The False Claims Act: How a Recent Decision Rejecting Qui Tam Lawsuits May Impact Its Enforcement

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For over 160 years, the False Claims Act's (FCA) qui tam provision has allowed individuals to bring claims on behalf of the federal government in exchange for a portion of the recovery. On Sept. 30, 2024, a Middle District of Florida court ruled the qui tam provision unconstitutional, finding that the relator—the party that brings the claim on behalf of the government—wields executive power and duties akin to an "officer of the United States" and therefore must be appointed pursuant to the appointments clause of the U.S. Constitution. Because the relator was not so appointed, her suit on behalf of the government violates the Constitution and must be dismissed.

The decision in *Zafirov* marks the first successful Article II challenge to the qui tam provision, but it is not entirely a surprise. Three members of the U.S. Supreme Court—Justices Clarence Thomas, Amy Coney Barrett and Brett Kavanaugh—recently telegraphed their willingness to examine the constitutionality of the qui tam provision under the appointments clause. The decision comes as President-Elect Trump's administration touts deregulation and downsizing the federal government. This article discusses the context, this decision and implications for future FCA cases.

The FCA's Qui Tam Provision

The FCA's qui tam provision is a key anti-fraud enforcement tool. It allows a private individual, known as a "relator," to bring suit on behalf of the federal government against any party committing fraud on the government. The government may intervene and effectively take over; dismiss the case, even over a relator's objection; or decline to intervene, allowing the relator to pursue the case on the government's behalf. The qui tam provision is designed to incentivize relators to come forward. Relators may receive a significant portion of the total recovery: 15-25% in intervened cases and 25-30% in nonintervened cases. FCA cases now skew heavily toward relator-initiated claims. In 2023, 87% of FCA recoveries came from relator-initiated cases.

Constitutional Challenges

Defendants' previous constitutional challenges to qui tam cases had little success. For example, defendants' challenges to relators' Article III standing failed with the Supreme

Court's decision in *In Vermont Agency of Natural Resources v. Stevens*, 529 U.S. 765, 771 (2000). The court held that relators had standing to sue on behalf of the government even though relators themselves did not suffer the requisite injury because relators, as partial assignees of the government's claim, could assert the government's injury.

Challenges under Article II previously fared no better. Article II provides that executive power is "vested" in the president, who "shall take care that the laws be faithfully executed." Defendants have argued that relators infringe on this by litigating their cases without government approval or oversight. But courts disagreed, finding that mechanisms such as the government's ability to intervene, dismiss, settle, request documents, and pursue alternative remedies provide sufficient authority over the litigation. See, e.g., R*iley v. St. Luke's Episcopal Hospital,* 252 F.3d 749, 753 (5th Cir. 2001). U.S. Courts of Appeals for the Fifth, Sixth, Ninth, and Tenth Circuits also rejected Article II challenges under the appointments clause, holding that relators are not "officers" of the United States.

Although the Supreme Court has yet to decide this specific Article II challenge, Article II was before the court last year, when a relator challenged the government's dismissal authority in non-intervened cases. In *Polansky v. Executive Health Resources*, 599 U.S. 419 (2023), the government sought to dismiss a qui tam case years after initially declining to intervene. The Court found this permissible under the statute. Thomas dissented and said the case should be remanded to consider the "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 concurrence, Kavanaugh and Barrett largely agreed, suggesting such Article II challenges may have merit and should be considered in an appropriate case.

The 'Zafirov' Decision

Zafirov, a physician relator, sued her former employer, claiming the company misrepresented patients' conditions to overbill Medicare. The government declined to intervene, the relator elected to move forward, and the parties litigated the matter for five years. After Thomas issued his dissent in *Polansky,* the defendants moved for judgment or dismissal based on Article II challenges, repeatedly citing Thomas.

The court agreed with the defendants, holding that a relator is an officer of the United States and therefore must be appointed consistent with Article II. Much of the decision spells out the defined duties, powers, and emoluments that evidence relators are officers under the law, as they: exercise "significant authority" of initiating and prosecuting a case, including "whom to investigate, whom to charge in the complaint, which claims to pursue, and which legal theories to employ;" exercise "core executive powers" in pursuing the case, such as "which motions to file, and which evidence to obtain;" they occupy a "continuing position established by law;" and may receive up to 30% of the federal funds recovered. Accordingly, relators are

officers who must be appointed by the president, the courts, or heads of departments, per the Appointments Clause. Without proper appointment, relators' FCA claims are unconstitutional.

The court rejected the relator's argument that historical qui tam and bounty statutes, passed by early U.S. lawmakers including many of the Constitution's framers, show that there is no constitutional tension. The decision emphasized that clear constitutional language "prevails over practice." The decision also rejected the contrary holdings of four U.S. Courts of Appeals as ignorant of "the long line of Supreme Court precedents explaining that enforcement authority and charging discretion are core executive power." And the decision pointed to a recent Supreme Court decision that Article II limits the power of federal agencies, highlighting that the appointment requirement keeps the Executive Branch accountable to the president, (citing *Seila Law v. CFPB,* 591 U.S. 197 (2020)).

Possible Impact on FCA Landscape

The government and Zafirov filed notices of appeal. If the Eleventh Circuit upholds the decision, it would create a circuit split and ripen the issue for the Supreme Court. In the meantime, FCA litigators should pay attention to the following potential changes:

More (aggressive) constitutional arguments from the defendants. The defendants may look to raise this and other constitutionality arguments to dispose of qui tams or related actions. Although *Zafirov* is a nonintervened case, some of the decision's logic could apply to any FCA case brought by a relator. Under *Zafirov*, the power to initiate an action on behalf of the government is reserved for constitutionally appointed authorities. Following *Zafirov*, companies in receipt of DOJ Civil Investigative Demands (CIDs) as part of an FCA investigation in the same district cited *Zafirov* to petition the court to set aside the CIDs as furthering an unconstitutional action, where the government had yet to make an intervention decision. See ECF No. 1, Case No. 8:24-cv-02420. Such "fruit of the poisonous tree" arguments are likely to become more frequent in FCA cases.

More (but selective) government intervention. The DOJ may intervene more frequently to ensure qui tam cases are not dismissed under the above logic. Such intervention requires federal resources and therefore is likely to be selective, focusing on cases the government deems strongest and, potentially, based on which location/circuit a case is filed.

More government dismissals. The DOJ may also more frequently exercise its authority to dismiss FCA actions, particularly those it considers meritless, opportunistic and contradictory to policy. By weeding out certain cases, the government may aim to avoid risking bad precedent, particularly for a lower-value matter.

More activity under seal. As the decision involved a non-intervened case, it may incentivize the government to do more before the intervention decision is made—generally while the case is sealed. The government can decline to intervene and let the case ride, but may now face an increased likelihood of court dismissal. The result may be more time under seal and more government investigative work, including document requests and interviews, during that period.

More aggressive, but selective, whistleblowers. The possibility of an end to nonintervened qui tam cases may incentivize relators to bring cases immediately and/or take steps toward earlier recoveries, rather than proceed with a lengthy litigation. Whistleblowers may look to file cases outside of the Middle District of Florida and other districts where a large portion of judges have similar backgrounds as Judge Kathryn Kimball Mizelle in *Zafirov* (a Thomas clerk and appointed by Trump).

Conclusion

Zafirov holds the possibility of changing the FCA landscape. But while the full impact remains to be seen, it is likely to impact litigants' choices immediately. Defendants have more persuasive authority they can rely on in raising constitutional challenges; the government may exercise more oversight and get involved in more FCA cases; and relators may become more aggressive as the ground shifts under them.

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