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NEWSLETTER

Ding-Dong the Qui Tam Relator Is Dead? Novel FCA Decision Could Change How False Claims Are Prosecuted

October 2024

Years from now, might we cite a recent Middle District of Florida decision as the beginning of the end of the False Claim Act's (FCA) *qui tam* provision in its current form? In granting the defendants' motion for judgment on the pleadings in *United States ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*, U.S. District Judge Mizelle struck a blow to the essence of the *qui tam* concept. The opinion agreed with the defendants that a relator "exercises significant authority, indeed core executive power, under the continuing position of relator [while] lack[ing] proper appointment under the Constitution," and therefore concluded that the *qui tam* provision "defies the Appointments Clause by permitting unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public." No. 8:19-cv-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).

Ascribing any permanence to the rationale in *Zafirov* seems premature. While this decision has the potential for wide-reaching effects, including re-shaping and limiting the way FCA cases can be brought and prosecuted, the decision is almost certain to be appealed. There is the weight of conflicting holdings on this issue, and nearly a century of practice, to suggest that the Appointments Clause argument is unlikely to prevail, even if the scope of the Appointments Clause is a fashionable legal issue that could fast-track *Zafirov* to the Supreme Court of the United States. And, even if the *qui tam* provisions in their current form were to be struck down, U.S. Department of Justice (DOJ) and Congress have other tools to encourage and prosecute whistleblower-originated allegations. Until

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the dust eventually settles, however, contractors should track developments in this area.

The FCA and Its *Qui Tam* Provision

The FCA is a federal statute aimed at persons and entities who knowingly submit, or cause the submission of, false claims to the Government or knowingly make false records or statements to get a false claim paid by the Government. Initially established to prosecute fraud against the Union Army during the Civil War era, the FCA is now the Government's primary civil tool to fight fraud. The consequences of an FCA violation can be severe and result in per-claim penalties and treble damages—not to mention suspension and debarment from federal contracting and reputational harm. Because it focuses on "claims" made to the Government, those who do business with the Government or rely on payments from the Government, like contractors, are perennial targets.

DOJ can bring an FCA action directly on behalf of the Federal Government. But under the FCA's *qui tam* provision, *see* 31 USC § 3730(b), an action can also be initiated by a whistleblower (a relator) who can receive up to 30% of any recovery. Known as *qui tam* actions, relator-initiated suits are filed under seal, permitting DOJ time to investigate the allegations before they become public. DOJ may decide to intervene and take over the case after its investigation. If DOJ declines, the relator may continue to prosecute the case, standing in the Government's shoes and making all litigation decisions. Even in those circumstances, however, the Government remains the true party in interest and DOJ typically monitors declined cases to avoid negative outcomes and precedent. DOJ may also intervene for the purpose of dismissing the case under 31 U.S.C. § 3730(c)(2)(A), although such dismissals are rare.

Over the last few decades, *qui tam* actions have dwarfed DOJ-initiated actions (known as "original actions") both in quantity and recoveries. In 2023, $2.3 billion of the overall $2.68 billion in FCA recoveries came from *qui tam* actions, although the vast majority stemmed from cases in which the Government intervened ($1.89 billion vs. $442 million). Relators also filed more than 700 *qui tam* actions last year. Without question, relators are a primary driver of FCA litigation and recoveries.

United States ex rel. Zafirov v. Florida Medical Associates, LLC, et al.

In *Zafirov*, a former employee (Dr. Zafirov) brought a *qui tam* claim alleging her company and other medical companies misrepresented patients' medical conditions in their Medicare claims. DOJ declined to intervene and Dr. Zafirov continued litigating on behalf of the United States as the sole relator. Defendants eventually moved for judgment on the pleadings, arguing that in bringing the *qui tam* claim, Dr. Zafirov violated Article II's Appointments Clause, Take Care Clause, and Vesting Clause.

The court's analysis and ultimate decision holding the *qui tam* provision unconstitutional focused on the Appointments Clause. The court found:

1. A relator is an officer of the United States;
2. Historical examples of *qui tam* provisions do not exempt a relator from the Appointments Clause; and

3. Because Dr. Zafirov was not constitutionally appointed, dismissal was required.

In equating relators with federal officers, the court zeroed in on a relator's "civil enforcement authority on behalf of the United States," including the "ability to initiate and litigate an action that binds the federal Government" and "unfettered freedom to prosecute the action as she determines best[,] . . . untethered to, and unbound by, DOJ policy or the Justice Manual." The court found "[a]n FCA relator possesses all the traditional indicia of holding a constitutional 'office[,]' . . . thus satisf[ying] step two of the test for officer status."

The court was also not swayed by Dr. Zafirov's "we've done it this way for decades" argument: "[s]imply put, the Constitution prevails over practice, especially when the text is clear and the practice is neither continuous nor challenged. To accept Zafirov's alternative Article II proposal—that historical existence equals constitutionality—would eviscerate longstanding Article II jurisprudence."

What's Next?

An appeal to the 11th Circuit is almost certain, but the reception this decision will receive is anything but. Historically, and universally, circuit courts have rejected constitutional challenges to the *qui tam* provisions. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753–58 (5th Cir. 2001); *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1040–42 (6th Cir. 1994); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1153–55 (2d Cir. 1993). Several other recent decisions have also addressed and rejected constitutional challenges to the *qui tam* provision, including at least one other within the 11th Circuit. *See United States ex rel. Wallace v. Exactech, Inc.*, 703 F. Supp. 3d 1356, 1363–66 (N.D. Ala. Nov. 20, 2023) (finding *qui tam* provision constitutional); *see also United States ex rel. Miller v. ManPow, LLC*, No. 2:21-cv-05418-VAP-ADSx, 2023 WL 8290402 (C.D. Cal. Aug. 30, 2023) (constitutional); *United States ex rel. Thomas v. Care*, No. CV-22-00512-PHX-JAT, 2023 WL 7413669, *2–5 (D. Ariz. Nov. 9, 2023) (constitutional). *But see United States ex rel. Shepherd v. Fluor Corp., Inc.*, No. 6:13-cv-02428-JD, 4–6 (D.S.C. Sept. 13, 2024) (deferring issue to summary judgment). Indeed, in *Exactech,* the court explicitly rejected an Appointments Clause argument similar to the one raised successfully in *Zafirov*, concluding that relators are not officers because their authorization to litigate under the FCA is not permanent, but "temporary and exist[s] only for the duration of a particular lawsuit."

Yet, if or when this issue reaches the Supreme Court, it could find a friendly ear, the most obvious being Justice Clarence Thomas. In his dissent in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, a case examining DOJ's dismissal authority under 31 U.S.C. § 3730(c)(2)(A), Justice Thomas described the *qui tam* provision as "unusual" and "unique," and questioned its constitutionality. He wrote that the Constitution grants

> . . . "[t]he entire 'executive Power' [] to the President alone." . . . "[C]onducting civil litigation . . . for vindicating public rights" of the United States is an "executive function[n]" that "may be discharged only by persons who are 'Officers of the United States' under the Appointments Clause, Art. II, § 2, cl. 2. . . . A private relator under the FCA, however, is not "appointed as an officer of the United States" under Article

> II. . . . It thus appears to follow that Congress cannot authorize a private relator to wield executive authority to represent the United States' interests in civil litigation.

Additionally, Justices Brett Kavanaugh and Amy Barrett filed a concurrence in *Polansky* expressing agreement with Justice Thomas' *qui tam* position. They noted that the *qui tam* provision is inconsistent with Article II and that private relators cannot represent the interests of the United States. And while Chief Justice John Roberts did not go quite as far—the majority opinion did not address any Article II concerns—he did indicate a level of interest and potential agreement with these concerns during oral argument, which could suggest sufficient interest by four Justices that would be needed to grant a *petition for certiorari* and hear a case on this issue.

A World Without Relators? Implications of Affirmation

Contractors and others who regularly do business with the Government will have to await the final resolution of this issue, which is likely many months (if not years) away. But even if the Supreme Court were to ultimately affirm this decision and strike the current *qui tam* provision, fraud will still be prosecuted—it might just look different.

Of course, Congress could potentially reimagine the *qui tam* provision in various ways, likely with strong FCA advocate Senator Chuck Grassley (R-IA)—who authored a 1986 FCA amendment allowing relators to share in FCA recoveries—at the helm.

Setting that aside, the added responsibility for prosecuting FCA actions would likely result in beefed-up attorney staffing within DOJ, including local U.S. Attorneys' Offices (USAO). As is, DOJ already brings (and recovers millions from) original actions each year, with a recent boom in such actions involving false claims for pandemic fraud. Indeed, DOJ brings and prosecutes its own FCA cases quite well.

DOJ also has policies and programs that it could expand or replicate to ensure it continues to learn of potential misconduct through whistleblowers. "Bounty programs," which award whistleblowers a portion of the recovery without participating in litigating the claim, have proven quite successful. The U.S. Securities and Exchange Commission whistleblower program has paid out more than $2 billion to more than 400 whistleblowers in the last 12 years. And the DOJ Criminal Division's whistleblower pilot program, launched in August 2024, has already demonstrated its utility by generating more than 100 submissions. There are also 10 USAO-specific whistleblower programs, and more in the works. Because most money recovered for the United States under the FCA stems from intervened cases, it is entirely plausible that whistleblower programs that provide incentives for reporting false claims allegations could serve as a viable alternative to the current *qui tam* model.

Conclusion

Regardless of whether *qui tam* actions survive this latest challenge, FCA cases are not going away. As we all wait to see where the chips fall, contractors should not take their foot off the gas on their compliance programs in hopes that FCA actions may diminish in likelihood. Rather, contractors should continue to maintain robust compliance programs to prevent, detect, and mitigate fraud and seek help from their in-house

and outside counsel whenever issues or questions arise.

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Wiley's cross-disciplinary White Collar Defense & Government Investigations and Government Contracts practices will continue monitoring this area for developments. Readers should contact the authors with any questions they may have.