

Services

Appellate

Government
Contracts

Litigation &
Alternative Dispute
Resolution

White Collar, Internal
Investigations, &
Compliance

Professionals

CORMAC T. CONNOR
WASHINGTON:
202.378.2416
CORMAC.CONNOR@
HUSCHBLACKWELL.COM

MATTHEW P. DIEHR
ST. LOUIS:
314.480.1916
MATTHEW.DIEHR@
HUSCHBLACKWELL.COM

JONATHAN A. PORTER
WASHINGTON:
202.378.2300
JONATHAN.PORTER@
HUSCHBLACKWELL.COM

JODY L. RUDMAN

Supreme Court Rejects an Objective Standard for False Claims Act Inquiries

The False Claims Act imposes liability for false and fraudulent claims a defendant submitted with the requisite state of mind, or *scienter*. Before the Supreme Court handed down its June 1, 2023, decision in the combined *SuperValu* and *Safeway* cases, several federal circuit courts examining the issue had held that *scienter* could not be established when a defendant's actions under an ambiguous regulation were consistent with an objectively reasonable standard – notwithstanding what the defendant itself may have believed.

So had held the district court and Seventh Circuit in the *SuperValu* case.

On June 1, the Supreme Court reversed. The unanimous court, in a decision authored by Justice Thomas, held that the *scienter* inquiry under the False Claims Act turns on a defendant's contemporaneous subjective belief. In other words, *scienter* can be established if the defendant subjectively thought its claims were inaccurate, even if the defendant could justify them *post hoc* as based on an objectively reasonable interpretation.

The issue in *SuperValu* involved the interpretation of an ambiguous phrase, for which *SuperValu* had argued no guidance had been issued, requiring providers to report their “usual and customary” prices for claimed drugs. In fact, many customers were paying less than the reported prices due to price matching and other discount programs. From the record, evidence suggested that some key SuperValu executives had voiced concerns, or believed that the phrase required a different approach than the one taken by SuperValu.

Based on existing precedent, the district court had held that the existence of an objectively reasonable interpretation in line with the defendant's conduct

(notwithstanding whether the defendant actually embraced that interpretation as being the correct one) negated *scienter*. The Seventh Circuit affirmed.

But ultimately the Supreme Court held that its own 2007 decision in a case called *Safeco* was inapplicable to the False Claims Act because that case turned on a different definition of *scienter* under a different law. The Supreme Court instead reverted to common law definitions of fraud and standards for establishing *scienter* for the False Claims Act issues specific to *SuperValu*.

In one sense, it could be argued that the Supreme Court issued a narrow decision. But its seemingly narrow holding, in practice, could have far-reaching impact by cutting off an avenue to resolving cases at summary judgment. Corporate “knowledge” under a reckless disregard standard already embodied inherent challenges in demonstrating the absence of genuine issue of fact. Now, though, the *SuperValu* decision further takes away the opportunity to rely on objective reasonableness, turning litigants instead to factual inquiries of subjective belief. The importance of contemporaneous documentation, recordkeeping, training, and governance with regard to all in the chain of decision making and all whose decisions are imputed to the company cannot be understated in its wake. As always, how this decision plays out in the practicalities of real cases remains to be seen.

Contact us

For assistance with False Claims Act cases or other matters related to questions of corporate knowledge, please contact Cormac Connor, Matthew Diehr, Jonathan Porter, Jody Rudman, or your Husch Blackwell attorney. For more background on this development, please view our April 21 update.