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Florida federal court strikes major blow to FCA whistleblowers

By Matthew E. Feinberg, Esq., PilieroMazza PLLC*

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In a prior blog (https://bit.ly/407z8DV), PilieroMazza discussed the Supreme Court's decision in *United States ex rel. Polansky v. Executive Health Resources, Inc*.

In that case, in his dissenting opinion, Justice Clarence Thomas referred to the qui tam provisions of the False Claims Act (FCA) as operating in "something of a constitutional twilight zone" and called into question whether relators have standing to pursue qui tam actions where the government declines to intervene in the litigation.

A recent decision offers defendants in FCA matters an additional defense to use when the government declines to intervene in litigation.

Specifically, Justice Thomas opined that "Congress cannot authorize a private relator to wield executive authority to represent the United States' interests in civil litigation." Based on Justice Thomas' opinion, which received some support from Justices Brett Kavanaugh and Amy Coney Barrett, PilieroMazza presumed that a case challenging the constitutionality of the qui tam provisions could be a "blockbuster in a future term."

A recent decision of the United States District Court for the Middle District of Florida pushes that issue to the forefront and offers defendants in FCA matters an additional defense to use when the government declines to intervene in litigation.

The case

In *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, Clarissa Zafirov filed a qui tam action under the FCA against her employer and various other defendants claiming that Florida Medical Associates misrepresented patients' medical conditions to Medicare resulting in unnecessary medical services. The government declined to intervene in the litigation.

Since filing the case in 2019, Zafirov controlled the litigation, deciding what claims to advance, what arguments to make, and what positions to take, all in the purported interest of the government but without the government's direction. The government's minimal participation in the litigation following its decision to decline to intervene was filing two "statements of interest" to express the government's opinion on specific issues.

After almost five years of litigation, the defendants filed a motion for judgment on the pleadings, arguing that the qui tam provisions of the FCA violate the Vesting and Take Care Clauses and Appointments Clause of Article II of the Constitution. "Article II of the Constitution reflects that 'the executive Power' — all of it — is 'vested in the President,' who must 'take Care that the Laws be faithfully executed.'" (Cleaned up.)

According to the defendants, the FCA creates a statutory vehicle that strips the President of executive power and hands it to the relator, violating the Constitution. Furthermore, the defendants argued that the FCA provides relators with power that only an "Officer of the United States" may wield, bypassing the appointment requirements for such officers. On these grounds, the defendants asked for the case to be dismissed with prejudice.

The ruling

The Court resolved the case on defendants' Appointments Clause arguments.

The Court ruled that a qui tam relator is an Officer of the United States because they possess civil enforcement authority on behalf of the United States.

First, the Court determined that an FCA relator must be considered an "Officer of the United States." The Court noted that "the President, as the head of the Executive Branch, has the power and the duty to enforce federal law." The Constitution presumes that lesser executive officers will assist the President in discharging such duties, so long as they "remain accountable to the President, whose authority they wield."

An individual is an officer of the United States if they "exercise significant authority pursuant to the laws of the United States" and

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"occupy a continuing position established by law." (Cleaned up.) Where an individual meets both requirements, the Constitution requires they be appointed consistent with the Appointments Clause.

The Court ruled that a qui tam relator is an Officer of the United States because they possess civil enforcement authority on behalf of the United States. Specifically, "[t]he FCA ... allows [relators] to litigate actions to final judgment and beyond. In the process, a relator often binds the federal government (sometimes even in future cases) and recovers punitive damages that flow to the public treasury."

Second, the Court held that relators hold a "continuing position established by law." This inquiry focuses on "tenure and duration" and whether an individual's duties are "occasional or temporary" as opposed to "continuing and permanent." The Court noted that a relator, in the context of the FCA, holds "statutorily defined duties, powers, and emoluments" indicating that the relator holds a continuing office.

In addition, the Court analogized the position of relator to the position of Independent Counsel, a position authorized to investigate and prosecute a single specific matter in accordance with the powers of the Department of Justice.

Ultimately, the Court concluded that both requirements were met to identify a relator as an "Officer of the United States." Because relators are not appointed in compliance with the Appointments Clause, the Court determined that the qui tam provisions of the FCA are unconstitutional.

The takeaways

The decision in *Zafirov* offers some key takeaways for FCA defendants:

(1) It is presently unclear whether *Zafirov* or the issues decided therein will gain traction in other courts, some of which are already considering Article II-based arguments. *Zafirov* is a first-of-its-kind decision and stands in contrast to a few prior decisions that reached a different conclusion, *i.e.*, that the qui tam provisions of the FCA do not violate the Appointments Clause. Other courts (indeed, other judges in the Middle District of Florida) may not be willing to go as far as the Court did in *Zafirov*. If that is the case, there may be little impact from the decision (outside the *Zafirov* litigation itself), at least until the appellate courts can weigh in. However, expect more defendants to litigate the Appointments Clause issue now that there is at least one decision supporting dismissal of non-intervened qui tam cases on Article II grounds.

(2) *Zafirov* offers defendants in non-intervened FCA cases another vehicle to challenge a relator's claims and potentially obtain early dismissal. Defendants should include Article II-based defenses in their responsive pleadings and consider whether the court or judge may be receptive to dismissal on Article II grounds. With the right judge, in the right case, a defendant may be able to obtain dismissal, even in a fact-intensive case where dismissal would otherwise not be available.

(3) *Zafirov* will be appealed to the Eleventh Circuit and likely the Supreme Court. As noted above, Justice Thomas' dissenting opinion in *Polansky* essentially invited the arguments that led to the *Zafirov* decision. In a concurring opinion, Justices Kavanaugh and Barrett noted that "the Court should consider the competing arguments on the Article II issue in an appropriate case." Based on those opinions, one can assume that at least three Supreme Court Justices would vote to consider the constitutionality of the FCA's qui tam provisions. It only takes four votes for the Supreme Court to take up a case. Because *Zafirov* broke the mold on the issue of the constitutionality of the qui tam vehicle, expect the Supreme Court to come up with sufficient votes to decide the issue once and for all, particularly if the Eleventh Circuit upholds the *Zafirov* decision (thereby creating a circuit split). Of course, before the case can reach the Supreme Court, it will need to go through the entire appellate process at the Eleventh Circuit. Even on an accelerated timeline, a final decision from the Eleventh Circuit may not be available until at least late 2025, and a Supreme Court decision may not be made until at least 2026. Until then, the constitutionality of non-intervened qui tam litigation likely will continue to be litigated throughout the country, potentially with conflicting results.

About the author

Matthew E. Feinberg is a partner at **PilieroMazza PPLC**, practice group chair of the firm's litigation and dispute resolution group, and chair of its False Claims Act and audits and investigations teams. He aids government contractors and commercial businesses with civil and appellate litigation and arbitration proceedings. He's based in Washington, D.C., and can be reached at mfeinberg@pilieromazza.com. This article was originally published Oct. 8, 2024, on the firm's website. Republished with permission.

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