Appeals We're Watching: Recent Appeal Potentially Sets Up SCOTUS Ruling on the Constitutionality of Whistleblower-Controlled False Claims Act Litigation

Description

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In October of 2024, the United States appealed the federal district court's judgment in *United States ex rel. Zafirov v. Florida Medical Associates, LLC*.[1] In that case, the court held that the statute authorizing whistleblowers to sue in the name of the United States to recover for false claims was unconstitutional. The *Zafirov* decision comes after three Justices of the U.S. Supreme Court called into question the "qui tam" provision of the False Claims Act (FCA) and expressed doubt over its constitutionality in *United States ex rel. Polansky v. Executive Health Resources, Inc.*[2] If upheld on appeal, the *Zafirov* decision would set up a circuit split and invigorate a defense that (at least before *Polansky*) had received the cold shoulder from other courts. We're watching this appeal because it could have significant ramifications, potentially curtailing a procedural mechanism that has been around since the era of the Civil War and fundamentally altering how many FCA cases would proceed (if they proceed at all).

The False Claims Act

Also known as Lincoln's Law, the 160 year-old FCA prohibits fraudulent claims for payment from the United States and the withholding of payments owed to the United States. It was enacted during the Civil War to combat fraud, such as that by unscrupulous vendors selling defective goods to the Union Army.[3] To encourage private persons to blow the whistle on fraud, the FCA contains a "qui tam" provision, which authorizes any "person" to enforce the statute by filing a lawsuit in the government's name.[4] If that person, known as a "relator," prevails, she may collect an "award" of up to thirty percent of the proceeds of the action.[5] After filing the complaint, the government may choose to intervene as a plaintiff in the action, which transfers "the primary responsibility for prosecuting the action" from the relator to the government.[6] In the vast majority of actions, the government decides not to intervene and the relator prosecutes the case.

The Appointments Clause of the Constitution

The "private person suing in the name of the government" authorization has come under scrutiny as potentially in conflict with powers afforded to the President under Article II of the Constitution. This is because under the Constitution, "the executive Power shall be vested in a President of the United States of America."[7] The Supreme Court has held that important to such power is the "exclusive authority" to determine who to investigate and which charges to prosecute.[8] Likewise, "the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court" is "a quintessentially executive power."[9]

As the President is only a single individual, the "Framers expected that the President would rely on subordinate officers for assistance" in discharging his duties.[10] To ensure accountability, the Appointments Clause of the Constitution requires Officers of the United States to be appointed by the President, with the advice and consent of the Senate, with inferior officers to be appointed by "the President alone, in the Courts of Law, or in the Heads of Departments."[11] Anyone who "exercise[s] significant authority pursuant to the laws of the United States" and who occupies a "continuing position established by law" qualifies as an officer.[12] If an individual satisfies both conditions, the Constitution requires that she be appointed consistent with the Appointments Clause.

The *Zafirov* Decision

In the *Zafirov* case, the government declined to intervene and the plaintiff-relator (Zafirov) litigated the action on behalf of the United States for five years. In early 2024, relying on the doubt expressed by Justice Thomas and others in *Polansky*, the defendants moved for judgment in their favor, arguing that the FCA's qui tam provision violates Article II's Appointments Clause, the Take Care Clause, and the Vesting Clause.

The district court ruled in the defendants' favor on the Appointments Clause argument, holding that the position of qui tam relator functioned as an officer of the United States because she exercised "significant authority" and occupied a "continuing position" under the law.[13] With respect to the former, the court observed that "the power to initiate an enforcement action in the name of the United States to vindicate a public right constitutes 'significant authority pursuant to the laws of the United States.'"[14] The FCA confers that power to relators.

With respect to the "continuing position" element, the court noted that this issue turned on an individual's statutory duties, powers, and emoluments. The FCA defined all three for the plaintiff-relator: (1) The relator had a statutory duty to file the complaint under seal, make various disclosures to the government, and afford the government time to investigate; (2) the FCA granted the relator "unfettered freedom to prosecute the action as she determines best," a substantial statutory power; and (3) "if the action succeeds, the FCA compensates a relator" with a statutory emolument of a percentage of the judgment.[15]

Having concluded that the position of relator constituted an officer of the United States, the court ruled that Zafirov had not been appointed in a constitutional manner because she was self-appointed, as allowed by the qui tam provision of the FCA. The district court concluded: "That arrangement directly defies the Appointments Clause by permitting unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public."[16] Zafirov and the government have both appealed.

Key Takeaways

The *Zafirov* decision may be the vehicle by which the Supreme Court ultimately weighs in on the constitutionality of the FCA's qui tam provision. Although unaddressed by the First Circuit, other federal circuit courts have rejected the Appointments Clause contention that prevailed in *Zafirov* (although these are rulings that predate *Polansky*). Moreover, other courts post-*Zafirov* may be more open to following the doubt cast in *Polansky*, and join *Zafirov* in reaching the conclusion that the FCA's qui tam provision is unconstitutional. Further developments in this area of the law seem likely, so stay tuned.

Consider engaging Partridge Snow & Hahn's Litigation Practice Group to answer questions regarding the implications of this decision. The above is for general informational purposes only and does not represent our advice as to any particular set of facts? nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome.

[1] No. 8:19-cv-01236-KKM-SPF, 2024 WL 4349242, at *1 (M.D. Fla. Sept. 30, 2024).

[2] *United States ex rel. Polansky v. Executive Health Resources, Inc.* 599 U.S. 419, 442 (2023) (Kavanaugh and Coney-Barrett, JJ., concurring); *id.* at 449-52 (Thomas, J., dissenting.). The question as to the constitutionality of the qui tam provision was not before the Court.

[3] *See Polansky*, 599 U.S. at 424.

[4] 31 U.S.C. § 3730(b); *see Polansky*, 599 U.S. at 424-25.

[5] 31 U.S.C. § 3730(d).

[6] *See* 31 U.S.C. § 3730(c).

[7] U.S. Const. art. II, § 1, cl. 1.

[8] *United States v. Nixon*, 418 U.S. 683, 693 (1974).

[9] *Seila Law LLC v. CFPB*, 591 U.S. 197, 219 (2020).

[10] *Id.* at 203-04.

[11] *See* U.S. Const. art. II, § 2, cl.2.

[12] *Lucia v. SEC*, 585 U.S. 237, 245 (2018).

[13] *Zafirov*, 2024 WL 4349242, at *1.

[14] *Id.* at *6 (citing *Lucia*, 585 U.S. at 245).

[15] *Id.* at *11.

[16] *Id.* at *19.

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