PUBLICATION

Zafirov Decision: A Turning Point or Just Another Chapter in Qui Tam?

Authors: Matthew Scott Chester, Emily Olivier Kesler
October 10, 2024

A tool long-favored by the plaintiffs' bar to extract big judgments and settlements from individuals and companies – the False Claims Act (FCA) – which allows individual whistleblowers to pursue alleged civil wrongdoers in the name of the United States, may suffer a fatal blow with a recent decision out of the U.S. District Court for the Middle District of Florida, which held that the FCA's private whistleblower provisions were unconstitutional. The case bears watching as it inevitably winds its way through the appellate process not only for its groundbreaking holding but also for the effect it may have on FCA enforcement; as the Department of Justice (DOJ) has advised, 2023 was another record-breaking year for FCA recoveries, with the government obtaining over $2.68 billion from FCA actions – the majority of which were filed by private whistleblowers.

In *United States ex rel. Zafirov v. Florida Medical Assocs., LLC* (Zafirov), U.S. District Court Judge Kathryn Kimball Mizelle ruled that *qui tam* lawsuits are unconstitutional because they violate Article II of the Constitution's Appointments Clause. Although Judge Mizelle is not the first judge to weigh in on this constitutional issue, she is the first to make an affirmative and dispositive finding of unconstitutionality. As a result, this case is ripe for appeal, not only to the U.S. Court of Appeals for the Eleventh Circuit, but also eventually up to the U.S. Supreme Court and, depending on which way the Supreme Court would ultimately rule, could have a lasting impact on how FCA cases are litigated.

The FCA provides that private parties known as relators may bring *qui tam* suits "for [themselves] and for the United States Government." 31 U.S.C. § 3730(b)(1). Although the *qui tam* mechanism is anything but new – its creation dating back to 1863 when the FCA was enacted – the prevalence of its use is something that has increased over the last several decades and, with this increase, its constitutionality has also been called into question in more recent years by, among others, Justices on the Supreme Court. Most recently, in *United States ex rel. Polansky v. Exec. Health Res., Inc*., Justice Clarence Thomas – whom Judge Mizelle clerked for – indicated 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." 599 U.S. 419, 449 (2023) (Thomas, J., dissenting). In a concurring opinion for this same case, Justices Brett M. Kavanaugh and Amy Coney Barrett conveyed their agreement that this constitutional issue is something that the Court should consider in a future case. *Id.* at 442 (Kavanaugh and Barrett, J., concurring).

With this opening by the Supreme Court, defendants in cases across the country have been filing various motions seeking to dismiss actions that were initiated by relators pursuant to the FCA. In *Zafirov*, the defendants did so via a motion for judgment on the pleadings, challenging the relator's ability to proceed based upon several Article II Clauses – the Appointments Clause, the Vesting Clause, and the Take Care Clause. Ultimately, Judge Mizelle found that the relator's prosecution of the action violated the Appointments Clause, declining to address the Vesting and Take Care Clause arguments entirely. This article's discussion of the arguments is similarly limited to the Appointments Clause

The Constitution requires "Officers of the United States" to be appointed by "the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl.2. Supreme Court precedent recognizes two requirements for an individual to qualify as an "officer." The individual must: (1) exercise "significant authority

pursuant to the laws of the United States"; *and* (2) "occupy a continued position established by law." *See Lucia v. SEC*, 585 U.S. 237, 245 (2018). In her 53-page opinion, Judge Mizelle concluded that the relator satisfied both prongs and as such, constituted an "Officer[] of the United States." More specifically, Judge Mizelle's opinion highlighted the significant authority wielded by the relator from the outset of the case (when she decided which defendants to sue and which claims to raise), through discovery (when she decided what evidence to obtain), and into litigation (when she decided which motions to pursue). In addition, relators exercise authority over whether and which cases to bring to final judgment and appeal, resulting in potentially detrimental binding future precedent. It should be noted that Judge Mizelle's conclusion that the relator qualified as an "officer" of the United States appears to be consistent with a recent Supreme Court trend – cited in *Zafirov* – holding officials who play a role in enforcing or administering federal law are "officers" of the Government[1]. Judge Mizelle next found that although a relator typically only occupies his/her position in one case, "the office of an FCA relator is continuous even if not continually filled" comparing the relator's role to that of a special prosecutor or bank receiver. And, because the relator had, in Judge Mizelle's words, "appointed herself" as an "Officer[] of the United States[,]" she lacked proper appointment under the Constitution, and therefore, the only appropriate result was dismissal with prejudice as to the relator.

Undoubtedly, Judge Mizelle's decision will be appealed to the Eleventh Circuit Court of Appeals. Although the Eleventh Circuit previously declined to address the constitutionality of *qui tam* actions in *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089 (11th Cir. 2020), Judge Mizelle's opinion and holdings in *Zafirov* would squarely place it before the Eleventh Circuit for decision. Should the Eleventh Circuit affirm Judge Mizelle's decision, it would create a circuit split, as the Fifth[2], Sixth[3], Ninth[4], and Tenth[4] Circuits ruled – prior to *Polansky* – that FCA *qui tam* actions do not violate Article II of the Constitution's Appointments Clause, making the case ripe for Supreme Court certification. Regardless of the outcome in the Eleventh Circuit, the Supreme Court could still grant certification of this case if there are enough Justices who agree that it is an "appropriate case" for "consider[ing] the competing arguments on the Article II issue[.]" *See Polansky*, 599 U.S. 419, 442 (Kavanaugh and Barrett, J., concurring).

What does Judge Mizelle's opinion mean for currently pending cases? As the *Zafirov* case proceeds through the appellate process, we would expect to see more challenges to the constitutionality of *qui tam* actions, which might result in more district courts following Judge Mizelle's lead – making Supreme Court review all the more likely. Further, if affirmed, *Zafirov* would require the dismissal of any currently pending FCA cases initiated by private whistleblowers, and given the lag time between when a *qui tam* action is typically filed and when litigation may resume should the DOJ seek to re-file such cases, limitations grounds could preclude the reinstatement of such cases.

If the relator provisions of the FCA are invalidated by the Supreme Court, what will *Zafirov*'s holding do to the future of FCA litigation? It does not appear that FCA litigation will be a "dead letter." While it might be fair to assume that fewer FCA cases would be filed in this scenario, *Zafirov* might also require the Government to devote additional resources to investigating and litigating FCA cases – rather than simply relying on and benefitting from a private relator's investigation of such claims. Moreover, though bureaucratically cumbersome, a "fix" for the Appointments Clause violation – including, for instance, the executive branch appointing certain whistleblowers as inferior officers of the government – might theoretically be possible.

If you have questions regarding the impact of this decision or FCA matters, please reach out to Emily Olivier Kesler, Matthew S. Chester, or any member of Baker Donelson's Government Enforcement and Investigations Group.

[1] *See Collins v. Yellen, 594 U.S. 220, 250-53 (2021) (holding the Director of the Federal Housing Finance Authority was an "officer"); United States v. Arthrex, 594 U.S. 1, 13 (2021) (holding administrative patent judges were "officers" of the United States); Seila Law v. Consumer Financial Protection Bureau, 591 U.S. 197,*

219-20 (2020) (holding the Director of the Consumer Financial Protection Bureau was an "officer"); Lucia v. Securities and Exchange Comm'n., 585 U.S. 237, 241, 244-51 (2018) (holding SEC administrative law judges were "officers").

[2] *Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753-58 (5th Cir. 2001) (en banc).*

[3] *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1040-42 (6th Cir. 1994).*

[4] *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 751-58 (9th Cir. 1993).*

[5] *United States ex rel. Stone v. Rockwell Int'l Corp., 282 F.3d 787, 804-07 (10th Cir. 2002).*