Recent Supreme Court False Claims Act Developments

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In 2023, there have been significant developments in the application and interpretation of the federal False Claims Act (FCA). The most headline-grabbing developments occurred at the U.S. Supreme Court in *United States ex rel. Schutte v. SuperValu Inc.*[1] and *United States ex rel. Polansky.*[2] There, the Court handed down decisions regarding the FCA's scienter requirement and the government's authority to dismiss qui tam cases over the objection of the relator. While those rulings will have notable impacts on the application of the FCA, some of their most interesting potential ramifications come when they are analyzed in light of other parallel issues. Accordingly, this article will briefly discuss those cases themselves and then pivot to discuss some of the other important practical takeaways they raise.

United States ex rel. Schutte—Clarifying the FCA's Scienter Requirement

The Supreme Court's Focus on Subjective Intent

On June 1, the Court handed down a unanimous decision in *SuperValu* which clarified the FCA's scienter requirement by addressing what is required to prove that a defendant acted "knowingly" when submitting a false claim. The specific question presented to the Court was "whether and when a defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it 'knowingly' violated the [FCA]."[3]

Defendants in the case argued that their contemporaneous understanding of the regulations at issue was irrelevant. Rather, they argued the relevant test to determine "knowledge" was whether their course of conduct was consistent with an objectively reasonable reading of the regulations. The Court rejected this interpretation and found that the determinative factor was the defendants' subjective beliefs when evaluating whether they acted "knowingly":

> The FCA's scienter element refers to respondents' knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed. And, even though the [relevant regulatory language] may be ambiguous on its face, such facial ambiguity alone is not sufficient to preclude a finding that respondents knew their claims were false.[4]

In terms of its most obvious impact, disposing of cases based on "knowledge" grounds at the motion to dismiss or motion for summary judgment stages will likely become more difficult, as subjective intent is arguably in the province of the jury in most instances.

Protecting Against the Threat of Inadvertent Privilege Waiver

Because of the Court's decision in *SuperValu*, defendants may feel pushed into arguing that they had a good faith belief that their interpretation of complex regulations was correct. When doing so, defendants should be wary of relators arguing that when a defendant affirmatively asserts a good faith belief that its conduct was lawful, it injects the issue of its knowledge of the law into the case and thereby waives the attorney-client privilege.

When considering that possibility, defense counsel should bear in mind cases like *United States ex. rel Saldivar v. Fresenius Medical Care Holdings, Inc.*,[5] an FCA case in which the court found that the defendant impliedly waived the attorney-client privilege by asserting its defense of good faith reliance upon a belief that its conduct was legal. In *Fresenius*, the court relied heavily on *Cox v. Administrator U.S. Steel & Carnegie Pension Fund*,[6] a civil RICO case in which the Eleventh Circuit found that the defendant went beyond a mere denial of criminal intent to affirmatively assert good faith, thus injecting the issue of its knowledge of the law into the case and thereby waiving the attorney-client privilege. In looking to *Cox*, the court in *Fresenius* found that it would be prejudicial and unfair to allow Fresenius Medical Care Holdings (FMCH) to argue its good faith belief that its conduct was legal, but to deny the relator an opportunity to fully explore their belief. The court noted that FMCH could have instead merely denied fraudulent intent without affirmatively asserting that it believed its conduct was legal.

While *Fresenius* and other cases[7] found waiver in such situations, other cases have drawn distinctions where such a good faith claim would not waive privilege. Those cases have focused on whether the good faith claim had a relationship to actual advice from counsel, i.e., was the defendant's good faith grounded in legal advice or something else.[8] When no such relationship exists, the client's reliance upon the good faith claim should not impliedly waive the attorney-client privilege protection.[9] Ultimately, however, to assert a good faith defense is to take a risk that the relator will argue a waiver of the attorney-client privilege – regardless of the fact that proving intent is a prima facie element on which the relator bears the burden of proof.

United States ex rel. Polansky—Ratifying the Government's Dismissal Authority

The Supreme Court's Focus on the Government as the Real Party in Interest

On June 16, the Court handed down an 8-1 decision in *Polansky*, which confirmed the government's authority to dismiss FCA qui tam lawsuits over relator objections, even after a decision not to intervene had been made. In that case, the government had initially decided against intervening and the matter had been pushed forward by the relator. As the Court explained:

> The case then spent years in discovery ... As its discovery obligations mounted and weighty privilege issues emerged, the Government ... decided that the varied burdens of the suit outweighed its potential value. The Government therefore filed a motion ... to dismiss the action over Polansky's objection.[10]

On appeal, the Court ratified the government's authority to move to dismiss "over a relator's objection so long as it intervened sometime in the litigation ... ."[11] Additionally, the Court—having noted that the government was the "real party in interest" in any FCA action—cautioned that:

> A district court should think several times over before denying a motion to dismiss. If the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion.[12]

Polansky's Implications for Pursuing Discovery Against the Government

The Court's decision significantly ratified the importance of the role of the government in qui tam lawsuits and made clear such lawsuits exist for one purpose, to "vindicate the Government's interests."[13] In determining what those interests are—at least from the perspective of the Department of Justice (DOJ)—it is worth reviewing the Jan. 10, 2018 "Granston Memo,"[14] which enumerates seven reasons for which DOJ may seek dismissal.[15] The government's decision in *Polansky* appears to fall under the sixth reason, "Preserving Government Resources," which advises considering dismissal when "the government's expected costs are likely to exceed any expected gain" for various reasons, including "the need to monitor or participate in ongoing litigation, including responding to discovery requests."[16]

But, defendants should note that while the burden of participating in discovery *might* justify the government's decision to unilaterally dismiss a qui tam action, DOJ has cautioned against defendants thinking aggressive discovery could be a "silver bullet." As Michael Granston himself remarked in 2019, "Defendants should be on notice that pursuing undue or excessive discovery will not constitute a successful strategy for getting the government to exercise its dismissal authority."[17] While discovery should not be propounded on the government as a strategy to trigger execution of dismissal authority, defendants should not shy away from aggressively pursuing relevant information in discovery. FCA defendants should remember the point most recently noted by the Eleventh Circuit, that—regardless of *Touhy* and the common belief that the government is rarely held to the same discovery strictures as private parties—the government ultimately "is not exempt from the rules of discovery" and "does not have the power to decide which discovery rules it will abide by and which it will ignore."[18] That is a point which should hold doubly true in FCA qui tam actions which serve only one purpose—to "vindicate the Government's interests." ⊙

Endnotes

[1]*United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023).
[2]*United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023).
[3]Petition for a Writ of Certiorari at 3, *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023).
[4]*SuperValu Inc.* 143 S. Ct. at 1399.
[5]*United States v. Fresenius Med. Care Holdings, Inc.*, No. 1:10-CV-1614-AT, 2014 WL 11517840 (N.D. Ga. Feb. 21, 2014).
[6]17 F.3d 1386, 1419 (11th Cir. 1994).
[7]*See, e.g., United States v. Davita, Inc.*, 2014 WL 11516329 (N.D. Ga. May 15, 2014); *Maar v. Beall's, Inc.*, 237 F.Supp.3d 1336 (S.D. Fla. 2017).
[8]*See Henry v. Quicken Loans, Inc.*, 263 F.R.D. 458 (E.D. Mich. 2008) (finding the defendants had waived their attorney-client privilege because the defendants asserted the advice of counsel as the basis for their good faith claims transforming a defense of good faith into a good faith reliance on counsel defense); *Banco Do Brasil, S.A. v. 275 Washington Street Corp.*, 2011 WL 3208027 (D. Mass. July 27, 2011) (finding no waiver of attorney-client privilege where the party did not claim reliance on counsel's advice as a defense to the underlying claim); *SmithKline Beecham Corp v. Apotex Corp.,* 2005 WL 2436662 (E.D. Pa. Sept. 28, 2005) (finding Plaintiff's denial of Defendant's bad faith allegations and its companion assertion of good faith conduct does not constitute an affirmative act which support an at issue waiver where the defense does not explicitly rely on the advice of counsel).
[9]*Williams v. Sprint/United Mgmt. Co.,*464 F. Supp. 2d 1100 (D. Kan. 2006); *Warner-Lambert Co. v. Teva Pharmaceuticals USA,* 289 F. Supp. 2d 515 (D.N.J. 2003).
[10]*Polansky*, 599 U.S. at 428.
[11]*Id*. at 424.
[12]*Id*. at 437-38.
[13]*Id*. at 438.
[14]Michael Granston, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)* (Jan. 10, 2018).
[15]*Id*. at 3-8.
[16]*Id*. at 6.
[17]Michael Granston, Remarks at Federal Bar Association False Claims Act Conference (Feb. 28 – Mar. 1, 2019).
[18]*Consumer Financial Protection Bureau v. Brown,* 69 F. 4th 1321, 1323, 1331 (11th Cir. 2023).