BCLP. Client Intelligent

**Insights**

# U.S. SUPREME COURT EXPLAINS MEANING OF "KNOWINGLY" UNDER THE FALSE CLAIMS ACT

Jul 11, 2023

In its recent unanimous and significant decision in the consolidated cases of *United States ex rel. Schutte v. SuperValu, No. 21-1326 (6-1-23),* and *United States ex rel. Proctol v. Safeway, Inc.*, *No. 22-111 (6-1-23),* the Supreme Court defined the term "knowingly" in the False Claims Act and reversed the Seventh Circuit's opinion in *Safeco Ins. Co. of America v. Burr*, 551 US 47 (2007), which had held companies could not have acted "knowingly" if their actions were consistent with "an objectively reasonable interpretation of the law that had not been ruled out by definitive legal authority or guidance."

The Court explained that the False Claims Act text and common law roots refer to a defendant's knowledge and subjective beliefs. The Court explained that the False Claims Act sets out a three-part definition of the term "knowingly" that largely tracks the traditional common law scienter requirement for claims of fraud, namely, (1) actual knowledge, (2) deliberate ignorance or (3) recklessness.

The Court explained that each of those terms focus on what the defendant thought and believed: "Actual knowledge" refers to what the defendant is aware of. "Deliberate ignorance" encompasses defendants who are aware of a substantial risk that their statements are false, but intentionally avoid taking steps to confirm the statements' truth or falsity. And, "recklessness disregard" captures defendants who are conscious of a substantial and justifiable risk that their claims are false, but submit the claims anyway. The Court noted that these forms of scienter track the common law of fraud, which generally focuses on the defendant's lack of an honest belief in the statement's truth. The focus is on what a defendant thought when submitting a claim – not what a defendant may have thought after submitting it.

In this case, petitioners claim that SuperValu and Safeway defrauded two federal benefit programs, Medicaid and Medicare. Medicaid and Medicare offer prescription-drug coverage to the beneficiaries and both often cap any reimbursement for drugs at the pharmacies "*usual and customary*" charge to the public. Petitioners asserted that SuperValu and Safeway for years offered various pharmacy discount programs to their customers, but reported their higher retail prices to Medicaid and Medicare rather than their discounted prices. Petitioners alleged and presented

evidence that the companies believe their discounted prices were their usual and customary prices and tried to prevent regulators and contractors from finding out about their discounted prices. In short, petitioners claim that the evidence shows that SuperValu and Safeway thought their claims were inaccurate yet submitted them anyway.

The Court noted that there are two basic and essential elements for a False Claims Act violation: (1) the falsity of the claim and (2) the defendant's knowledge of the claim's falsity.

The trial court had ruled against SuperValu on the falsity element, finding that its discounted prices were its usual and customary prices and that, by not reporting them, SuperValu submitted false claims. However, the trial court granted SuperValu summary judgment based on the scienter element, holding that SuperValu could not have acted "knowingly." The trial court found that the term "usual and customary" was ambiguous, and the pharmacies could not have "known" that their claims were inaccurate because they could not have "known" what the phrase "usual and customary" actually meant. The Seventh Circuit Court of Appeals affirmed, holding that the company could not have acted "knowingly" if its actions were "consistent with an objectively reasonable interpretation of the law."

The Supreme Court reversed and 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 knew their claims were false. The Supreme Court explained that the Seventh Circuit did not hold that the companies made an honest mistake about that phrase, but, rather, the Seventh Circuit held that because other people might make an honest mistake, defendants' subjective beliefs became irrelevant to their scienter. The Supreme Court disagreed, explaining that facial ambiguity of the phrase "usual and customary" does not by itself preclude a finding of scienter under the False Claims Act. Even if the phrase is ambiguous, respondents could have learned its correct meaning. Here, petitioners asserted that the companies understood that the phrase referred to the discounted prices and tried to hide their discounted prices. The Supreme Court held that petitioners have made out a valid false fraud theory and held that a defendant's knowledge and subjective belief is all that is required, not what an objectively reasonable person may have known or believed.

In a recent second opinion interpreting the False Claims Act, the Supreme Court held in *Polansky v. United States*, *No. 21-1052 (6-16-23),* that the case was correctly dismissed when the United States moved to dismiss a whistle blower suit under the False Claims Act even though the government did not intervene in the case before seeking dismissal.

Polansky's suit alleged that Executive Health, a subsidiary of United Health Group, Inc. violated the False Claims Act by erroneously causing hundreds of thousands of claims for medical services to be billed to Medicare at inpatient rates instead of outpatient.

The United States did not initially intervene in the case before seeking dismissal. Under the False Claims Act, the Department of Justice may move to end a whistle blower suit, even over the whistle blower's objection, by giving notice of a motion to dismiss and after an opportunity for a hearing on a motion. The government had moved for dismissal arguing that the case would impose significant burdens on government resources, such as litigation costs, if the suit were allowed to continue. Polansky argued on appeal to the Supreme Court that the Government should not have been able to move to dismiss the case because it had failed to properly intervene in the case before it had moved for dismissal.

The Supreme Court, however, agreed with the Government that the United States did not have to intervene in the case before seeking dismissal. "Today, we hold that the Government may seek dismissal of a FCA action over a realtor's objection so long as it intervened sometime in a litigation, whether at the outset or afterward."

### RELATED PRACTICE AREAS

- False Claims Act
- Appellate
- Litigation & Dispute Resolution

## MEET THE TEAM


**Charles A. Weiss**

St. Louis

charles.weiss@bclplaw.com
+1 314 259 2215

professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.