WINSTON & STRAWN LLP

BLOG

U.S. Appeal in *Zafirov* May Lead to Circuit Split and SCOTUS Review of Constitutionality of FCA's Qui Tam Provisions

OCTOBER 30, 2024

Despite an earlier declination of intervention in *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, Case No. 8:19-cv-01236-KKM-SPF (M.D. Fla. Sept. 30, 2024), yesterday, the United States filed a notice of appeal of the Zafirov Court's September 30, 2024 decision to dismiss the case to the U.S. Court of Appeals for the Eleventh Circuit. The district court held in the underlying dismissal order that the *qui tam* provisions of the False Claims Act (FCA) are unconstitutional, echoing arguments made by certain justices in a recent FCA case before the U.S. Supreme Court.[1] The relator, Dr. Clarissa Zafirov, filed suit in 2019 against her employer, Florida Medical Associates, LLC, alleging that the physician practice group violated the FCA by misrepresenting patient medical conditions to Medicare. Like most relators, Zafirov did not assert that any of the alleged illegality harmed her personally; rather, she brought suit on behalf of the "real party of interest," the United States of America. The government had declined to intervene, leaving Zafirov to pursue the litigation on her own over the past five years. But yesterday, the United States filed its Notice of Appeal, opening the door for further review of the constitutionality of the FCA's *qui tam* provisions – including by the U.S. Supreme Court should there be a circuit split.

In her unprecedented decision, Judge Kathryn Kimball Mizelle granted the defendant's motion for judgment on the pleadings, accepting their argument that the FCA's *qui tam* provisions violate Article II of the U.S. Constitution's Appointments Clause. The court concluded that "[a]n FCA relator is an officer of the United States" and—despite the relator's best efforts to cite historical examples of the *qui tam* provision's implementation—Zafirov was "not constitutionally appointed" and, therefore, "dismissal is the only permissible remedy."[2]

The court reasoned that the *qui tam* provisions allow a relator to direct litigation and bind the federal government "without direct accountability" to anyone in the Executive Branch—all without the need to consult with the federal government before filing suit, receiving a commission from the President, or swearing an oath of loyalty to the United States.[3] This, the court reasoned, was contradictory to the Constitution's "executive Power" that is vested solely in the President, including the "'exclusive authority and absolute discretion' to determine who to investigate and which charges to prosecute."[4]

Instead, the court observed that a *qui tam* relator "enjoys unfettered discretion to decide whom to investigate, whom to charge in the complaint, which claims to pursue, and which legal theories to employ."[5] The court also noted that a relator can determine whether to appeal a final judgment and which arguments to preserve, "thereby shaping the broader legal landscape for the federal government"—decision-making power that vests in a relator "greater

independence than a Senate-confirmed United States Attorney or Assistant Attorney General, who must obtain the approval of the Solicitor General to appeal."[6] Finally, the court emphasized that the *qui tam* provisions create financial incentives for relators that encourage and empower them to "seek daunting monetary penalties against private parties on behalf of the United States in federal court"—all without an Executive Branch appointment to pursue such cases.[7]

The court also notably raised the "unclear role" of litigation-funding companies, which "heightens the tension between *qui tam* actions and ordinary Executive Branch practice."[8] The court acknowledged that a relator may sell portions of her interest in an FCA action to third parties, leading to situations where "the government might not know who is involved in FCA enforcement."[9] Citing comments made by a former DOJ official in 2020, the court noted that the department does not "really know the extent to which third party litigation funders are behind the *qui tam* cases that [the DOJ was] investigating, litigating, or monitoring," nor does it "know whether relators are sharing information with third party funders, or whether and to what extent the funders are exercising control over relators' litigation and settlement decisions."[10]

While *Zafirov* is a single ruling in a single case and is not binding authority, similar Article II arguments will undoubtedly be raised by FCA defendants in other jurisdictions. The United States' appeal to the Eleventh Circuit yesterday lays the foundation for a circuit split and opens the door for potential review of the constitutionality of the FCA's *qui tam* provisions by the U.S. Supreme Court. The defense's Article II arguments may be welcomed by at least three members of the High Court, as reflected by dissenting and concurring opinions filed by Justices Thomas, Kavanaugh, and Barrett in a recent case.[11] Justice Thomas, for his part, noted in his dissent that "there are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation."[12] The elimination, or even curtailment, of the *qui tam* provisions would have a significant impact on the government's ability to rely on relators to bring to its attention alleged violations of the FCA, thereby potentially limiting the use of the FCA as a primary enforcement tool to root out fraud and abuse. Since 1986, *qui tam* lawsuits have resulted in roughly 70% of the $75 billion recovered by the federal government in FCA actions. Judicial limitations on the FCA's *qui tam* powers may also open the door for a legislative fix to address the Article II infirmities accepted by the *Zafirov* court. We will continue to monitor this case, as well as related developments, and provide updates in the coming months.

If you have any questions regarding this or related subjects or if you need assistance, please contact Suzanne Jaffe Bloom (Partner and Co-Chair, Government Investigations, Enforcement, and Compliance Practice), Amandeep Sidhu (Partner, Government Investigations, Enforcement, and Compliance Practice), Reed Stephens (Partner, Government Investigations, Enforcement, and Compliance Practice), or your Winston & Strawn relationship attorney. You can also visit our Government Program Fraud and False Claims Act Playbook webpage and our Government Investigations, Enforcement, and Compliance Practice webpage for more information on this and related subjects.

---

[1] *United States ex rel. Polansky v. Exec. Health Res., Inc.*, Case No. 21-1052 (U.S. June 16, 2023).

[2] *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, Case No. 8:19-cv-01236-KKM-SPF, at *4 (M.D. Fla. Sept. 30, 2024).

[3] *Id.* at *2.

[4] *Id.* at *1 (quoting *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (quoting U.S. Const. art. II, § 1, cl. 1); and quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974)).

[5] *Id.* at *2.

[6] *Id.*

[7] *Id.* at *1 (quoting *Seila Law*, 591 U.S. at 219).

[8] *Id.* at *3.

[9] *Id.* (citing *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1100–03 (11th Cir. 2020)).

[10] *Id.* (citing Ethan P. Davis, Principal Deputy Att'y Gen., U.S. Dep't of Just., Remarks on the False Claims Act at the U.S. Chamber of Commerce's Institute for Legal Reform (June 26, 2020)).

[11] *United States ex rel. Polansky*, Case No. 21-1052 (U.S. June 16, 2023).

[12] *Id.*

5 Min Read

Authors

Suzanne Jaffe Bloom

T. Reed Stephens

Amandeep S. Sidhu

Related Capabilities

Government Investigations, Enforcement & Compliance

Government Program Fraud, False Claims Act & Qui Tam Litigation

Health Care

Related Professionals

Suzanne Jaffe Bloom

T. Reed Stephens

Amandeep S. Sidhu

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.

© 2024 Winston & Strawn LLP.