POLSINELLI

Publications

October 4, 2024 • Updates

Federal District Court Rules Qui Tam Whistleblower Enforcement of False Claims Act Unconstitutional

On September 30, 2024, Judge Mizelle, a federal judge in the Middle District of Florida, ruled that the False Claims Act's (FCA) *qui tam* enforcement provision is unconstitutional, a ruling that, if followed by other courts, could have significant impact on FCA enforcement by relators in pending and future non-intervened cases. The court concluded that under the FCA, relators—private parties that bring suits on behalf of the government—operate as "Officers" of the executive branch of the United States who must be properly appointed pursuant to Article II of the U.S. Constitution. *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, Case No. 8:19-cv-01236, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024) (Mizelle, J.)

Background of Zafirov Case

The case was brought by relator Clarissa Zafirov against certain medical providers, claiming the providers had submitted false claims by misrepresenting patients' medical conditions to Medicare. The government declined to intervene in the case, leaving Zafirov to litigate the case herself pursuant to the FCA's *qui tam* provision and continue to seek a percentage of any potential recovery. After years of motion practice and discovery, the defendant providers filed a motion for summary judgment on the pleadings raising several constitutional challenges to the FCA's *qui tam* provision.

The Court's Holding that the Qui Tam Provision is Unconstitutional

In finding that an FCA relator is an "Officer" under Article II, the court assessed whether a relator exercises "significant authority pursuant to the laws of the United States" and occupies a "continuing position established by law." *Lucia v. SEC*, 585 U.S. 237, 245 (2018). The court concluded that a relator's power to institute and prosecute a suit on behalf of the federal government qualified as exercising "significant authority" under federal law. In so concluding, the court focused on a relator's ability to file an FCA case without prior oversight by the federal government that seeks "daunting," "substantial," or "punitive" penalties—a characterization with which FCA defendants facing prosecution would likely agree. The court then found that a relator holds a "continuing position," even though he or she ordinarily only prosecutes a single action. As support, the court analogized a relator to temporary officials whom courts have previously held meet this

Related People

- Kevin M. Coffey
- Gregory R. Jones
- Dayna C. Staron
- Colin J. Martindale

Related Capabilities

- Government Investigations
- False Claims Act Defense

standard, such as a special prosecutor, independent counsel, and a bank receiver.

Because Zafirov, as a FCA relator, was an Article II Officer who was not properly appointed (for example, by the President, heads of departments, or courts), the court concluded she lacked authority to prosecute the case and dismissed it with prejudice. Zafirov unsuccessfully argued that the FCA's *qui tam* provision should survive constitutional scrutiny because of the "historical pedigree" of relator-driven FCA actions since the Civil War. As the court concluded: "the Constitution prevails over practice, especially when the text is clear[.]"

The Future for Qui Tam Relators

This decision almost certainly will be appealed to the Eleventh Circuit, which could create a circuit split if upheld between the Eleventh Circuit and contrary decisions from the Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeals. At least three Justices appear willing to address the issue at the Supreme Court as well, based on concerns they expressed in concurring and dissenting opinions that the FCA's *qui tam* provision may violate Article II. *See United States ex rel. Polansky v. Exec. Health Resources, Inc.*, 559 U.S. 419, 442 (2023) (Kavanaugh, J., concurring (joined by Barrett, J.,)); *id.* at 449 (Thomas, J., dissenting). In the *Zafirov* case, Judge Mizelle relied heavily on these non-controlling opinions.

For now, this ruling only applies to the parties in the *Zafirov* case and, potentially more broadly, to FCA cases where the government has not intervened. However, health care providers and other industries that receive federal funds should continue to monitor whether additional courts follow its reasoning and assess implications it may have on any pending *qui tam* matters. A shift in the legal landscape in this area would have a profound effect on FCA enforcement, as the majority of FCA actions are brought by private parties under the *qui tam* provision. In fiscal year 2023 alone, $2.3 billion of the $2.68 billion recovered in FCA settlements and judgement arose from *qui tam* cases.

Middle District of Florida: The Epicenter of FCA Litigation

The *Zafirov* opinion is likely to send ripples through the Middle District of Florida. With the local U.S. Attorney's Office and the U.S. District Court for the Middle District of Florida already managing one of the largest FCA caseloads in the country, this decision may significantly alter how these cases are approached and prosecuted within the jurisdiction moving forward.

And, while the immediate impact of *Zafirov* may be local, the Middle District of Florida's historically heavy FCA docket has played an outsized role in shaping FCA trends on a national scale.

In a 2021 analysis of FCA litigation trends, Lex Machina—a legal analytics platform developed by LexisNexis—highlighted that the Middle District of Florida had the highest number of FCA cases filed between 2016 and 2020, totaling 191 cases. This high volume of FCA filings is largely attributed to the prevalence of Medicare fraud cases in Florida, reflecting the state's significant health care industry and the corresponding oversight challenges.

Further underscoring the Middle District of Florida's central role in shaping FCA litigation, Lex Machina reported that eight out of the nineteen judges with the highest volume of FCA cases nationwide were from this district. Notably, Judge Moody was listed as the sixth most active judge in FCA cases in the United States during this period. Judge Mizelle

clerked for Judge Moody after graduating from law school in 2012.

During this period, Lex Machina also identified Polsinelli as one of the 20 most experienced and active law firms handling FCA cases, underscoring the firm's role in this evolving landscape.

Judge Mizelle's FCA Expertise Rooted in Middle District of Florida and Influential Clerkships

Judge Mizelle was appointed to fill a vacancy on the U.S. District Court for the Middle District of Florida in 2020. After graduating from the University of Florida's Fredric C. Levin College of Law, she clerked for Judge Moody in the Middle District of Florida, where she assisted Judge Moody in managing his heavy FCA docket.

Following her clerkship with Judge Moody, Judge Mizelle went on to clerk for Judge Pryor on the U.S. Court of Appeals for the Eleventh Circuit from 2013 to 2014. She also served in various roles at the U.S. Department of Justice from 2014 to 2018. In 2018, Judge Mizelle clerked for Justice Clarence Thomas of the U.S. Supreme Court. As discussed above, Justice Thomas expressed skepticism about the constitutionality of the FCA's *qui tam* provisions in his dissenting opinion in *Polansky*, an argument that Judge Mizelle later echoed in her own ruling finding the FCA's qui tam provisions unconstitutional.

After her Supreme Court clerkship, Judge Mizelle briefly worked in private practice at a large national law firm before being appointed to the federal bench.

The FCA's history spans more than two centuries, with numerous amendments and interpretations along the way, but few have carried the potential for significant impact like Judge Mizelle's decision in *Zafirov*, which could redefine the role of private whistleblower enforcement under the statute.

Polsinelli will continue to monitor this matter and provide updates.