Insights

Is the Heyday of Whistleblowers Coming to a Close?

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Under the False Claims Act ("FCA"), whistleblowers (known as *qui tam* relators) are able to initiate and direct the litigation of cases that seek recovery for alleged injuries to the federal government. 31 U.S.C. § 3730(b). The penalties for FCA violations are astronomical – with penalties up to $28,000 for each violation, plus three-times the amount of damages the government sustains as a result of the violation. 31 U.S.C. § 3729; 28 C.F.R. § 85.5(a), (d). As an incentive, *qui tam* relators stand to receive a windfall from the successful litigation or favorable settlement of FCA claims in the form of a 15-30% share of the total recovery, plus reimbursement of their attorneys' fees and costs. 31 U.S.C. § 3730(d). Given the high risk to FCA defendants and the high reward to *qui tam* relators, the number of cases (including meritless cases) has increased exponentially over the years.

Last year, when the Supreme Court issued its opinion in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023), three Justices raised serious concerns about the constitutionality of the FCA's *qui tam* device. In his dissent, Justice Thomas declared, "there is good reason to suspect that Article II [of the United States Constitution] does not permit private relators to represent the United States' interests in FCA suits." *Id.* at 451 (Thomas, J., dissenting). Echoing Justice Thomas' concerns, Justice Kavanaugh, joined by Justice Barrett, openly invited an Article II challenge to the FCA's *qui tam* device "in an appropriate case." *Id.* at 442 (Kavanaugh, J., concurring).

Since then, FCA defendants across the country have argued that theirs is the "appropriate case" for putting an end to the *qui tam* provisions of the FCA and other federal statutes. *See, e.g.*, *United States ex rel. Wallace v. Exactech Inc.*, No. 7:18-CV-01010-LSC (N.D. Ala.); *United States ex rel. Doe v. Planned Parenthood Fed'n of Am., Inc.*, No. 2:21-CV-00022-Z (N.D. Tex.); *United States ex rel. Duncan v. Mr. Cooper Grp.*, No. 3:23-CV-01113-E (N.D. Tex.); *United States ex rel. Cutler v. Cigna Corp.*, No. 3:21-cv-00748 (M.D. Tenn.); *Campaign Legal Ctr. V. 45Committee, Inc.*, No. 23-7040 (D.C. Cir.); *Nat'l Horesemen's Benevolent v. State of Texas*, No. 23-10520 (5th Cir.); *State of Oklahoma v. United States*, No. 23-402, 2023 WL 6881770 (U.S.). In a nationwide first, Judge Kathryn Mizelle in the Middle District of Florida found the FCA's *qui tam* provisions to be unconstitutional. *See United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, No. 8:19-cv-01236-KKM-SPF (M.D. Fla. Sept. 30, 2024).

In *Zafirov*, Judge Mizelle referenced Supreme Court cases that address the separation of powers inherent under the Constitution in contexts outside of the FCA. Under that clear line of precedent, Judge Mizelle found that relators exercise significant Executive authority and are thus officers of the United States. Notably, relators have the power to initiate and direct litigation and "enjoy[] unfettered discretion to decide whom to investigate, whom to charge in the complaint, which claims to pursue, and which legal theories to employ." *Id.* at 5. Relators also have the power to pursue an appeal, even though United States Attorneys and Assistant

Attorneys General – who have undergone the Senate confirmation process – must first obtain approval from the Solicitor General before they may take those acts on behalf of the government. *Id.* Because relators perform the duty of officers without being properly appointed under the guardrails imposed by the Appointments Clause of Article II, Judge Mizelle determined that the FCA's *qui tam* device violates the Constitution.

The *Zafirov* decision applies only to the defendants in that case and the decisions will almost certainly be appealed. However, *Zafirov* is a critical step in the right direction for FCA defendants defending *qui tam* claims. The decision gives defendants another tool in their arsenal for defending against FCA claims. The Seventh Circuit has previously upheld the FCA, but it has expressed a willingness to reconsider the issue. *See United States v. UCB, Inc.*, 970 F.3d 835, 849 (7th Cir. 2020) ("Our task is to apply the [FCA] until a party with standing convinces us or the Supreme Court that to do so would be unconstitutional.").

Keep in mind that even if the Supreme Court rules in *Zafirov* or some other "appropriate case" that the FCA's *qui tam* provision is unconstitutional, FCA claims will not just go away. As *Zafirov* notes, the government can still bring FCA claims in its own right. *Zafirov* at 4-5. But the government currently brings less than half of all new FCA matters outside of the *qui tam* process. Will whistleblowers still raise their grievances with the government if they lose their statutory finders' fee? Only time – and continued litigation – will tell.
