Federal Contracting
Sept. 30, 2024, 5:57 PM EDT; Updated: Oct. 1, 2024, 9:18 AM EDT

Fraud Law's Whistleblower Portions Ruled Unconstitutional (2)

By Daniel Seiden

Documents

Opinion

Docket

- Self-appointment doesn't satisfy Appointments Clause: judge
- Whistleblowers are US officers, have enforcement authority

The False Claims Act's whistleblower provisions violate Article II of the US Constitution, a Florida federal district court said Monday, dismissing a Medicare fraud suit.

A whistleblower suit under the FCA "defies the Appointments Clause by permitting unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public," Judge Kathryn Kimball Mizelle of the US District Court for the Middle District of Florida said.

There's no question that whistleblower—or relator— Clarissa Zafirov is an officer of the United States and that she was improperly appointed, the court said.

The Framers of the Constitution knew it was impossible for one person to perform all the Executive Branch's business, so they made the Appointments Clause to retain accountability for appointed officers.

Relators are officers because they possess civil enforcement authority on behalf of the US, and because they occupy a continuing position, the court said.

But the FCA allows relators to self-appoint themselves as officers, direct the litigation, and to bind the US government without accountability to the Executive Branch, the court said.

"Because self-appointment, obviously, does not satisfy the Appointments Clause, the defendants prevail on this constitutional challenge," the court said.

The court cited the US Supreme Court's decision in *United States ex rel. Polansky v. Executive Health Resources Inc.*, in which Justices Clarence Thomas, Brett M. Kavanaugh, and Amy Coney Barrett expressed doubt about whether Congress could authorize whistleblower suits.

This decision "is not surprising" given recent statements by Justices Thomas, Kavanaugh, and Barrett on the constitutionality of the FCA's qui tam provision, said Jason N. Workmaster, who represents FCA defendants with Miller & Chevalier Chartered. "But it remains an open question whether a majority of the Supreme Court will agree with that conclusion," he said.

"Although somewhat seismic in nature, Judge Mizelle's decision is not that shocking to close observers as Justice Thomas—for whom Mizelle served as a clerk—authored a dissenting opinion" in *Polansky*, said Robert Rhoad, who represents FCA defendants with Nichols Liu LLP.

Mizelle's opinion "tracks that dissent and is now poised for appeal with the potential for Supreme Court review," he said.

"The court in Zafirov plainly got it wrong," said Eric Havian of Whistleblower Partners LLP, a law firm that specializes in whistleblower cases.

"There have been many cases dating back decades that have affirmed the FCA's qui tam mechanism against similar or identical Constitutional challenges," he said.

"If the Justices of the Supreme Court are consistent in their embrace of history when evaluating the constitution, that should be the end of the matter," Havian said.

Zafirov, a family physician, alleged that Florida Medical Associates LLC—which does business as VIPcare—increased risk adjustment scores of Medicare Advantage beneficiaries without regard to their actual physical condition, which led to increased reimbursements from the government.

Zafirov sued in May 2019. The court denied motions to dismiss in 2022.

Morgan Verkamp LLC, Nolan Auerbach & White LLP, and Rabin Kammerer Johnson represent Zafirov. Bradley Arant Boult Cummings LLP; Foley & Lardner LLP; and Gunster, Yoakley & Stewart PA represented the defendant.

The case is United States ex rel. Zafirov v. Fla. Med. Assocs. LLC, M.D. Fla., No. 19-cv-1236, 9/30/24.

To contact the reporter on this story: Daniel Seiden in Washington at dseiden@bloombergindustry.com

To contact the editors responsible for this story: Nicholas Datlowe at ndatlowe@bloombergindustry.com; Amy Lee Rosen at arosen@bloombergindustry.com