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Florida Ruling May Undermine FCA Whistleblowers' Authority

Article

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On September 30, 2024, a decision from the US District Court for the Middle District of Florida in *Zafirov v. Florida Medical Associates LLC* struck a blow to the False Claims Act that will deprive relators of their ability to bring suits under the FCA.

The FCA prohibits fraudulent claims for payment from the US and the withholding of payments owed to the US and provides for both criminal and civil actions. While the FCA reaches virtually anyone who does business with the government, the majority of cases relate to healthcare, defense spending and government contracts.

US District Judge Kathryn Kimball Mizelle dismissed a case against several Medicare Advantage organizations and providers on the grounds that an individual suing on behalf of the federal government under the FCA, also known as a relator, violates the Article II appointments clause of the US Constitution.

The court held that relators must be considered officers of the government and appointed in a manner consistent with the Constitution, given relators' ability to exercise significant authority to bring lawsuits on behalf of the US government.[1]

Under the FCA, any person may file a lawsuit in the government's name to enforce the statute.[2] The government then has an opportunity to intervene in the lawsuit or leave it to the relator to litigate under a procedure known as a *qui tam* lawsuit.

The *Zafirov* Effect

If the individual relator proceeds with the lawsuit, they may collect an award of up to 30 percent of the proceeds of the action.[3] Given this ability to collect

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proceeds, it is no surprise that individual relators bring the majority of FCA lawsuits.[4]

However, as the court took issue with in *Zafirov*, the FCA also gives the relator the ability to bind the federal government without first consulting with any officer and to pursue the litigation fully independently.[5] As the government declines to intervene in most actions, relators enjoy enormous freedom in bringing claims under the FCA.

In *Zafirov,* the relator Clarissa Zafirov, a board-certified family care physician, alleged that the defendants – medical providers including her former employers – mispresented patients' medical conditions to Medicare. The government decline to intervene in the suit and, therefore, Zafirov proceeded under the *qui tam* provisions of the FCA.

In 2021, more than five years into the litigation, the defendants moved for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The defendants argued that the FCA's *qui tam* provisions violated the Take Care and Vesting Clauses of Article II, due to the lack of removal authority and supervisory control over a relator, as well as the Appointments Clause of Article II, arguing that a relator is an improperly appointed officer of the US.

The court ruled for the defendants on the Appointments Clause question and therefore declined to address the arguments arising under the Take Care and Vesting Clauses.

In *Zafirov*, the court concluded that an FCA relator is an officer of the United States and must therefore be constitutionally appointed under the Appointments Clause.[6] Since Zafirov was not constitutionally appointed, the lawsuit was dismissed.

The court reasoned that relators under the FCA exercise the significant authority required to be considered officers of the US and occupy a continuing position established by law.

The court held that because an FCA relator "conduct[s] civil litigation in the courts of the United States for vindicating public rights," the relator wields significant authority as litigation is a "core executive power."[7]

The court also held that an FCA relator meets the requirements to be an officer of the US by holding a continuing position established by federal law. It does not matter that a relator does not continually fill their office, as relators still have statutorily defined duties, powers and emoluments.[8]

The court reasoned that FCA relators essentially "self-appoint as special prosecutors" whose scope of prosecutorial jurisdiction is "limited only by the complaint" which the relator creates and the FCA's "open-ended" jurisdictional provisions.[9]

Additionally, the court reasoned that a relator's position is not transient or fleeting because the position continues throughout the lawsuit, and the "power

to vindicate public rights through litigation" is more than incidental to the operations of government.[10]

Constitutional Grounds

Since an FCA relator meets both requirements to be considered an officer of the United States, a relator must be constitutionally appointed under Article II. There is no Article II exception for *qui tam* provisions, so because "the Constitution prevails over practice," the history of *qui tam* provisions cannot overcome clear Constitutional language and "well-settled" Article II jurisprudence.[11]

While Judge Mizelle's decision is at odds with decisions by the Fifth (en banc), Sixth, Ninth and Tenth Circuit Courts of Appeals, it builds on recent decisions by the US Supreme Court.

For example, since just 2018, the Supreme Court has held that US Securities and Exchange Commission administrative law judges, administrative patent judges, and the Directors of the Consumer Financial Protection Bureau and the Federal Housing Finance Authority are all executive officers due to their ability to enforce federal law.[12]

Chevron's Impact

The most obvious example of this trend is the recent overturning of *Chevron* deference by the Supreme Court this summer.[13] Now, instead of deferring to agency interpretations of ambiguous statutes, courts must now hear the interpretation brought by each party.[14]

This decision strips executive agencies of their ability to legislate in areas in which they are the clear experts, thus depriving them of much of their authority and opening challenges to established agency law.

Also, last year, in *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*, three Justices suggested that the *qui tam* provisions may be "inconsistent" with Article II, with Justice Thomas, for whom Judge Mizelle served as a law clerk, stating that "[t]here 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."[15]

In a case that likely will predict the fiscal impact of the *Zafirov* decision, the Supreme Court stripped the SEC of its ability to order disgorgement as a deterrent to defendants and to protect the investing public.[16]

This decision also brought the SEC's ability to obtain disgorgement at all into question. Perhaps more importantly, this decision reportedly cost the SEC $1.1 billion in recoveries as of 2019.

The *Zafirov* decision will likely see an even larger financial impact, as in 2023, where $2.3 billion of the total $2.6 billion of FCA recoveries came from relator *qui tam* lawsuits.

With a billion-dollar industry at risk by this case, the *Zafirov* decision is sure to be appealed. This decision will almost certainly be appealed to the US Court of Appeals for the Eleventh Circuit Eleventh Circuit and may end up before the Supreme Court.

Here, the continued constitutionality of *qui tam* provisions would undergo further rigorous examination under the cloud of numerous recent Supreme Court decisions favorable to the holding in *Zafirov*.

The Takeaways

This ruling on whistleblower rights carries significant implications. For whistleblowers, the decision potentially undermines their authority to initiate lawsuits on behalf of the government.

If upheld, *Zafirov* will significantly limit the capability to expose and rectify wrongdoings in a timely and effective manner. Furthermore, it poses a direct threat to whistleblower protection as it questions the constitutional viability of appointing relators.

As for companies, the changes could influence FCA litigation processes. A potential reduction in the number of claims pursued against them could be seen if relators lose capacity to initiate *qui tam* actions. The business community must strategically assess the evolving judicial landscape to understand its potential impact on compliance and internal reporting structures.

Companies may need to reinforce their internal whistleblower policies and encourage a culture of transparency to preemptively address possible violations. This would not only mitigate the risk of litigation but also uphold ethical business practices.

For legal professionals, the ruling invites deeper scrutiny into the balance between protecting whistleblowers and ensuring constitutional adherence. Stakeholders must remain vigilant as the legal discourse progresses, necessitating adaptations in corporate governance, legal strategy and policy advocacy to navigate the uncertainties presented by the judicial reconsideration of whistleblower laws.

As this case unfolds, it is set to significantly shape the jurisdiction and future of whistleblower rights and protections.

[1] *See U.S. ex rel Zafirov v. Florida Medical Associates, LLC*, No. 8:19-cv-1236, 2024 U.S. Dist. LEXIS 176626, ECF No. 346 (M.D. Fla. Sept. 30, 2024).

[2] *See* 31 U.S.C. § 3730(b)(1).

[3] *Id.* at 3730(d).

[4] *See Zafirov*, 2024 U.S. Dist. LEXIS 176626, at *7.

[5] *Id.* at *8.

[6] *Id.* at *14-15.

[7] *Id*. at *24, 29 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126, 140 (1976).

[8] *Id.* at *37-38.

[9] *Id*. at 38-39.

[10] *Id*. at *43-44.

[11] *Id*. at *46, 55.

[12] *See Lucia v. SEC*, 585 U.S. 237, 241, 244-51 (2018); *U.S. v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021); *Seila Law LLC v. CFPB*, 591 U.S. 197, 219-20 (2020; *Collins v. Yellen*, 594 U.S. 220, 250-53 (2021).

[13] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

[14] *Id.*

[15] *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J., dissenting), *id.* at 442 (Kavanaugh, J. concurring with Barrett, J.).

[16] *Kokesh v. SEC*, 581 U.S. 455 (2017).

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