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Justices Say FCA Liability Hinges On Defendants' Beliefs



By [Daniel Wilson](#) · [Listen to article](#)

Law360 (June 1, 2023, 11:08 AM EDT) -- The U.S. Supreme Court ruled Thursday that liability in False Claims Act suits depends on whether defendants believed their claims were false and not on whether they had made an "objectively reasonable" interpretation of law or regulation.

Both the text of the FCA's scienter, or knowledge, standard and its common law underpinning require an assessment of a defendant's subjective beliefs about potential wrongdoing, Justice Clarence Thomas wrote for a unanimous court, vacating a pair of Seventh Circuit decisions finding that supermarket chains [SuperValu Inc.](#) and [Safeway Inc.](#) did not bilk Medicare and Medicaid when they claimed allegedly customary costs that were higher than their discounted prices.

"The question presented is ... whether respondents could have the scienter required by the FCA if they correctly understood that standard and thought that their claims were inaccurate," Justice Thomas said. "We hold that the answer is yes: What matters for an FCA case is whether the defendant knew the claim was false. Thus, if respondents correctly interpreted the relevant phrase and believed their claims were false, then they could have known their claims were false."

Whistleblowers Tracy Schutte, Michael Yarberry and Thomas Proctor have accused the supermarkets of wrongly and knowingly failing to offer all discounts that were regularly available to retail customers in the "usual and customary," or U&C, prices they offered to Medicaid and Medicare beneficiaries for generic drugs, a requirement for those programs.

For roughly a decade beginning in 2006, the majority of the supermarkets' generic drug sales to retail customers were at the price of \$4 for a 30-day supply, matching a discount program started by [Walmart](#), according to the decision. That in effect made the discounted price the U&C price, but the retailers charged higher, non-discounted prices to Medicare and Medicaid, the whistleblowers said.

A district court had agreed that SuperValu's discounted prices were its U&C prices and that by not reporting them, it had made false claims. But the FCA requires not only falsity but also scienter, where defendants need to have acted with either "actual knowledge" of falsity, or with "reckless disregard" or "deliberate ignorance" of the truth, and the court found that the supermarket hadn't acted with scienter, backing up that decision in Safeway's case.

The Seventh Circuit then affirmed both of those rulings, saying that the retailers had made "objectively reasonable" interpretations of ambiguous law that they weren't otherwise warned away from by "authoritative guidance," adopting the so-called Safeco standard from the Supreme Court's 2007 [Safeco Insurance Co. of America v. Burr](#) decision, a Fair Credit Reporting Act case.

Under the Seventh Circuit's view, it didn't matter whether a defendant actually believed that objectively reasonable interpretation at the time it made its claims, with subjective belief only coming into the scienter assessment if their claims were objectively unreasonable.

But the Safeco standard does not apply to the FCA, because that standard was "tied to the FCRA's particular text," which has a different "willfully" standard for determining a defendant's mens rea, or state of mind, Justice Thomas said.

Both the FCA's text and its roots in the common law of fraud "focus primarily on what respondents thought and believed," which means that determining scienter involves a defendant's knowledge and subjective belief, not whether a claim is based on an objectively reasonable belief, Justice Thomas said Thursday.

The scienter determination also involves defendants' beliefs at the time they submitted a claim, and not on whether there are "post hoc interpretations that might have rendered their claims accurate," the justice said.

And although the term usual and customary is "less than perfectly clear," which could effectively forgive a mistaken, but honest, belief that U&C pricing involved retail and not discounted prices, that sort of "facial ambiguity" is not enough alone to preclude scienter, according to Justice Thomas.

Tejinder Singh of [Sparacino PLLC](#), counsel for the whistleblowers, said in a statement to Law360 on Thursday that the decision was a "fantastic result" that "places the onus on anybody claiming public funds to take appropriate steps to ensure that claims are valid and true before presenting them — and closes the door on dishonest businesses that would try to cheat the government and use legal ambiguities as a shield."

"The Supreme Court holds that there is no safe harbor when a defendant can merely identify an objectively reasonable interpretation of the law that might have covered its conduct, and appropriately places the emphasis on what the defendant thought or believed at the time it acted," he added. "Also, by making it clear that the False Claims Act's scienter standard incorporates the common law of fraud, the court provides important clarity about the legal standard that should be helpful in many pending and future cases."

Counsel for Safeway and SuperValu deferred comment on the decision to representatives for the companies, and a representative for SuperValu's parent [United Natural Foods Inc.](#) declined to comment on the decision on Thursday. A representative for Safeway did not immediately respond to a request for comment.

The whistleblowers are represented by Tejinder Singh of Sparacino PLLC; John Timothy Keller and Dale J. Aschemann of Aschemann Keller LLC; Rand J. Riklin of [Goode Casseb Jones Riklin Choate & Watson](#); Paul B. Martins, Julie Webster Popham and James A. Tate of [Helmer Martins Tate & Garrett Co.](#) LPA; Glenn Grossenbacher of the Law Office of Glenn Grossenbacher; Jason M. Idell of Idell PLLC; Gary M. Grossenbacher of Gary Grossenbacher Attorney at Law; and C. Jarrett Anderson of Anderson LLC.

SuperValu and Safeway are represented by Carter Phillips, Kwaku Akowuah, Rob Hochman, Jaime Jones, Tacy Flint and Josh Fougere of [Sidley Austin LLP](#).

The government is represented by Elizabeth B. Prelogar, Malcolm L. Stewart and Benjamin W. Snyder of the Office of the Solicitor General and Brian M. Boynton, Michael S. Raab, Charles W. Scarborough and Joshua Dos Santos of the [U.S. Department of Justice's](#) Civil Division.

The cases are U.S. ex rel. Proctor v. Safeway Inc., case number [22-111](#), and U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., case number [21-1326](#), both in the [Supreme Court of the United States](#).

--Editing by Alyssa Miller.

Update: This story has been updated with more details from the case and to reflect that United Natural Foods declined to comment.

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Daniel Wilson

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Case Information

Case Title
United States ex rel. Tracy Schutte, et al., Petitioners v. SuperValu Inc., et al.

Case Number
21-1326

Court
Supreme Court

Nature of Suit

Date Filed
April 05, 2022

Case Title
United States, ex rel. Thomas Proctor, Petitioner v. Safeway, Inc.

Case Number
22-111

Court
Supreme Court

Nature of Suit

Date Filed
August 05, 2022

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