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James G. Sheehan (james.sheehan@ag.ny.gov, linkedin.com/in/james-sheehan-90264115/) is the Chief of the New York Attorney General's Charities Bureau, which oversees compliance and regulation of the nation's largest charities sector, including the largest nonprofit hospital sector.

Gabriel L. Imperato (gabriel.imperato@nelsonmullins.com, linkedin.com/in/gimperato/) is the Managing Partner of the Fort Lauderdale office of Nelson Mullins and the Team Leader of the Firm's Health Care Criminal and Civil Enforcement, Litigation and Compliance Practice.

The compliance lessons in the wake of the Supreme Court decision in U.S. ex rel Schutte v. SuperValu, Inc.

by James G. Sheehan and Gabriel L. Imperato

The False Claims Act (FCA) permits private individuals to bring lawsuits in the name of the United States—called qui tam—against those they believe have defrauded the federal government: 31 U.S.C. § 3730(b). The FCA thereby incentivizes individuals with knowledge of fraudulent activities to come forward and assist in the government's efforts to deter fraud and recover damages and penalties. Successful qui tam lawsuits have resulted in the whistleblowers receiving a substantial percentage of the recovered amounts as a reward for blowing the whistle.

The FCA holds individuals liable for "knowingly presenting false or fraudulent claims for payment or approval." The "knowingly" requirement is also often referred to as the scienter element. Therefore, when analyzing a potential FCA violation, the two essential elements are (1) the falsity of the claim and (2) the defendant's knowledge of the claim's falsity. In June 2023, the Supreme Court case of *United States et al., ex rel. Schutte et al., v. SuperValu Inc. et al.*, held that it is the subjective intent (as opposed to any objective standard) of a defendant that will be considered relevant when determining whether they acted "knowingly" under the FCA.[1] The definitions of "knowing" and "knowingly" in the FCA are specific to that law. The knowingly standard can be met when one has actual knowledge that the claims are submitted out of also unique and expansive and includes when one has actual knowledge that the claims being submitted are false or fraudulent. This knowing standard, however, is also met if improper claims are submitted out of deliberate ignorance or reckless regard.

The decision in the SuperValu case further elaborated on the practical definition of "deliberate ignorance" and "reckless disregard." Petitioners in the SuperValu case brought forth two legal actions against respondents, corporations (SuperValu and Safeway) that manage a substantial network of retail pharmacies nationwide. Petitioners claimed that the respondents had been consistently overbilling the Medicare and Medicaid programs over an extended period when seeking reimbursement for prescription drugs that are eligible for coverage under these programs. In earlier proceedings, a district court ruled against SuperValu on the falsity element, stating that SuperValu "submitted false claims by not reporting their discounted prices, even though, in fact, those prices were their 'usual and customary' [prices]." However, the same court would later grant summary judgment for SuperValu on the "knowing" element, finding that SuperValu could not have acted "knowingly" because the definition of "usual and customary" prices was objectively ambiguous; therefore, defendants could not have

acted "knowingly" for purposes of the FCA ("the objective standard"). The Supreme Court rejected this analysis and similar cases that held that an appropriate test was the defendants' knowledge, belief, and intent and that the defendants could not—after submitting the claim—rely on an "objectively reasonable" interpretation of the law that had not been ruled out by definitive legal authority or guidance.

The Seventh Circuit's approach, rejected by the Supreme Court, would require that circumstances related to submission of a claim would have to be objectively unreasonable before a defendant could be held liable for "knowingly" submitting a false claim. This standard for determining the falsity of a claim would be regardless of what the defendant personally believed; the Seventh Circuit concluded that it did not matter whether future defendants believed their discounted prices were their "usual and customary prices." Rather, the crux of the decision relied upon was whether someone else—in the defendant's position—could have reasonably thought that the retail prices (and not their discounted prices) were their usual and customary prices.

Under the Supreme Court's decision in SuperValu, the FCA's scienter element refers to defendants' knowledge and subjective beliefs rather than being dependent on what an objectively reasonable individual might have known or believed. Further, the Court held that even though the phrase "usual and customary" may be ambiguous on its face, such facial ambiguity alone is not sufficient to preclude a finding that respondents submitted their claims knowing they were false. The Court stated that the term "[usual and customary] in isolation may have been somewhat ambiguous, but that ambiguity does not preclude (and may require) learning the correct meaning—or, at least, becoming aware of a substantial likelihood of the terms' correct meaning."

The SuperValu opinion lays out three explicit ways a plaintiff may establish the "knowing" element. First, "if [defendant] actually *knew* that their reported prices were not their 'usual and customary' prices when they reported them." Second, "[defendants] were *aware of a substantial risk* that their higher, retail prices were not their 'usual and customary' prices and *intentionally avoided learning* whether their claims were accurate ("deliberate ignorance"). Finally, "[defendants] *were aware of such a substantial and unjustifiable risk* but submitted the claims anyway" ("reckless disregard").

The SuperValu opinion changes the showing that the government and private whistleblower plaintiffs must make to proceed to a trial on the merits. In the past, defendants could review the history and communications of government agencies in search of any "reasonable interpretation," which would make the governing rules ambiguous and potentially have the case dismissed before trial. After SuperValu, the focus will be on the defendants' knowledge and intent, which will open the door to substantial discovery, extended litigation, and increased risk of liability.

This case is a significant victory for the government. It eliminates the potential for defendants to be sheltered behind a per se "objectively reasonable" standard advocated by the Seventh Circuit. While it is likely that this ruling may result in an overall increase in litigation, its greater effect will be to create deterrence and leverage for settlement in future FCA cases.

The SuperValu decision has already been cited in at least 38 other cases since it was issued in June. Earlier dismissals of FCA cases were reversed in many of those cases. As the Seventh Circuit said in *US ex rel. Heath v. Wisconsin Bell* (decided August 2, 2023), "Wisconsin Bell's own conduct raises a genuine question as to whether it acted in reckless disregard of the truth or falsity of the claims it submitted," so the court reversed an earlier decision dismissing the claims and sent it back for trial. The court noted, "A relator may of course rely on circumstantial evidence to prove scienter (knowledge) under the" FCA.

The decision also raises the stakes for healthcare organizations and the tasks for compliance professionals. The practical effect of managing the risk of "knowing" conduct under the FCA ("deliberate ignorance" or "reckless disregard") requires healthcare organizations and compliance professionals to take actions and undertake the

due diligence necessary to avoid the risk of the submission of improper claims and resultant liability under the FCA.

Takeaways

- The "ambiguity" and "objective reasonable interpretation" test is removed as a defense—under most circumstances—by the Supreme Court decision in the SuperValu case.
- The test now is the "subjective intent" of the parties in question.
- The Supreme Court further defines what "deliberate ignorance" and "reckless disregard" means under the statute.
- This sets out the task for healthcare organizations and their compliance professionals for due diligence and careful decision-making to meet the challenges of managing compliance risk and False Claims Act liability.
- A failure to address these risks exposes healthcare organizations to significant liability.

1 United States et al. ex rel. Schutte et al. v. SuperValu Inc., et al., 21-1326 U.S. (2023), https://www.supremecourt.gov/opinions/22pdf/21-1326_6jfl.pdf.