

LEGAL UPDATES

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# SCOTUS Signals Likely Reversal in *SuperValu*, Arguments Reflect Concerns over Application to Other FCA Cases

On April 18, 2023, the United States Supreme Court heard oral argument in two consolidated cases that have the potential to upend False Claims Act (FCA) litigation. Oral argument on both sides and questioning from the Justices indicated tensions and sincere disagreement over the complexities of applying the False Claims Act's scienter element in areas of ambiguity.

The consolidated cases are *United States ex rel. Schutte v. SuperValu, Inc.*, and *United States ex rel. Proctor v. Safeway, Inc.* At issue is the question of whether and under what circumstances a defendant's subjective beliefs about the lawfulness of its conduct are relevant to an accusation that it violated the False Claims Act with the requisite scienter, when its conduct is consistent with an objectively reasonable interpretation and the government had issued no authoritative guidance on the issue. Supreme Court precedent suggests no inquiry into subjective intent is proper in these circumstances, and so held the Seventh Circuit Court of Appeals. But according to counsel for the United States' and relators' counsel, subjective belief of falsity, notwithstanding the existence of an objectively reasonable interpretation that matches the defendant's conduct, is relevant to establishing scienter. Currently the circuits are deeply split over the issue.

A few takeaways:

1. It appears likely that the Supreme Court will reverse the Seventh Circuit and hold that subjective intent is to some degree relevant to the knowledge inquiry under the FCA.

2. That degree, and where the lines are drawn, may not be easily answered by the Court's majority opinion.
3. Depending on the makeup of the majority, language may be included that pushes back against the "extreme" interpretation some felt the government's and relator's counsel were asking the Court to adopt.
4. Companies may want to consider how they are interpreting ambiguously worded obligations and documenting their interpretations.

### **Reversal appears likely**

Questions from all Justices signaled a majority is skeptical of the notion that a company's subjective intent is wholly irrelevant to the scienter inquiry, notwithstanding an objectively reasonable interpretation after the fact. Justices' questions noted there could be situations where individuals within a company show in their communications that they are contemporaneously aware that their interpretation of an ambiguous law is incorrect. Many focused on the facts at issue being discrete and the question narrow, which can imply an easier consensus.

### **The majority is not likely to agree to an extreme interpretation**

The facts pertinent to these consolidated cases may be somewhat limited. According to the lawyers' arguments, the obligation at issue was ambiguous. The government had issued no authoritative guidance. The defendants' prices had been audited over the years. The decisions they made fit within an objectively reasonable interpretation.

In light of this fact pattern—the "easier case"—and given the challenges of line drawing, some Justices signaled skepticism of an expansive inquiry into subjective belief, with more exposure to liability, pushed by the government's and relators' counsel.

One Justice introduced a hypothetical in which a company faces an ambiguously worded obligation and identifies three reasonable interpretations: A, B, and C. The three interpretations range from most restrictive (A) to least restrictive (C), with interpretation C offering an aggressive but still reasonable approach. He then asked whether selecting interpretation C equates to a knowing false claim if it is later determined by a court to be incorrect. Relators' counsel and the government both argued for liability. The Justice was not convinced and responded, "Wow."

Another Justice presented a hypothetical in which an ambiguous obligation has two potential interpretations. The company believes that one has a 51 percent chance of being correct, and the other a 49 percent chance. He asked whether the company has knowingly submitted a false claim if it

selects the 49 percent option for business reasons. The government argued yes, because the company selected the less probable interpretation. This Justice balked, calling such a result “extreme.”

Another Justice wondered aloud why relators’ counsel was trying to make the case harder, forecasting her comfort with a decision limited to the facts of this case but skepticism of a broader rule.

It is therefore possible that the majority, even in reversing the Seventh Circuit and permitting some level of inquiry into subjective intent, will either limit that inquiry or include language indicating some degree of deference is appropriate where companies arrive at legitimately held interpretations in ambiguous circumstances. As pointed out by counsel, it is entirely possible for interpretations to be incorrect but not false and therefore actionable. Counsel for the Defendants also included a pointed reminder that the FCA is extremely punitive.

### **What this means to you**

In a construct where subjective intent is relevant to determining whether interpretations of ambiguous laws are legitimately held, companies should think about how they are documenting their interpretations, at what level of the company these interpretations are made and held, and who is communicating them. Further complicating the issue is the advice of counsel.

Creating a record of how companies are interpreting ambiguous regulations—and building consensus around those interpretations—could be important. Creating a record and a consensus around decisions in these situations could fall into the gulf or even a safety net, depending on the majority opinion, identified as incorrect but not false. From the standpoint of future FCA litigation, the availability of summary judgment, and the specter of significant fines and penalties, the difference could be meaningful.

The opinion that issues, when it does, will certainly be much examined and debated. Whether it brings additional clarity to a complex issue remains to be seen.

### **Contact us**

If you have questions regarding the False Claims Act and how it relates to your business, please contact Jonathan Porter, Jody Rudman, or your Husch Blackwell attorney.