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Seventh Circuit Holds Objective Scienter Standard Applies to FCA



In its recent decision in [United States ex. rel. Schutte v. SuperValu Inc.](#), the Seventh Circuit joined four other circuits in holding that the Supreme Court's objective scienter standard articulated in the Fair Credit Reporting Act (FCRA) case [Safeco Insurance Company of America v. Burr](#) applies to the [False Claims Act](#) (FCA).

Under the objective scienter standard, a defendant who acts under an incorrect interpretation of a statute does not do so with reckless disregard—and therefore scienter, a required element of a FCA violation—if (i) the interpretation was objectively reasonable, and (ii) no authoritative guidance cautioned the defendant against it. Notably for companies that contract with the federal government, this decision narrows the scope of their liability under the FCA. It also highlights the importance of such companies identifying and acting in accordance with authoritative guidance—a term of art whose precise contours remain undefined. FCA Background The FCA imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." For liability to attach under the FCA, a plaintiff must satisfy two elements: (i) falsity and (ii) scienter. The scienter element requires the plaintiff to show that the defendant knowingly submitted a false claim to the government. Knowingly is statutorily defined to "mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information." The FCA does not provide additional clarity regarding these three scienter levels. The *SuperValu* Decision In *SuperValu*, the relators brought a *qui tam* action under the FCA alleging that SuperValu knowingly caused false Medicare and Medicaid claims to be submitted to the government by incorrectly reporting its usual and customary (U&C) drug prices. The district court held that the relators failed to satisfy the scienter prong. The relators appealed the district court's decision. On appeal, the parties asked the circuit court to determine whether *Safeco* applies to the FCA. The Seventh Circuit held that *Safeco* applies to the FCA and noted that every other circuit court that has analyzed the issue—the D.C., Third, Eighth, and Ninth Circuits—has concluded the same. After adopting the objective scienter standard, the Seventh Circuit applied it to the matter at issue. It first considered whether SuperValu's interpretation of U&C price was objectively reasonable. The court found that U&C price is open to multiple interpretations and that SuperValu's interpretation was "not inconsistent" with the regulatory definition

and was therefore objectively reasonable. The Seventh Circuit next considered whether any authoritative guidance warned SuperValu against its interpretation of U&C price. It stated that, under *Safeco*, authoritative guidance must, at minimum, come from either circuit court precedent or guidance from the relevant government agency. The court found there was no such authoritative guidance here. In reaching its decision, the court declined to decide whether *Safeco* requires that authoritative agency guidance "be binding on the agency, such as notice-and-comment rulemaking or agency adjudications." As the Seventh Circuit noted, circuits are split on this question. Implications of the Decision The Seventh Circuit's decision is a victory for companies that contract with the federal government and are therefore subject to liability under the FCA because it narrows the scope of such liability. Plaintiffs/relators in at least five circuits, including the Seventh Circuit, must now satisfy the objective scienter standard, which, given the vague statutes on which plaintiffs/relators often ground their claims, increases the likelihood of dismissal. The boundaries of the scienter requirement, however, remain unclear and accordingly, require continued attention. It is an open question whether (i) authoritative guidance includes sources other than circuit court decisions and agency guidance and (ii) agency guidance must be binding on the agency to be authoritative. Companies should continue to monitor judicial decisions discussing authoritative guidance to better understand that term of art and thereby avoid violating the FCA.

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