PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 10 **NUMBER 12** **December 2024**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Julie Chee at 1-800-306-5230
Email: ..... Julie.Chee@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3385
Fax Number . . . . . (800) 828-8341
LexisNexis® Support Center . . . . . https://supportcenter.lexisnexis.com/app/home/

For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (518) 487-3385

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt)
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2024–Pub.4938)

Editor-in-Chief, Editor & Board of Editors

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Federal Judge Dismisses Qui Tam Case Based on Constitutional Concerns: Is the False Claims Act Qui Tam Era Coming to a Close?

By Thomas A. Coulter and Brian Stolarz*

In this article, the authors examine a recent decision by a federal district court in Florida ruling that the qui tam component of the federal False Claims Act is unconstitutional.

In a stunning, but not unexpected, case for all who follow the federal False Claims Act (FCA), a federal judge in the U.S. District Court for the Middle District of Florida has ruled that the qui tam component of the FCA is unconstitutional.

The case, *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*,[1] gives further vitality to the dissenting opinion of Supreme Court Justice Clarence Thomas in *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*,[2] which questioned the constitutionality of allowing a qui tam plaintiff's case to proceed when the government does not intervene in the case.

THE DECISION

In *Zafirov*, the Florida district court held that because a qui tam relator, who under the FCA can pursue actions on behalf of the government and share up to 30 percent of the recovery, is not appointed by the president and has no executive power, the relator cannot pursue a case in the name of the government. The court noted that a relator, who has not received a commission or sworn an oath of loyalty to the federal government, has no direct accountability to anyone in the Executive Branch, and "enjoys unfettered discretion to decide whom to investigate, whom to charge in the complaint, which claims to pursue, and which legal theories to employ."

Furthermore, the court noted that a relator determines whether to appeal, "thereby shaping the broader legal landscape for the federal government." In addition to the control of the litigation, the court stressed the unique financial constructs of the qui tam statute, stating that the reality is that a relator "seek[s]

---

* Thomas A. Coulter, a partner in the Washington, D.C., office of Norton Rose Fulbright US LLP, may be contacted at tom.coulter@nortonrosefulbright.com. Brian Stolarz, senior counsel in the firm's office in Washington, D.C., may be contacted at brian.stolarz@nortonrosefulbright.com.

[1] U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al., No. 8:19-CV-01236-KKM-SPF (M.D. Fla. Sept. 30, 2024) (Mizelle, J.).

[2] U.S. ex rel. Polansky v. Executive Health Resources, Inc., 599 U.S. 419, 449 (2023).

daunting monetary penalties against private parties on behalf of the United Stated in federal court" without an Executive Branch appointment to do so.[3]

Critically, the court noted that the "unclear role" of litigation funding companies "heightens the tension between qui tam actions and ordinary Executive Branch practice" because a relator may sell some of their interest to a litigation funder, blurring the lines of who is actually pursuing the action and the financial motivations.

The court held that because the relator is an officer of the United States, historical examples of qui tam provisions do not exempt a relator from the Appointments Clause; since a relator is not constitutionally appointed but rather self-appointed as a special prosecutor, dismissal "is the only permissible remedy." Although there are other constitutional concerns under the Take Care and Vesting Clauses, the court ruled in favor of the defendants on the Appointments Clause issue and, therefore, did not discuss the other constitutional issues.[4]

LEGISLATIVE HISTORY

Private relators now bring the majority of FCA cases, and since 1986, relators have received almost US$9 billion from FCA cases. The legislative history of the 1986 amendments makes plain the intent of the qui tam statute—Congressman Howard Berman stated that "[t]his is precisely what this law is intended to do: deputize ready and [willing] people . . . to bring to justice those contractors who overcharge the government."[5] This improper deputizing is exactly what *Zafirov* determined was unconstitutional. The fundamental argument is that the faithful execution of the law does not mean the transfer of exclusive authority to individual relators who are primarily motivated by personal gain rather than the protection of federal funds.

The Supreme Court is certainly very interested in the issues raised in *Zafirov*.

---

[3] Id. (citations omitted).

[4] The same argument that prevailed in the Zafirov case was recently made by the authors in a long-standing qui tam action in the U.S. District Court for the District of Columbia in a motion to dismiss that went into considerable detail about the history of the FCA, the qui tam statute and the 1986 amendments to the law that greatly increased the number of qui tam cases that are filed on an annual basis. Although the firm's motion to dismiss was denied summarily without a written opinion, the arguments it raised, one of which was adopted in the thorough Zafirov opinion, show that the constitutional issues in the qui tam statute are real and concerning and federal judges should take note of them in future cases as they will continue to be raised.

[5] 132 Cong. Rec. 29,322 (1986).

In *Polansky*, Justice Thomas stated that "[t]he potential inconsistency of qui tam suits with Article II has been noticed for decades."[6] Justice Thomas also stated that the FCA "*has long inhabited something of a constitutional twilight zone*" and "there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits."[7]

Justices Barrett and Kavanaugh, in concurrence, stated that they agreed with Justice Thomas 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."[8]

Furthermore the concurring justices stated that the court "should consider the competing arguments on the Article II issue in an appropriate case."[9]

Finally, in addition to these statements by the dissenting justices, in the majority opinion, Justice Kagan stated that the FCA "has been enforced by a unique public-private scheme," acknowledging that the FCA is not a typical federal statute.[10]

The plaintiffs whistleblower bar has predictably called the case an outlier and a potential gateway for more fraud if there are no qui tam relators. However, the constitutional requirement of being a properly appointed Executive Branch official is not a nicety or convenience and cannot be avoided by an argument that the ends of fraud detection and revenue for the government justify the statute.

CONCLUSION

The case is clearly heading for an appeal to the U.S. Court of Appeals for the Eleventh Circuit and likely to the Supreme Court due to decisions by other federal courts that did not find the qui tam statute unconstitutional in similar circumstances. With three Supreme Court justices interested in the right case to analyze the qui tam aspects of the FCA, *Zafirov* may be that case and may signal that the False Claims qui tam era is coming to an end.

---

[6] Polansky, 143 S.Ct. at 1741.

[7] Id. at 1741 (emphasis added).

[8] Id. at 1737.

[9] Id.

[10] Id. at 1727.