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Zafirov Decision Sets Stage for Appellate Showdown Over Constitutionality of FCA's *Qui Tam* Provision

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For the first time ever, a judge has ruled that the *qui tam* provision of the False Claims Act (FCA), which whistleblowers have used to recover $52 billion on behalf of the government since 1986, is unconstitutional.

In *U.S. ex. rel. Zafirov v. Florida Medical Associates LLC* (*Zafirov*), [1] a whistleblower physician brought an FCA case against providers and a Medicare Advantage Plan for allegedly submitting false risk adjustment data to the Centers for Medicare and Medicaid Services. The relator posited that this was a scheme that yielded higher government reimbursement for services than was otherwise medically warranted. After five years of litigation, U.S. District Court Judge Kathryn Kimball Mizelle for the Middle District of Florida dismissed the whistleblower's suit because the FCA's "idiosyncratic" *qui tam* provision violates the Appointments Clause of Article II of the U.S. Constitution (the Appointments Clause). Article II, wrote Judge Mizelle, requires that the president, a court, or the head of a federal department appoint "Officers of the United States." [2] The test to determine whether a person is such an officer is whether the position (1) exercises significant authority pursuant to federal law and (2) is a continuing position established by law. [3]

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Judge Mizelle found that relators in FCA cases exercise significant authority pursuant to federal law by bringing civil enforcement cases on behalf of the federal government to vindicate a public right, litigating such cases to final judgment and beyond, binding the government by setting precedent, and recovering treble "punitive" damages for the public fisc. The court noted that the Department of Justice (DOJ) only intervenes in about 20 percent of *qui tam* cases, and even then the government has "limited control" over the suits because it must obtain judicial approval for voluntary dismissal. Conversely, relators remain parties after government intervention; have "unchecked" power and "unfettered freedom" to initiate, litigate, and appeal these actions; and are not limited by DOJ policy or the Justice Manual. The court's order describes relators as having "greater independence than a Senate-confirmed United States attorney or assistant attorney general."

Judge Mizelle also found that relators hold a "continuing position established by law" because, among other things, the relator's position is not limited in duration and is non-personal in nature, akin to a self-appointed special prosecutor. Ultimately the court concluded that relators are officers of the United States who must be appointed to their positions pursuant to the Appointments Clause and granted the defendants' motion for judgment on the pleadings because the relator was "unconstitutionally appointed" when she brought the lawsuit.

The *Polansky* Effect

Zafirov will most likely be appealed to the United States Court of Appeals for the 11th Circuit. On appeal, the District Court's conclusion that FCA relators exercise significant authority pursuant to federal law (and are therefore federal officers who require appointment) will have to be reconciled against the Supreme Court's recent holding in *U.S. ex rel. Polansky v. Executive Health Resources Inc.*,

where SCOTUS described the relator's control of a *qui tam* suit as being significantly more limited.

The *Polansky* Court reviewed the FCA's multiple restrictions on a relator's prosecution of a *qui tam* suit. For example, if the DOJ declines to intervene, the Government remains the "real party in interest," retains the right to stay discovery, and receives most of the lawsuit's ultimate financial recovery. If the DOJ intervenes, then the Government becomes a party, proceeds with the action alongside the relator, and acquires the right to dismiss the FCA suit despite the whistleblower's objections as long as the relator is provided notice and a hearing.

Importantly, the majority in *Polansky* held that pursuant to Section 3730(c)(3) of the FCA, the DOJ may intervene in a whistleblower's suit ***at any point in the litigation***, independent of the seal period, by showing "good cause." The DOJ can then dismiss a *qui tam* case over the relator's objections "whenever it has intervened" by meeting Federal Rule of Civil Procedure 41(a)'s lenient voluntary dismissal standard, which merely requires "a court order, on terms that the court considers proper." SCOTUS noted that Rule 41's dismissal standard "will be readily satisfied" by the DOJ's motion "in all but the most exceptional cases."

By applying Rule 41's lenient standard to the DOJ's dismissal motion in *Polansky*, SCOTUS adopted the Third Circuit's "Goldilocks" position. It rejected both a liberal standard advocated by the DOJ, which would have given the Government virtually unfettered discretion to dismiss pending FCA actions, and a more onerous dismissal standard advocated by the defendants. Although the DOJ's dismissal discretion is not absolute, the Government will meet the Rule 41 standard in FCA dismissal cases "[a]bsent some extraordinary circumstance." Accordingly, a relator's power is ultimately always limited by the DOJ's discretion to intervene and

dismiss at any point in the relator's litigation of an FCA case.

Nonetheless, the *Zafirov* order relied heavily on Justice Thomas' dissent in *Polansky* without acknowledging the lenient dismissal standard the majority opinion adopted. For further analysis of the *Polansky* decision, please see our previous blog.

Should the *Zafirov* defendants win on appeal and create a circuit split, SCOTUS will be called upon to resolve the constitutionality of the FCA's *qui tam* provision, which could fundamentally alter the landscape of fraud enforcement nationwide. For now, at least one court has ruled that *qui tam* whistleblowers should be out of business. We will continue to monitor developments in this space. If you have any questions about how this decision might affect you or your company, Akerman has an experienced team of health care litigators who can help.

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[1] *U.S. ex. rel. Zafirov v. Fla. Med. Assocs. LLC, et al.*, No. 8:19-cv-01236-KKM-SPF (M.D. Fla. Sept. 30, 2024) (granting Defendant's motion for judgment on the pleadings).

[2] Art. II. Sec. 2, Clause 2.

[3] *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976).
