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Client Alert

White Collar Defense

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Federal Government Asks 11th Circuit To Reverse Decision Declaring Qui Tam Provision of the False Claims Act Unconstitutional

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In October 2024, we wrote about U.S. District Judge Kathryn Kimball Mizelle's dismissal of a whistleblower action, deeming the *qui tam* provisions of the False Claims Act (FCA) unconstitutional.[1] The Department of Justice (DOJ) intervened on appeal and filed a brief late last week to the 11th Circuit seeking reversal of Judge Mizelle's first-of-its-kind decision. This case is critical to keep an eye on because the ruling, if upheld, could have widespread impact on FCA enforcement—including in health care enforcement—across the country.

Background

Since its inception, the FCA has been used by whistleblowers (called "relators") to bring *qui tam* lawsuits on behalf of the government. Since 1986, settlements and judgments under the FCA have exceeded $78 billion, including more than $2.9 billion in fiscal year 2024 alone.[2] Allowing private citizens to file whistleblower actions was intended to help the government root out fraud, recover ill-gotten government funds, and promote compliance with the FCA. In 2024, whistleblowers were party to 558 settlements and judgments and brought 979 new lawsuits, the highest number of *qui tam* lawsuits ever filed in a single year.[3]

Judge Mizelle's unconstitutionality ruling disturbed four decades of *qui tam* lawsuits. But it was not entirely out of the blue—in *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023), both Justice Brett Kavanaugh's concurring opinion, which Justice Amy Coney Barrett joined, as well as Justice Clarence Thomas' dissenting opinion, opened the door to such a ruling by expressly questioning the constitutionality of *qui tam* suits.

DOJ Intervention on Appeal

DOJ has now intervened in the *Zafirov* appeal for the limited purpose of defending the constitutionality of the *qui tam* provisions of the FCA. In asking the 11th Circuit to reverse Judge Mizelle's ruling, DOJ argues that the district court's decision was both incorrect and unprecedented, as every other court to have considered the constitutionality of the FCA's *qui tam* provisions since their inception has found them lawful. We summarize the key points of the government's argument below.

First, DOJ argues that the district court's opinion is contrary to *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), which, according to DOJ, makes clear that relators do not exercise executive power when litigating under the FCA because they are pursuing their private financial interest. DOJ also analogizes the *qui tam* provisions to other public-serving statutes that provide private rights of actions, and claims that allowing Judge Mizelle's opinion to stand could call all those other statutes into question.

Second, DOJ contends that the district court erred in holding that relators are acting as officers of the United States in violation of the appointments clause. FCA *qui tam* actions, DOJ asserts, do not implicate the appointments clause because relators are not government actors like, for example, members of the Federal Election Commission, independent counsel, or other government officials. Unlike individuals in those positions, relators do not wield government power. Instead, they pursue private interests and, in that respect, are more akin to private plaintiffs who sue under Title VII, antitrust laws, or the Clean Water Act.

DOJ also notes that relators' lack of executive power is evident in the procedural steps of a qui tam suit. Specifically, once a relator files a *qui tam* suit, the case usually does not proceed until the government reviews the matter and determines whether to intervene and proceed itself, intervene and move to dismiss, or allow the relator to litigate the case. According to DOJ, the government's review lays bare relators' lack of federal power in setting or swaying

government decision-making. This is so because government review ensures that actions proceed only when they are consistent with the government's priorities. Further, unlike government officers, relators do not occupy a continuing position within government—their role is personal, confined to a single case, and limited in time and scope. Third, DOJ argues that the district court failed to adequately consider the long history of relator actions, which the Supreme Court recognized in *Stevens*.

More than 30 amici have also weighed in on the matter, highlighting the profound effect the outcome of the appeal will have on the future of the FCA. There is not yet an indication of when oral argument will be held or when a ruling will be issued.

If you have any questions about this case, *qui tam* actions, or the FCA in general, please reach out to the White Collar Defense group at Lowenstein Sandler.

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[1] *See United States ex rel. Zafirov v. Florida Medical Associates*, LLC, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).

[2] *See* Press Release, U.S. Dep't of Justice, False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024 (January 15, 2025).

[3] *Id.*

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