Navigating Attorney–Client Privilege Post-*SuperValu*

By Mark Kelley and Caleb Hayes-Deats

In *United States ex rel. Schutte v. SuperValu Inc.*, the Supreme Court held that whether a False Claims Act ("FCA") defendant acts "knowingly" depends on its subjective understanding of a statement's truth or falsity. In many FCA cases, truth or falsity turns on the defendant's compliance with the legal or regulatory requirements. The best evidence of a defendant's subjective understanding of its claims will often be the advice it received from attorneys. *SuperValu* is thus likely to increase the number and importance of privilege disputes to FCA practice. Defendants' assertions about their subjective understanding of legal requirements will provoke assertions of waiver, multiplying high-stakes fights over what is and is not discoverable. This article analyzes *SuperValu*'s implications for privilege disputes and offers some practical tips about how to prepare.

1. The Supreme Court's Decision in *SuperValu*

In *SuperValu*, the Supreme Court held the term "knowingly" requires analysis of the defendant's subjective beliefs, rather than objective reasonableness. The case involved claims for reimbursement to Medicare and Medicaid by retail drug pharmacies. Regulations required those pharmacies to charge the Government for the "usual and customary" price for drugs.[1] However, SuperValu offered a number of discounts, including a "price match" program which matched lower prices offered by competitors like WalMart. The relators alleged that SuperValu offered discounted prices to many customers, which raised a question as to what SuperValu's "usual and customary" price was: Its list price, or the discounted price offered to some of its customers. SuperValu charged the Government for its list price, even if it sold the drug to others at a discounted price.

A relator sued, alleging that SuperValu had defrauded the Government by charging the Government the full price for drugs, when the "usual and customary" price was a discounted price.[2] The district court granted summary judgment to SuperValu and another pharmacy,[3] and the Seventh Circuit affirmed, holding that SuperValu applied an "objectively reasonable" interpretation of the phrase "usual and customary" in concluding that the phrase referred to retail, as opposed to discount, prices.[4] Given the lack of "authoritative guidance" on the question, SuperValu could not have "knowingly" submitted false claims for retail prices, as long as their claims were lawful under a reasonable interpretation of the statute.

The Supreme Court disagreed, reversing and remanding the Seventh Circuit's decision. The term "knowingly," the Court held, refers to a defendant's knowledge and subjective beliefs at the time it submits a claim, not simply what a reasonable person could have known or believed.[5] Accordingly, what matters is whether the person submitting the claim thought, or had reason to think, that a claim was fraudulent, not whether there was a reasonable interpretation of the relevant regulations that was consistent with the claim for payment. The Court also held that a person will be liable if he or she is aware of a *substantial* risk that a claim is unlawful, and either avoids learning whether the claim was lawful or submits the claim anyway.[6]

The Court noted that the three states of mind contained in the FCA – knowledge, deliberate ignorance, and recklessness – track the scienter requirement for common-law fraud. It noted that the three states of mind each focus on what a defendant "thought and believed," just as common-law fraud "'depends on a subjective test' and the defendant's 'culpable state of mind.'"[7] Scienter is thus usually established if a defendant "lack[ed] an honest belief" in the truth of a statement.

The common law's focus on a defendant's state of mind pointed the Court to "what the defendant thought was submitting the false claim," rather than any "*post hoc* interpretations that might have rendered their claims accurate."[8] In *SuperValu*, there was evidence that the defendants had received notice that the phrase "usual and customary" referred to their discounted prices, including through a footnote in a CMS Medicare Prescription Drug Benefit Manual.[9] That evidence at least created a dispute of fact as to whether the defendants subjectively believed in the truth of their claims for payment to the Government, which precluded awarding them summary judgment.[10]

The Court rejected a few other arguments. First, it rejected the argument that, because the regulation was ambiguous, the defendants could not know that they were violating it. Although the phrase "usual and customary" might be ambiguous "in isolation," the Court noted that the defendant could learn what the phrase meant from other sources.[11] It analogized to a driver seeing a sign requiring her to drive a reasonable speed – although that sign may be ambiguous "in isolation," its meaning would be clear based on other signs posting the speed limit. Second, it rejected the argument that, because a misrepresentation of law is not actionable, a claim based on a knowingly incorrect interpretation of statute is not actionable, either. Since the defendant's misrepresentation carried, at least by implication, an assertion of fact to justify the statement, it was actionable.[12]

2. *SuperValu*, Scienter, and Waiver of Attorney-Client Privilege

SuperValu increases the relevance of privileged information to the issue of whether defendants acted knowingly and will likely result in battles over the occurrence and scope of privilege waivers. *SuperValu* emphasizes the importance of a defendant's subjective beliefs and interpretation of governing regulations. In *SuperValu*, the

evidence of those beliefs included information provided in a CMS Manual, but in other cases, the relevant material may be covered by attorney-client privilege. Defendants thus may want or need to disclose communications with their attorneys as evidence of what they understood the governing regulations to require. Indeed, *amici* in *SuperValu* raised waiver issues as a reason to reject the relator's interpretation of "knowingly."[13] And the Government has argued that even reliance on *Government* statements can result in waiver whether or not the defendant also relied on advice of counsel relating to those statements.[14]

Of course, a defendant can *intentionally* waive attorney-client privilege, and such waiver is required if a defendant argues that it relied on the advice of counsel to determine what a law or regulation required. An advice-of-counsel defense is a complete defense as long as three elements are satisfied: The defendant must have (1) "honestly and in good faith sought the advice of counsel," (2) "fully and honestly laid all the facts before his counsel," and (3) "in good faith and honestly follow[ed] counsel's advice."[15] But asserting the defense requires waiving privilege over all communications and advice relating to the topic of advice and producing all such materials in discovery.[16] As the well-known phrase goes, a party may not use attorney-client privilege "as a shield and a sword."[17]

But defendants can also *unintentionally* waive the attorney-client privilege by incorporating privileged information into claims and defenses that its opponent, in fairness, must have the opportunity to test. *SuperValu*'s emphasis on a defendant's subjective beliefs may make such waiver more common, since a defendant might put advice of counsel at issue by invoking its subjective understanding of what the law required as a defense. The key question when deciding waiver is whether a party has "assert[ed] a claim that in fairness requires examination of protected communications." For example, in the Second Circuit's seminal *Bilzerian* decision, a defendant in a securities-fraud case wanted to testify that he thought what he did was legal – in essence, that he lacked the *mens rea* to commit securities fraud. The Second Circuit held that such testimony would put the defendant's knowledge of the law – as well as his *basis* for that knowledge – at issue, so he could not fairly invoke that defense without waiving the privilege.

But whether a claim of good faith requires waiver of privilege is a fact-intensive inquiry. The Second Circuit has emphasized that waiver should be decided on a "case-by-case basis" and depends on the "specific context" in which the privilege is asserted.[19] Indeed, other courts have held in other contexts that denial of the requisite *mens rea* for liability – the issue in *Bilzerian* – should not normally result in a waiver of privilege.[20]

In FCA cases, waiver arguments are not uncommon, and the Government has been aggressive in the past about asserting that the privilege has been waived. For example, in one case involving allegedly fraudulent billing practices in the healthcare industry, the defendant denied that it knowingly violated the law. The district court granted the Government's motion to compel production of privileged communications to rebut that claim, holding that the defendant put its good faith at issue and, in order to investigate that good faith, the Government needed access to the privileged material.[21] And in a case involving UnitedHealth's practices billing Medicare, UnitedHealth planned to argue that it relied on HHS guidance to negate scienter. The Government argued that would waive privilege by raising whether such reliance was reasonable "in light of all of the other information available to it, including potentially contradictory or cautionary advice from [UnitedHealth's] attorneys."[22]

Those kinds of arguments are likely to become more common following *SuperValu*. If a defendant seeks to defend itself by arguing that it believed it was submitting a valid claim based on its understanding of the relevant statute or regulation, the Government or relator could argue that the defendant has put its good faith at issue. Accordingly, the Government could make the same argument it made in *Poehling* – that, in order to test that defense, the Government needs discovery into the basis for that subjective belief and whether that belief was held in good faith. That discovery will include, at least in the Government's view, materials relating to advice from attorneys regarding the correct way to interpret the relevant statute or regulation.

3. Litigating Privilege After *SuperValu*

For the Government and relators, *SuperValu* presents an opportunity. They can allege that defendants knowingly violated legal requirements and then evaluate the defendant's responses for potential waivers. For potential defendants, *SuperValu* increases the risk of unintentional waiver of privilege and should lead to reevaluation of how to deal with potentially ambiguous legal requirements. The reevaluation process should include the following:

- First, identifying ambiguous statutes or regulations that create significant legal risk and require a definite interpretation from the company;
- Second, establishing the company's position on what those statutes or regulations mean;
- Third, establishing what obligations the company has arising from that meaning;
- Fourth, promulgating that understanding to the relevant functions at the company; and
- Fifth, monitoring developments in the law so that all of these steps can be updated to accommodate changes.

The company should memorialize these steps and keep a record of its response to ambiguous statutes and regulations that it can use to aid its defense if those interpretations are ever challenged.

One important reminder from *SuperValu* is that the potential for waiver should be considered at each step in this process, before litigation even arises. That potential can affect the way a company communicates with its counsel regarding advice relating to ambiguous statutes or regulations – it can even affect the format of the advice provided. An entity facing risks in this area of the law would be wise to consider

whether it will be advantageous to have a written record of advice received in the form of a memorandum outlining its understanding of the relevant statute or regulation.

A company considering these issues can employ a few tools to minimize the risk of waiver. If possible, the company should set forth its interpretations in ***non-privileged*** documents. For example, it could set forth that interpretation in training or manuals prepared for line-level employees, such as contract or billing specialists. Such documents can be produced in litigation as evidence of the company's subjective understanding of requirements, potentially without waiving any applicable privilege.

Waiver is also less likely at the very earliest stages of a potential claim. Before a complaint is filed, representations are made only to the opposing party and not the court. Representations made to opposing counsel alone are less likely to create prejudice or a fairness issue that requires disclosure of privileged communications.[23]

If waiver cannot be avoided entirely, companies can also deploy strategies to limit its scope. Privilege waiver typically extends to all communications on the same subject. So, a company can consider how to cabin the subject on which it waives privilege. The limitations can include, for example, dates (when did the question arise, and when was a final decision made?), personnel (who was involved in the discussion?), and distinctions between business lines or organization (did the question arise in a narrow context or specific to a particular function?).

With these principles in mind, a company facing FCA risk should also consider whether to create a "package" of materials concerning its understanding of legal requirements, which it can provide to a party threatening to sue. That package may or may not include materials that, in a particular context, might trigger a waiver. Either way, materials in the package can explain how the company identified ambiguous statutes and regulations, how it reached an understanding of what those statutes and regulations require, how it plans to make decisions that would implicate the ambiguous statutes and regulations, and how it will stay abreast of relevant legal developments.

In conclusion, privilege battles are likely to intensify following *SuperValu*. At first glance, such battles will give significant leverage to the government and relators, who may be able to seek discovery into defendants' most sensitive communications. But savvy defendants can, with appropriate preparation, mitigate the risk of waiver or reduce its scope.

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Endnotes

[1]*See* 42 C.F.R. §447.512(b)(2).

[2]*United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 747 (2023).

[3]*See United States v. Safeway Inc.*, 466 F. Supp. 3d 912, 935 (C.D. Ill. 2020); *United States v. SuperValu, Inc.*, No. 11-3290, 2020 WL 3577996, at *8 (C.D. Ill. July 1, 2020).

[4]*See United States ex rel. Proctor v. Safeway, Inc.*, 30 F.4th 649, 659 (7th Cir. 2022); *United States v. SuperValu Inc.*, 9 F.4th 455, 468 (7th Cir. 2021).

[5]*See SuperValu*, 598 U.S. at 752.

[6]*Id.* at 757.

[7]*Id.* at 752 (quoting Restatement (Third) of Torts §10, Comment a).

[8]*Id.*

[9]*See Safeway, Inc.*, 30 F.4th at 656.

[10]*SuperValu*, 598 U.S. at 754.

[11]*Id.*

[12]*Id.* at 753, 756-57.

[13]*See, e.g., Brief of the Chamber of Commerce of the United States of America, et al. as Amici Curiae in Support of Respondents* at 10, 26-27, *United States ex rel. Schutte v. SuperValu Inc.*, No. 21-1326 (U.S. Mar. 28, 2023).

[14]*See, e.g., Plaintiffs' Mem. Supporting Mot. to Compel* at 22, Dkt. 505-1, *U.S. ex rel. Poehling v. UnitedHealth Group, Inc.*, No. 16 Civ. 08697 (C.D. Cal. June 3, 2022) (arguing that basis for waiver is parties' "assertion of good-faith reliance upon the government, not their reliance upon privileged communications"). Disclosure: MoloLamken represented defendants in this case.

[15]*United States v. Colasuonno*, 697 F.3d 164, 181 (2d Cir. 2012).

[16]*See, e.g., In re Grand Jury Proc.*, 219 F.3d 175, 182 (2d Cir. 2000).

[17]*United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

[18]*Bilzerian*, 926 F.2d at 1292.

[19]*In re Grand Jury Proc.*, 219 F.3d at 183.

[20]*See, e.g., United States v. White*, 887 F.2d 267, 270–71 (D.C. Cir. 1989).

[21]*See Barker v. Columbus Reg'l Healthcare Sys., Inc. et al.*, 12-cv-108 (M.D. Ga. Aug. 29, 2014) Doc. No. 67.

[22]*Plaintiffs' Mem. Supporting Mot. to Compel* at 21, Dkt. 505-1, *U.S. ex rel. Poehling v. UnitedHealth Group, Inc.*, No. 16 Civ. 08697 (C.D. Cal. June 3, 2022).

[23]*See In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987) (disclosure that occurred "early in the proceedings, was made to opposing counsel rather than to the court, and was not demonstrably prejudicial to other party" was less likely to result in waiver).