

Supreme Court's Recent Decision on FCA's Scienter Standard Potentially Raises Threshold for Government to Establish "Reckless Disregard"

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On June 1, 2023, a unanimous Supreme Court decision sought to clarify the meaning of "scienter" in the FCA context, which deals with the defendant's knowledge (or lack thereof) that a claim for payment was false and intent to submit the false claim. See *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023) ("*SuperValu*"). There, the Court ruled that "[f]or scienter, it is enough if respondents believed that their claims were not accurate." *Id.* at 1404. According to the *SuperValu* decision, only that subjective belief as to the claim's falsity matters, and whether there is an "objectively reasonable" explanation for the false claim is irrelevant. *Id.* at 1399 ("The FCA's scienter element refers to respondents' knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed.").

While explaining the basis for the decision, Justice Thomas wrote that "the FCA's standards focus primarily on what respondents thought and believed," discussing how the three different FCA knowledge standards—actual knowledge, deliberate ignorance, and reckless disregard—each rely on the defendant's subjective knowledge. *Id.* at 1400-01. Describing "reckless disregard" in the FCA context, Justice Thomas explained that the term "captures defendants who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway." *Id.*

That sentence is already being used to argue that *SuperValu* heightened the government's burden when it is attempting to prove reckless disregard—that to establish reckless disregard the government must show that the defendant was, as Justice Thomas described, "conscious of a substantial and unjustifiable risk that their claims are false." If courts rely on this as the standard for establishing reckless disregard in the future, it could heighten the government's burden as compared to tests currently used by courts. For example, in July 2022 the Middle District of Georgia described the reckless disregard standard in the FCA context as when the defendant "knows or has reason to know of facts that would lead a reasonable person to realize that harm like a false claim is the likely result of the relevant act." *United States ex rel. Hockaday v. Athens*

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Orthopedic Clinic, P.A., 616 F. Supp. 3d 1339, 1354 (M.D. Ga. 2022) (quoting *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1058 (11th Cir. 2015)) (cleaned up).

As one example of how defendants are already using the Court's language, in a June 23 brief to the Western District of Virginia District Court discussing the impact of the *SuperValu* decision, the defendants in the *Miller* case contended that "[t]he Supreme Court clarified that the FCA's 'reckless disregard' standard 'captures defendants who are [1] conscious of a [2] substantial and [3] unjustifiable risk that their claims are false, but submit them anyway.'" See, e.g., *United States ex rel. Miller v. Reckitt Benckiser Group PLC*, 1:15-cv-00017, Dkt. No. 149 at 10-11 (W.D. Va. July 7, 2023). DOJ responded that there is no three-part test to establish reckless disregard, and instead the effect of the *SuperValu* decision is simply rejecting any argument that the FCA's scienter element incorporates an objective test. *Id.*, Dkt. No. 150 at 3. According to DOJ, the Court was not "establishing new and restrictive criteria" to show reckless disregard, but was merely "summarizing" existing case law. *Id.*

The Western District of Virginia has not yet made a ruling relevant to these arguments, but the eventual ruling will be one of the first to test a potential new argument available to FCA defendants resulting from the *SuperValu* decision, and may provide an additional hurdle for the government to prove reckless disregard.