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# High Court Legacy Of FCA Unity Teeters On Ideological Brink

By **Jeff Overley and Daniel Wilson**

Law360 (January 19, 2023, 11:10 PM EST) -- The U.S. Supreme Court's reputation for harmoniously handling bitter battles over the False Claims Act's meaning is in a precarious place as the justices ponder fraud liability for purportedly inadvertent compliance errors, an issue that has cleaved lower courts ideologically amid divisive debates over judicial deference to regulators.

Questions about the likelihood of an unusually acrimonious FCA showdown started swirling soon after the justices last week **agreed to clarify** how the U.S. Department of Justice and whistleblowing "relators" can prove that improper billing occurred "knowingly," as the anti-fraud law's scienter standard requires. Similar disagreements over appropriate evidence of knowledge have arisen repeatedly in recent FCA cases, and the high court accepted two such cases: Schutte v. SuperValu Inc. and Proctor v. Safeway Inc., both from the Seventh Circuit.

The disputes are specifically about fraud suits targeting incorrect yet "objectively reasonable" interpretations of ambiguous laws and rules, and whether it matters if someone didn't genuinely think their interpretation was correct. The topic is reminiscent of **a white-hot debate** over doctrines that obligate judges to show deference to reasonable interpretations offered by federal agencies in challenges to ambiguous laws and rules.

## Supreme Cooperation

The high court's modern precedent on the False Claims Act dates to the late 1990s. Most decisions have been unanimous, but a new case, Schutte v. SuperValu, might splinter the justices along ideological lines.

- **Schutte** (2023). Decision: Pending.
- **Polansky** (2023). Decision: Pending.
- **Cochise** (2019). Decision: 9-0
- **Rigsby** (2016). Decision: 8-0
- **Escobar** (2016). Decision: 8-0
- **KBR** (2015). Decision: 9-0
- **Schindler Elevator** (2011). Decision: 5-3
- **Graham County II** (2010). Decision: 7-2
- **Eisenstein** (2009). Decision: 9-0
- **Allison Engine** (2008). Decision: 9-0
- **Rockwell International** (2007). Decision: 6-2
- **Graham County I** (2005). Decision: 7-2
- **Cook County** (2003). Decision: 9-0
- **Vermont Agency** (2000). Decision: 7-2
- **Hughes Aircraft** (1997). Decision: 9-0

Conservative justices in recent years have assailed and weakened those doctrines, including so-called Chevron deference to agency views of murky statutes. BraunHagey & Borden LLP lawyer Leah Judge, who represents whistleblowers, told Law360 that she's concerned the attacks are poised to spill into the FCA realm, allowing fraudsters to profit lucratively from knowingly flawed views of compliance duties.

"I would be lying if I told you I wasn't concerned that this case is going to this court," Judge said, adding that denigration of the federal bureaucracy might influence what "should be a straightforward textual and statutory analysis."

Defense lawyers are also foreseeing a possible detour from the high court's typical comity and consensus in FCA matters. "This case is more policy-charged than some of the other [recent FCA] cases," Bradley Arant Boult Cummings LLP partner Elisha J. Kobre, a former DOJ prosecutor, told Law360. "It's the relators that are appealing, and I think that they're going to have a tough road to get a reversal here."

The False Claims Act is rarely the most quarrelsome area of federal litigation, and the law has long enjoyed broad bipartisan backing in Congress. At the same time, it often implicates sincere principles that occasionally carry a political tinge or seem like elemental distinctions between the prevailing mindsets of the defense and plaintiffs bars.

Among defense counsel, as well as jurists inclined to side with them, whistleblowers are routinely portrayed as money-hungry fabulists and maligned as **disgruntled and underperforming ex-workers**. Lawsuits that contain echoes of publicly known information are regularly ridiculed as **"parasitic,"** a decades-old pejorative in FCA argot. Federal laws are described as "among the most completely impenetrable texts within human experience," a famous line from a Fourth Circuit case that SuperValu **quoted in a recent brief**.

Among plaintiffs counsel, whistleblowers are routinely **lauded for bravely risking their careers** to guard taxpayer funds and protect patients in Medicare and Medicaid. Lawsuits that contain echoes of publicly known information are described as vital insider accounts. Federal laws are called complex but also readily understood by sophisticated corporations with savvy lawyers and advisers.

Despite those divergent depictions, and despite conflicting legal philosophies among Supreme Court justices, the high court has consistently found common ground in FCA cases during the past quarter-century. In that time period, which encompasses most of the high court's modern FCA precedent, the justices have decided a baker's dozen of FCA cases, and eight of those decisions have been unanimous. Not since 2011 has an FCA case produced even a single dissenting vote.

In the five cases where the justices weren't in full agreement, each dissenting vote came from a left-leaning justice — a subtle sign of the FCA's ability to arouse partisan passions, as well as the fact that conservatives have long outnumbered liberals on the high court and **authored most of the majority opinions** in FCA cases.

Schutte v. SuperValu is the first FCA case at the Supreme Court since the emergence of a 6-3 conservative supermajority in 2020. Some observers say that the imbalance is one more reason that the plaintiffs bar and the DOJ would understandably be sweating the outcome.

"The current court, as constituted, will probably be more difficult on the government on this issue," Patric Hooper, a founding partner of Hooper Lundy & Bookman PC, said in an interview this week. "For those of us who represent defendants in this [area], we're pleased that the current makeup of the court is such that they are not as deferential to regulatory agencies."

Lower court proceedings offer further fodder for predictions that the FCA showdown might amplify divisions among the justices. SuperValu and Safeway **prevailed** at the district and circuit court levels, and every judge who sided with the defendants had been appointed by a Republican president, while the only dissenting judge was appointed by a Democrat.

A similar split occurred in Sheldon v. Allergan, a comparable case in the Fourth Circuit. That case also produced a 2-1 decision with two GOP appointees in the majority and a Democratic appointee in dissent. And when the case recently went to en banc review, judges appeared polarized along

ideological lines during **oral arguments**, and they ultimately **deadlocked**, mirroring the court's almost-even balance of Republican and Democratic appointees.

A plaintiffs attorney familiar with the SuperValu and Safeway litigation, speaking with Law360 on condition of anonymity, said in an interview that "the relevant division in how you see this is less about conservative versus liberal, for example, and more about whether your sympathies lie with the business community or with the enforcement community."

"Let's take conservative appointees," the source added, speaking specifically of Supreme Court justices. "Some of them, I think, have very clear pro-business sympathies. But others had long careers in law enforcement as U.S. attorneys or similar [roles] before they got [to the high court]. And for them, their sympathies may be a little more complicated, or even tilt in the other direction."

As the cases hurtle toward briefing and arguments at the Supreme Court, plaintiffs counsel will "be looking for themes that [they] think would resonate with [justices] who aren't naturally predisposed to reflexively agree with the enforcement side," the source said.

Although the high court has accepted numerous FCA cases in recent decades, its reviews have rarely delved deeply into the law's scienter provision. One exception occurred in a landmark case, Universal Health Services v. Escobar, that the justices decided in 2016. The decision focused on "material" misrepresentations, but it also illustrated instances of fraud committed knowingly.

"If the government failed to specify that guns it orders must actually shoot," a contractor can't contend it didn't know that the function was material, because "a reasonable person would realize the imperative of a functioning firearm," the Escobar opinion said.

Lower courts have referenced Escobar, and the controversy about agency powers, in recent FCA cases about faulty interpretations of legal requirements. Fourth Circuit judges in Sheldon v. Allergan quoted Escobar when discussing "'strict enforcement' of the FCA's 'rigorous' scienter requirement," and they mentioned that "the administrative state wields vast power and touches almost every aspect of daily life."

The dissenting judge in Sheldon v. Allergan directly addressed those passages, accusing the majority of fabricating an "artificial construct" meant "to further the majority's end" of "preventing the ever-expanding 'administrative state'" from abusing its powers.

In the SuperValu and Safeway cases, one of the tallest tasks for plaintiffs lawyers might be winning over Justice Brett Kavanaugh, who as a D.C. Circuit judge in 2015 **joined an FCA opinion** in a case that resembles the SuperValu and Safeway litigation. The opinion in Purcell v. MWI Corp. embraced the Supreme Court's decision in Safeco Insurance Co. of America v. Burr, a Fair Credit Reporting Act case from 2007, by applying it to the FCA.

That's important because a crucial point of contention in the SuperValu and Safeway matters is about Safeco's applicability, or lack thereof. Incorporating Safeco would be a defeat for whistleblowers; in a footnote, it said that when laws and guidance "allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator."

Nichols Liu LLP partner Bob Rhoad, a lead defense attorney in the MWI case, told Law360 that he expects "Justice Kavanaugh will want to draft the majority opinion" in the SuperValu and Safeway cases, because "he was very active in our oral argument" in Purcell v. MWI.

"I think he will say that, while it might be tempting to bring subjective [intent] into play — to avoid a purported 'bad actor' from coming up with a 'litigation fresh' defense — ultimately it is the government's/agency's fault," Rhoad said via email.

But some plaintiffs attorneys are also feeling optimistic. They're pointing to the Supreme Court's long-running legacy of like-mindedness on FCA matters, as well as the fact that conservatives have spurned multiple cases during the past 25 years that looked like realistic vehicles to defang the formidable statute.

"Where they've had opportunities to take big bites out of the False Claims Act, they just haven't done it," Guttman Buschner & Brooks PLLC founding member Reuben Guttman, who represents FCA relators, told Law360 in an interview.

Shayne Stevenson, leader of Hagens Berman Sobol Shapiro LLP's whistleblower practice, also expressed hope that the broader imbroglio over deference doctrines and unelected bureaucrats won't be decisive. That controversy will be a theme in case, Stevenson said, but it's ultimately distinct from safeguarding popular programs — including Medicare, Medicaid and military spending — that are the focus of most FCA cases.

"I would expect a strong response from those justices who are typically concerned about the growth of the administrative state and the complexity of regulations, but those avenues will remain available to a company that acts in good faith," he said. "What shouldn't be available is a get-out-of-jail-free card for corporations that are not acting in good faith."

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, each before the Supreme Court of the United States.

--Editing by Jay Jackson Jr.

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