervene, which the District Court had implicitly granted."[20]

The Court also held that the proper standard for this type of motion to dismiss is Federal Rule of Civil Procedure 41(a), the rule governing voluntary dismissals in ordinary civil litigation.[21]

Implications for Defendants: A Second Chance

This ruling upholds the DOJ's longstanding practice of dismissing *qui tam* actions over relator objections,[22] and effectively allows the DOJ to contemporaneously intervene in, and then dismiss, a *qui tam* action when the action is not in the government's best interest. The holding also extends the period in which the government can intervene and then dismiss: at any point in the litigation, not just during the initial 60-day window. Taken together, this should provide companies facing whistleblower *qui tam* actions with some comfort knowing that the DOJ can voluntarily dismiss *qui tam* actions, despite declining to initially intervene and over relator objections, even years after the filing of the complaint.

Conclusion

While *SuperValu* highlights the importance of a robust legal and compliance program in light of the new subjective scienter standard, *Executive Health Resources* provides targets of whistleblower *qui tam* actions with some comfort that the DOJ has more leverage to dismiss an action after declining to intervene.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings New York lawyers:

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[1] 31 U.S.C. § 3729(a)(1)

[2] *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 69-70 (2007)

[3] *United States ex rel. Schulte v. SuperValu Inc.*, 143 S. Ct. 1391, 1396 (2023)

[4] *Id.*

[5] *Id.* at 1397-98

[6] *Id.* at 1398

[7] *Id.* at 1399

[8] *Id.* at 1404

[9] *Id.* at 1400. *See also Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (distinguishing "actual knowledge" from "constructive knowledge," noting that "to have 'actual knowledge' of a piece of information, one must in fact be aware of it.")

[10] *Id.*

[11] *Id.* at 1399

[12] 31 U.S.C. § 3730(b)(1)

[13] 31 U.S.C. § 3730(c)(1)

[14] 31 U.S.C. § 3730(b)(2)

[15] 31 U.S.C. § 3730(c)(3)

[16] 31 U.S.C. § 3730(b)(4)(B)

[17] 31 U.S.C. § 3730(c)(2)(A)

[18] *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 143 S. Ct. 1720, 1729 (2023)

[19] *Id.*

[20] *Id.*

[21] *Id.* at 1734

[22] *See, e.g.*, Michael D. Granston (Director, Commercial Litigation Branch, Fraud Section, DOJ), *Memorandum Regarding Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)* (January 10, 2018), https://www.insidethefalseclaimsact.com/wp-content/uploads/sites/860/2018/12/Granston-Memo.pdf ("[W]hen evaluating a recommendation to decline intervention in a *qui tam* action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal."); Jeff Overley, DOJ Aims Torpedo At 11 FCA Kickback Suits (December 18, 2018), https://www.law360.com/articles/1112891/doj-aims-torpedo-at-11-fca-kickback-suits (DOJ dismissing 11 *qui tam* complaints over relator objections).