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Blog Post

Update: Appellate Showdown Over FCA *Qui Tam* Provision's Constitutionality Reaches Eleventh Circuit

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As we anticipated in our October 17, 2024, blog, both the Government and the Relator have appealed the district court's decision in *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al.* (*Zafirov*), the first case to hold that the *qui tam* provision of the federal False Claims Act violates the Appointments Clause of the U.S. Constitution. Briefly, on September 30, 2024, the United States District Court for the Middle District of Florida reasoned that *qui tam* relators, as whistleblowers, step into the shoes of the federal Government to prosecute such claims. In so doing, the District Court held, relators wield executive power and exercise government authority when litigating FCA claims on the Government's behalf, thus triggering the Appointments Clause's requirement that the President, an executive agency department head, or a court appoint them as "officers of the United States."

Tension exists between this decision and SCOTUS' June 2023 decision in *Polansky* (see our blog about that decision here). How can whistleblowers wield executive power and government authority substantial enough to warrant a presidential appointment (*Zafirov*) when SCOTUS has held that the DOJ can intervene in a *qui tam* case at any time by merely showing "good cause," even purely for purposes of dismissing the litigation over the relator's objection (*Polansky*)? To do so, the

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Government need only meet Rule 41's lenient voluntary dismissal standard.

The Appellants seized upon this tension in their opening Eleventh Circuit briefs. The DOJ cited *Polansky* to support the Government's argument that relators do not exercise executive power or government authority sufficient to warrant the Appointments Clause's requirements. The DOJ argued that it retains the ultimate power of dismissal at all stages of FCA litigation, quoting SCOTUS' observation in *Polansky* that district courts should grant the DOJ's motion to dismiss FCA litigation "in all but the most exceptional cases."

Likewise, the Relator (Ms. Zafirov) argued that the DOJ retains "control over every aspect of the [FCA] litigation." The Relator further minimized the importance of indications in *Polansky* from Justices Thomas (dissent) and Kavanaugh and Barrett (concurrence) that they would entertain a constitutional challenge to the FCA's *qui tam* provision, explaining that their "mere musing" in dicta cannot overtake the consensus of precedent supporting the validity of the whistleblower provision, especially because the remaining six justices did not voice similar constitutional concerns.

Next up, the Appellees' response brief is due March 10, 2025. We are eager to see how they respond to the Appellants' arguments. An ultimate invalidation of the FCA's *qui tam* provision on constitutional grounds would completely change the landscape of fraud, waste, and abuse enforcement nationwide.

Stay tuned for our next update regarding this seismic litigation.