

# Litigators of the Week: A Defense Win for SuperValu and Albertsons In False Claims Act Trial After SCOTUS Weighs in on Scien

By Ross Todd

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**A**fter the U.S. Supreme Court revived a case claiming SuperValu overcharged the government for millions of prescriptions under the False Claims Act, the supermarket chain and codefendant Albertsons turned to a trial team at **Williams & Connolly** led by **Enu Mainigi, Josh Podoll** and **Jennifer Wicht**.

That was a sound choice.

After three and a half weeks of trial and just two hours of deliberations, federal jurors in Springfield, Illinois, returned a defense verdict for SuperValu and Albertsons this week. Whistleblowers claimed the prices charged under company policies to match competitors' prices for prescriptions should have been submitted to the government as "usual and customary" prices, rather than the higher retail prices submitted. Although the jurors found this week that the companies knowingly submitted false claims to federal and state programs, they found those claims resulted in no damages.

**Lit Daily: Who was your client and what was at stake?**

Enu Mainigi: Our clients were Albertsons and SuperValu (which is now owned by United Natural Foods).



(l-r) Enu Mainigi, Jennifer Wicht, and Josh Podoll of Williams & Connolly.

Relators were seeking more than \$123 million in single damages based on more than 17 million claims. (We obviously don't agree this was correct.) If relators had prevailed, any damages award would have been trebled, as required by statute, and there would have been per-claim penalties of between \$5,500 and \$27,894, depending on when the claims were submitted and what the court decided.

**How did this matter come to you and the firm?**

Mainigi: We didn't join until after the Supreme Court vacated the prior summary judgment ruling in Albertsons' and SuperValu's favor. At that point, the clients thought that the case

might actually be tried and brought us in as trial counsel.

**Who all was on your team and how did you divide the work?**

Jennifer Wicht: We had a tremendous team from top to bottom. In addition to the three of us, our partner **Craig Singer** led the charge on legal issues, and partner **Grant Geyerman** helped coordinate key third-party witnesses. Our two senior associates were **Annie Showalter** and **Kimberly Broecker**. They took witnesses, argued directed verdict and played a leading role in witness preparation—all while keeping the trains moving on time. Our incredible, jack-of-all-trades junior associate team of **Jack Danon**, **Will Donnelly** and **Alex Heldman** did everything from overnight legal briefing to witness preparation. And our discovery attorney, **Julie Reynolds**, tracked down anything we possibly could have wanted from the discovery record—which was no small task since we came in after discovery was complete.

Among the three of us, Enu was the first chair and led the strategy and overall development of the case, in addition to examining key witnesses and delivering the opening and closing. I focused on the SuperValu fact witnesses. And Josh worked primarily on experts, in particular the experts on damages and causation who were critical to the outcome.

**What were your key trial themes and how did you drive them home with the jury?**

Josh Podoll: At trial, we focused on SuperValu's historical approach to the policy at issue, and the industry's understanding. Those two things worked together really nicely, given the way the case unfolded. The relators had to call our employees to try to prove their case. So

we were able to introduce our people early, let them tell their story, then pivot to the industry's understanding in our case using third-party and expert evidence. On causation, we really tried to simplify and cut to the chase. We kept the cross-examinations of their experts as streamlined and accessible as possible.

**The judge allowed jurors to ask questions during the proceedings. How did the mechanics of that work? And how did the jurors' questions shape your presentation?**

Wicht: In terms of mechanics, the jury would pass notes to the judge as the witness was testifying. Then, at a break, the judge would give the parties an opportunity to object to any particular question. If the judge decided to go forward, she would read the question to the witness after the witness finished testifying, and she gave the parties a chance to ask any follow-up based on the witness's answer.

It's not common for judges to allow jury questions while witnesses are on the stand, although the practice may be on the rise in federal courts. But we found the jurors' questions incredibly helpful. It gave us insight to the issues the jury was mulling over. And it allowed us to tweak our exams to get at what the jury was thinking. Our jury was very engaged and asked excellent questions throughout the trial.

**Jurors ultimately sided with the plaintiffs on the question of whether your client knowingly submitted false claims, but with SuperValu on the question of whether the government suffered any damages. A lot of your trial presentation tried to show that SuperValu's employees did not believe price match prices were usual and customary. How much of your time did you spend on causation?**

Podoll: We always saw causation as a critical issue, and we focused on it heavily during our trial prep and in pretrial briefing. Knowledge ended up getting more play at trial, in part because it necessarily requires the fact testimony of the key players at the company. Causation in this case was an issue primarily for the experts, so it only came up with four witnesses over the course of three and a half weeks.

**You and your firm have tried FCA cases both before and after the U.S. Supreme Court issued its decision in this case. How has that decision changed the dynamics in these cases?**

Mainigi and Wicht: The Supreme Court's decision makes a bigger difference in discovery and at the summary judgment stage than it does at trial. All the Supreme Court decided was that a defendant has to show more than objective reasonableness to win on scienter. As a practical matter, at trial, all the evidence of objective reasonableness still is admissible because it corroborates the company's subjective belief that what it was doing was allowed. So while the Supreme Court decision changes the standards and, of course, the focus earlier in the case, it really doesn't have a huge impact on the story you end up presenting in court.

**What can other FCA defendants take from how you defended your client in this case?**

Mainigi and Wicht: This case is a great example of just continuing to fight through adversity. There were some challenging rulings before we ever got in the case and other tough rulings pretrial. But we and the client kept moving forward and developing the record on all the issues that remained. So, at the end of the day, we were able to tell a compelling story across the whole case and get a great result for our clients.

**What will you remember most about this matter?**

Mainigi: The jury. They were so attentive and dedicated. And the client. For being willing to fight the fight at trial, even with two elements decided against us pretrial.

Wicht: This case required real dedication to keep on fighting in the face of some challenging pretrial rulings. I am grateful our clients were willing to give us that chance, which requires a lot of courage in the face of potential False Claims Act liability, and that our position resonated with the jury.

Podoll: This was a truly incredible trial team. And it's not just the amazing talent from top to bottom. The way this team gelled together, both inside and outside the courtroom, was something special.