PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 10 **NUMBER 5** **May 2024**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Heidi A. Litman at 516-771-2169
Email: ..... heidi.a.litman@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3385
Fax Number . . . . . (800) 828-8341
LexisNexis® Support Center . . . . . https://supportcenter.lexisnexis.com/app/home/

For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (518) 487-3385

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2024–Pub.4938)

Editor-in-Chief, Editor & Board of Editors

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

A False Claims Act Year in Review, and a Look Forward—Part I

By Scott F. Roybal and Jennifer N. Le*

In this two-part article, the authors review the basic elements of the civil False Claims Act, its qui tam provisions, recent Department of Justice enforcement statistics and a number of recent False Claims Act developments. In particular, this first part begins by briefly reviewing the basic elements of the civil False Claims Act (FCA), its qui tam provisions, and recent Department of Justice enforcement statistics. It then discusses the Supreme Court's decisions regarding the government's authority to dismiss qui tam *actions under 31 U.S.C. § 3730(c)(2)(A), and the correct pleading standard required to prove scienter. The conclusion of this article, to be published in the next issue of* Pratt's Government Contracting Law Report, *will review Biden administration actions relating to the FCA, the status of proposed amendments to the FCA, the growing FCA enforcement against private equity firms, ongoing FCA enforcement against pandemic relief fraud, and rising FCA scrutiny on required cybersecurity measures as well as the increased FCA enforcement on higher education institutions.*

The civil False Claims Act (FCA)[1] was enacted in 1863 in response to allegations of fraud in Civil War procurements. The FCA has since become the government's weapon of choice to combat fraud, waste, and abuse in government contracting.

The FCA makes it unlawful for a person to knowingly: (1) present or cause to be presented to the government a false or fraudulent claim for payment, or (2) make or use a false record or statement that is material to a claim for payment.[2] A person acts "knowingly" under the FCA if he or she acts with "actual knowledge, deliberate ignorance or reckless disregard of the truth or

---

* Scott F. Roybal is a partner at Sheppard, Mullin, Richter & Hampton LLP and a member of its Governmental practice group. He handles government contract disputes, investigating and litigating qui tam False Claims Act cases and related whistleblower actions, and defends individuals and corporations in a wide range of civil and criminal fraud investigations. Jennifer N. Le is a senior associate within the firm's Governmental practice group who works on matters involving the government, including disputes, litigations and investigations. Both are residents in the firm's Los Angeles office and may be reached at sroybal@sheppardmullin.com and jle@sheppardmullin.com, respectively.

[1] 31 U.S.C. § 3729 et seq.

[2] 31 U.S.C. §§ 3729(a)(1)(A)–(B) (2009); U.S. ex rel. Rose v. Stephens Inst., 909 F.3d 1012, 1017 (9th Cir. 2018).

falsity of information."[3] Mistakes and ordinary negligence, however, are not actionable under the FCA.[4]

The FCA provides for up to treble damages and as of February 12, 2024, penalties of between $13,946 and $27,894 per violation. Violators are also subject to administrative sanctions, including potential suspension, debarment, or program exclusion from participating in government contracts. The FCA has a lengthy statute of limitations of no less than six years and, in some cases, up to 10 years after a violation has been committed.

The FCA permits private citizens, known as qui tam relators, to bring cases on behalf of the government. In qui tam cases, the complaint and a written disclosure of all relevant evidence known to the relator must be served on the U.S. Attorney for the judicial district of the court where the case was filed as well as on the U.S. Attorney General. The qui tam complaint is then ordered sealed for a period of at least 60 days, and the government is required to investigate the allegations contained therein and decide whether to intervene. If the government declines to intervene, the relator may proceed with the complaint on behalf of the government. The complaint must be kept confidential and is not served on the defendant until the seal is lifted. Relators may receive a "whistleblower bounty" of between 15 and 25 percent of the recovery if the government intervenes in their cases and between 25 and 30 percent if the government declines.

JUSTICE DEPARTMENT REPORTS MORE THAN 1,200 NEW FCA CASES AND BILLIONS OF DOLLARS IN RECOVERIES

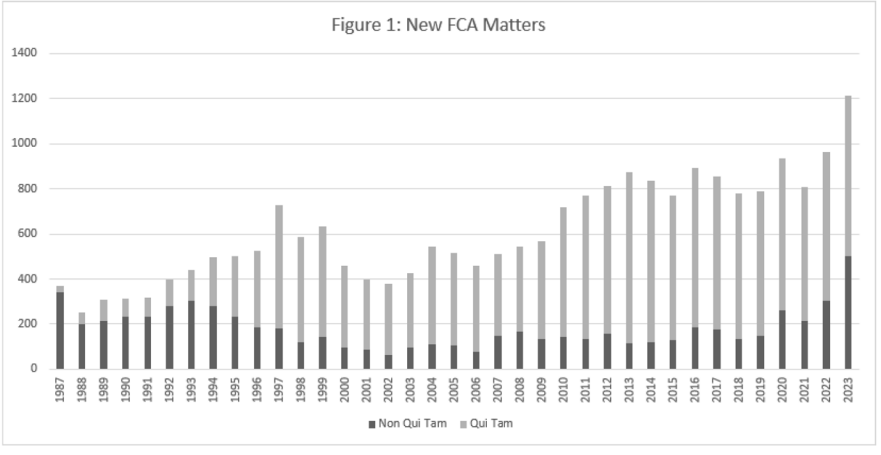
Figure 1 charts new FCA cases per year, which shows a steady increase in qui tam-driven cases.[5] Well over 700 FCA cases have been filed each year for the past 14 years and a high percent of those cases have been qui tam cases. Many qui tam cases remain under seal for years pending an intervention decision by the Department of Justice (DOJ). In 2023, there was a high-water mark in new FCA cases brought by both the government and qui tam relators for a total of 1,212, likely linked to the expenditure of substantial federal funds related to pandemic relief and the ever increasing budgets tied to federal healthcare and other procurement programs. This uptick started back in 2020 during the beginning of the COVID-19 pandemic and related federal stimulus. In 2020, 2022, and 2023, the government also filed more new FCA cases than in prior years, showing the FCA remains a high priority for enforcement.

---

[3] 31 U.S.C. § 3729(b).

[4] United States v. Sci. Applications Int'l Corp., 626 F.3d 1257 653 F. Supp. 2d 87 (D.D.C. 2009).

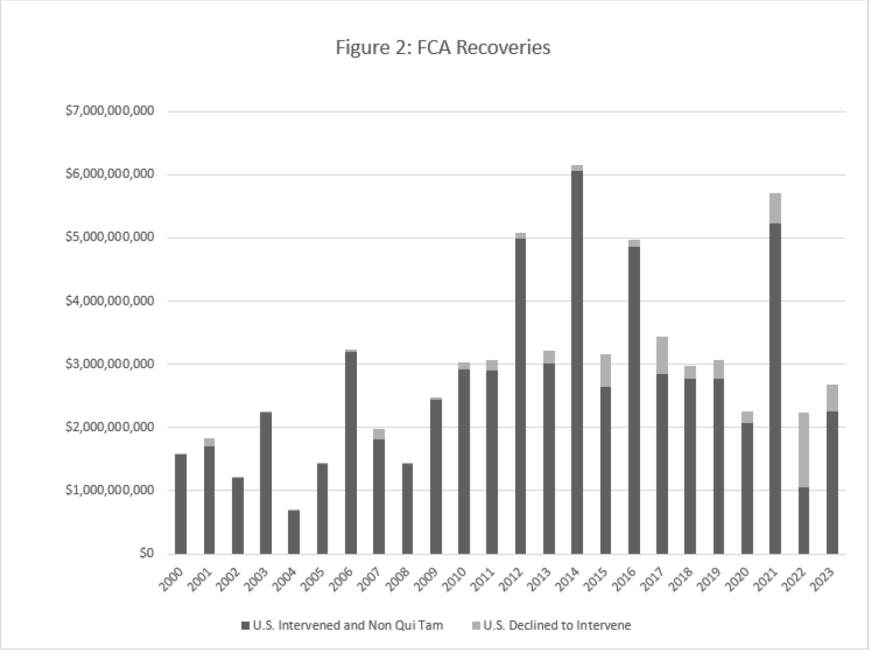
[5] DOJ Office of Public Affairs, Fraud Statistics—Overview (February 22, 2024).



The DOJ collected over $2.68 billion in settlements and judgments in 2023, a slight increase from 2022 FCA monetary recoveries of $2.2 billion, but still trending downwards from prior years when there were more individual big settlements. Nonetheless, in 2023, DOJ pulled in 543 settlements and judgments, the highest number in a single year since the FCA amendments in 1986. Figure 2 shows annual recoveries by the government in FCA cases and compares recoveries coming from qui tam cases where the government declined to intervene versus non-qui tam cases or qui tam cases where the government intervened.[6] Consistent with recent trends, DOJ reported recoveries ($1.8 billion) in 2023 mostly came from settlements and judgments from the healthcare industry, including managed care providers, hospitals, pharmacies, laboratories, long-term acute care facilities, and physicians. DOJ reported that additional 2023 recoveries reflected its focused attention on new enforcement priorities such as pandemic relief programs and cybersecurity requirements in government contracts and grants.

---

[6] See footnote 1 above.



THE SUPREME COURT ISSUES DECISIONS IN FAVOR OF THE GOVERNMENT REGARDING TWO KEY FCA SUBJECTS

The Government's Dismissal Authority Under 31 U.S.C. § 3730(c)(2)(A)

FCA Section 3730(c)(2)(A)[7] allows the government to dismiss a qui tam action over the objection of the relator. Rarely used until recent years, § 3730(c)(2)(A) has emerged as a more frequent method of ending qui tam FCA cases. In 2018, Michael D. Granston, then director of the DOJ's Commercial Litigation Branch, Fraud section, issued a memorandum (the Granston Memo) outlining seven factors for the government to consider when dismissing qui tam actions:

1. Curbing meritless qui tam actions;
2. Preventing parasitic or opportunistic qui tam actions;
3. Preventing interference with agency policies and programs;
4. Controlling litigation brought on behalf of the United States;

[7] "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."

5. Safeguarding classified information and national security interests;
6. Preserving government resources; and
7. Addressing egregious procedural errors.

Circuit courts of appeal have been mostly split into two general camps with respect to the role of the judiciary in reviewing dismissals of qui tam cases under § 3730(c)(2)(A).

First, the standard of the U.S. Court of Appeals for the Ninth Circuit, articulated in *United States v. Baird-Neece Packing Corp.*,[8] required the government to (1) identify a valid government purpose, and (2) demonstrate a rational relation between dismissal and accomplishment of that purpose.

Second, the standard of the U.S. Court of Appeals for the District of Columbia Circuit, articulated in *Swift v. United States*,[9] gave the government virtually "unfettered" discretion to dismiss qui tam cases under § 3730(c)(2)(A).

Circuit courts have continued to weigh in on the standards of review in recent years. In 2021, in *U.S. ex rel. Health Choice Alliance LLC et al. v. Eli Lilly & Co. Inc. et al.*,[10] relators accused Bayer Corp. and Eli Lilly & Co. Inc. of participating in a kickback scheme to induce medical providers to prescribe their products. The government declined to intervene and, one year later, moved to dismiss the case under § 3730(c)(2)(A), citing its two-year investigation into the relators' case. The district court granted the motion over relators' objections. The U.S. Court of Appeals for the Fifth Circuit chose not to adopt outright the District of Columbia Circuit's or the Ninth Circuit's standard, but determined that the Ninth Circuit's more stringent standard would have been satisfied because (1) the government established a relationship to a government purpose (dismissing a meritless case to avoid costs of prosecution), and (2) the relators could not show that the dismissal was "fraudulent, arbitrary and capricious, or illegal."

The U.S. Court of Appeals for the Third Circuit added its own opinion on reviewing dismissals in 2021. In *Polansky v. Exec. Health Res. Inc*,[11] a relator brought an action against a healthcare company alleging that it overbilled Medicare by certifying inpatient services that should have been provided on an outpatient basis. The government initially declined to intervene. However,

---

[8] United States v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998).

[9] Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003).

[10] U.S. ex rel. Health Choice Alliance LLC et al. v. Eli Lilly & Co. Inc. et al., 4 F.4th 255 (5th Cir. 2021).

[11] Polansky v. Exec. Health Res. Inc, 17 F.4th 376 (3d Cir. 2021).

many years later and after five years of extensive discovery, the government moved to dismiss the action over the relator's objection, arguing that the burden of the suit outweighed its potential value, especially because the government was uncertain about the relator's chances of success in litigation. The Third Circuit held that the government was required to intervene in the case before it could dismiss an action under Section 3730(c)(2)(A), but nonetheless reviewed the government's motion to dismiss as a de facto motion to intervene without remanding the case to the district court. The Third Circuit also held that the government did not need to intervene at the first available opportunity. The Third Circuit rejected both the District of Columbia Circuit's and Ninth Circuit's standards and applied the standard of review under Fed. R. Civ. P. 41(a) (Dismissal of Actions), which gave the district court a "broad grant of discretion" to shape the proper terms of dismissal. In this case, Rule 41(a) permitted voluntary dismissal of the action without a court order by the plaintiff (i.e., the government) because the notice of dismissal was filed before the opposing party served either an answer or a motion for summary judgment, whichever is the latter.

On June 16, 2023, the Supreme Court issued its decision on the *Polansky* matter after granting certiorari a year earlier on June 21, 2022 and hearing arguments on December 6, 2022.[12] The Supreme Court was faced with two questions for review: (1) whether the government has authority to dismiss a qui tam FCA suit after initially declining to intervene, and (2) what standard applies if the government has such authority. In an 8-1 majority decision, the Supreme Court adopted the Third Circuit's approach and affirmed the government's authority to dismiss qui tam actions whenever it chose to intervene during the litigation, whether at the outset or a later time in the case. The Supreme Court further agreed with the Third Circuit, holding that in assessing such a dismissal motion, district courts should apply the rule generally governing voluntary dismissal of suits in ordinary civil litigation, Rule 41(a).

Writing for the majority, Justice Elena Kagan explained that the application of Rule 41 in FCA actions will differ in two ways from the norm.

First, a dismissal under Section 3730(c)(2)(A) requires notice and an opportunity for a hearing.

Second, districts courts evaluating whether the dismissal occurred on "proper" terms must weigh the relator's interests against the government's interests, particularly when the relator committed substantial resources to the matter.

---

[12] United States ex rel. Polansky v. Executive Health Resources, Inc., No. 599 U.S. 419 (2023).

Nonetheless, the Supreme Court recognized that the government will satisfy Rule 41 "in all but the most exceptional cases" and that deference should be given to the government's views (once it has intervened) because the relator's interest is pursued on behalf of the government and based on injury to the government alone. In other words, the relator's case would not exist but for the alleged harm done to the government. As such, the government can meet the standard for Rule 41 by simply offering reasonable arguments for why the burdens of continued litigation outweigh its benefits (e.g., grounds for why the case is not likely to prevail and arguments related to significant litigation and discovery costs). This is so even if the relator presents compelling counter arguments.

The decision in *Polansky* will likely have negligible impact on the rate of the government's willingness to pursue dismissal in the FCA context. Though DOJ pushed for the use of dismissal following the Granston Memo, the DOJ has hardly flexed its dismissal muscle in the past 5 years. What may be possible instead is a chilling of qui tam suits from the relators' side. Potential relators may hesitate to pursue an action knowing that the government can intervene and dismiss it at any time, even after years of costly litigation and discovery expenses borne by the relators. Relators and their counsel will have to assess the likelihood of a case's success as they gather evidence and be prepared to demonstrate the case's potential to prevail without overburdening the government to prevent a dismissal.

Perhaps the greater implication from *Polansky* stems from Justice Clarence Thomas' dissenting opinion, which raised constitutionality concerns that qui tam actions may violate Article II of the U.S. Constitution. According to Justice Thomas, the right to represent the interests of the United States in litigation belongs to the executive branch and only appointed officers of the United States may carry out such function. FCA whistleblowers and their counsel are not appointed officers of the United States, thus, "Congress cannot authorize [] private relator[s] to wield executive authority to represent the Government's interests in civil litigation."

In a concurrence, Justice Brett Kavanaugh joined by Justice Amy Coney Barrett, agreed with Justice Thomas' constitutional concerns regarding the viability of qui tam actions under Article II. Justice Kavanagh suggested that the Court consider those concerns "in an appropriate case." Although lower courts historically have upheld the qui tam provisions against constitutional challenges in FCA cases, the three Justice's recent stance in *Polansky* opens the possibility for defendants and lower courts to reconsider these arguments.

The FCA's Correct Standard for Pleading and Proving Scienter

On June 1, 2023, the Supreme Court issued a unanimous and pivotal opinion settling disputes over the controversial pleading requirement related to the FCA's scienter element, which only allows liability when the alleged wrongdoer is shown to have acted "knowingly."[13] The FCA defines knowingly as a person acting with actual knowledge or deliberate ignorance or reckless disregard of the truth or falsity of information. A showing of specific intent is not required.

Earlier in January 2023, the Supreme Court consolidated and granted certiorari in two cases from the U.S. Court of Appeals for the Seventh Circuit, which ruled on this issue: *U.S. ex rel. Proctor v. Safeway Inc.*,[14] and *U.S. ex rel. Schutte et al. v. SuperValu Inc. et al.*[15] Both cases involved the interpretation of the phrase "usual and customary" charge as it relates to the cap for how much a pharmacy can recoup in reimbursement under the relevant Medicare and Medicaid programs. Defendants there submitted claims for certain drugs based on their normal retail prices rather than on their discounted program prices. In other words, they were charging the government more for reimbursement of certain drugs than their other customers who received the benefit of their discounted prices. In both cases, the Seventh Circuit applied the Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*,[16] and held that a defendant's subjective intent when submitting a claim was irrelevant to the scienter analysis when the requirements of that claim are unknown due to their vague and ambiguous nature and there is no authoritative guidance ruling out the objectively reasonable interpretation of the regulation. Accepting the defendants' arguments at summary judgment that their conduct represented a post hoc objectively reasonable interpretation of an ambiguous regulation (i.e., that "usual and customary" charge could have been understood as referring to retail prices), the Seventh Circuit affirmed that relators could not establish scienter. Based on the rulings of these two cases, the Supreme Court agreed to consider "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]."

In a unanimous 9-0 opinion, Justice Thomas, writing for the Court, vacated the Seventh Circuit's ruling, holding that *Safeco* is inapplicable in the FCA

---

[13] United States ex rel. Schutte v. SuperValu, Inc., 598 U.S. 739 (2023).

[14] U.S. ex rel. Proctor v. Safeway Inc., Case No. 22-111.

[15] U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., Case No. 21-1326.

[16] Safeco Insurance Co. of America v. Burr, 551 U.S. 47 (2007).

context and that liability under the FCA depends on a defendant's subjective belief as to whether a claim was false at the time it submitted the claim and not what an objectively reasonable person may have known or believed. The key inquiry here is "whether the defendant knew the claim was false. Thus if [defendants] correctly interpreted the relevant phrase and believed their claims were false, then they should have known their claims were false." In expounding on the Court's holding, Justice Thomas noted that the Court's decision comes from the FCA's text and its common law roots in fraud, which require an assessment of a defendant's subjective beliefs when determining scienter or knowledge. Justice Thomas explained that all three definitions of "knowingly" under the FCA (i.e., actual knowledge, deliberate ignorance, and reckless disregard) track the common-law requirements for fraud, which focus on "defendant's lack of an honest belief in the statement's truth." For this reason, when determining scienter in the FCA context, the inquiry is solely on what the defendant thought when submitting a claim, and not what an objective person may have thought nor whether there are "*post hoc* interpretations that might have rendered [its] claims accurate."

The Court further emphasized that the facial ambiguity of a phrase does not by itself preclude a finding of scienter under the FCA. The Court suggested that FCA defendants faced with an ambiguous regulation cannot bury their heads in the sand. The Court explained that ambiguity does not preclude defendants from learning the regulations or terms' correct meaning, "or, at least, becoming aware of a substantial likelihood of the terms' correct meaning."

Going forward, the *Schutte* decision makes clear that an FCA defendant cannot rely on *Safeco* and the argument that some "reasonable person" might have interpreted a vague and ambiguous regulation in a different manner than the defendant to negate any finding of scienter. Practically, this means that defendants cannot as easily eliminate a case at the motion to dismiss stage of the proceedings and may have to fight the scienter battle through more extensive discovery, summary judgment and at trial.

Notwithstanding the Court's narrow holding, nothing in *Schutte* excuses the burden on FCA plaintiffs (both the government and relators) to specifically allege sufficient and particularized facts per Federal Rule of Civil Procedure 9(b) to support an inference of actual knowledge of falsity of claims submitted. And, as Justice Thomas raised during oral arguments, defendants may also still consider attacking and defeating the FCA's falsity element by presenting arguments that the underlying laws or regulations at issue are subject to more than one or multiple reasonable interpretations. If a defendant can show that its conduct in question was actually consistent with at least one reasonable interpretation of the applicable laws or regulations, then it may prevail upon the

Court to find that the requisite element of falsity is missing. That would in effect be sufficient—regardless of scienter—to successfully defeat an FCA action.

With the defendants' subjective belief now key in determining scienter, where ambiguous regulations exist that are vital to defendants' claims to the government, defendants should carefully document their attempts to figure out such regulations' correct meanings and document what they believe are the correct meanings of the regulations at the time of claim submission. This process may be shored up by defendants seeking legal advice regarding a reasonable interpretation and recommended course of conduct. If, at a later time, defendant's course of conduct is challenged in an FCA action, it may be able to avoid a finding of scienter (i.e., knowing misconduct) by showing it engaged in reasonable conduct and relied on the advice of counsel. Of course, this may potentially trigger issues of waiving attorney-client privilege and protected work product to establish the defense based on good-faith and reasoned subjective belief.

Lastly, the Court's discussion in *Schutte* opens up uncertainty on the FCA's standard for reckless disregard. Justice Thomas stated that reckless disregard "captures defendants who are conscious of a substantial and unjustifiable risk that their claims are false, but submit the claims anyway." However, Justice Thomas did not define or discuss exactly what is considered a "substantial and unjustifiable risk." The unclear direction from the Court on this front will no doubt come to a head in the lower courts as they grapple to devise a proper definition for "substantial and unjustifiable risk." It is expected that defendants and their counsel will take advantage of this statement and argue that reckless disregard is at least akin to gross recklessness and perhaps something well beyond.

* * *

Editor's note: The conclusion of this article will be published in the next issue of *Pratt's Government Contracting Law Report*.