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FCA Whistleblower Provisions Could Face Peril Under Trump

By **Hannah Albarazi**

Law360 (December 3, 2024, 3:11 PM EST) -- Over 160 years after enactment of the False Claims Act and its qui tam provisions, the confluence of a conservative U.S. Supreme Court and a second Trump administration has attorneys contemplating a future without whistleblower-led litigation.

With President-elect Donald Trump pledging government belt-tightening and a Trump-appointed federal judge recently holding unconstitutional the FCA's qui tam provisions, the anti-fraud enforcement tool now hangs in the balance.

Originally enacted by Congress in 1863 to stop government contractors from supplying Union troops with ailing horses and defective rifles, the law was updated in 1986 to increase incentives for whistleblowers to file lawsuits alleging false claims on behalf of the government. FCA liability was expanded in 2009 to cover anyone using government funds inappropriately.

Over the decades, the enforcement mechanism has become deeply baked into the law and the practices of prosecutors, along with the white-collar defense and whistleblower bars.

Its demise, said Adam Pollock, managing partner at Pollock Cohen LLP, would disrupt "an entire statutory framework that Congress developed over centuries to carefully cabin the role of a qui tam relator."

"It's not like someone is leaning over and grabbing the wheel," he said.

Incentivizing whistleblowers to come forward is "tremendously valuable" in protecting government funds, especially in the healthcare industry, given that the U.S. Department of Health and Human Services doesn't have an independent whistleblower incentive program, said Pollock, who represents qui tam whistleblowers and previously served as a New York state prosecutor.

During the 2023 fiscal year, roughly 85% of the $2.86 billion in FCA funds recovered came from qui tam cases, according to DOJ data. Nearly 70% of those recovered funds came from healthcare-related fraud.

If the FCA's qui tam provisions went away, it would have a "huge detrimental effect," Pollock said.

Yet attorneys who represent government contractors in FCA litigation, such as Robert Rhoad with Nichols Liu LLP, argue that elimination of the qui tam provisions might not be catastrophic. Excising them would curb "bounty hunting" by whistleblowers, known as relators, but would not preclude the

fashioning of a new whistleblower incentive program, Rhoad said.

Dwindling Qui Tam Support

Many attorneys told Law360 they suspect the incoming Trump administration will be in step with conservative Supreme Court justices who appear open to knocking down the provisions — or at least limiting the scope of their utility.

"The only thing we can presume is that Trump is ideologically more aligned with the conservative justices who have signaled less support for qui tam cases," said Kate Rumsey, special counsel with Shepperd Mullin and a former assistant U.S. attorney in Trump's first administration.

Crowell & Moring LLP partner Jason M. Crawford, who often defends against FCA suits, expects more challenges to the constitutionality of the provisions in the coming years, saying "concerns about separation of powers issues in qui tam cases have gained traction ever since Justice [Clarence] Thomas reignited the discussion with his dissent in the Polansky decision."

In U.S. ex rel. Polansky v. Executive Health Resources Inc., the high court held in 2023 that the government can move to dismiss an FCA qui tam action at any point after it has intervened.

Justice Thomas penned a lone dissent questioning whether the role of qui tam relators is unconstitutional because such power is reserved for the president and his subordinates under the Constitution's appointments clause.

Trump-appointed Justices Brett Kavanaugh and Amy Coney Barrett issued a brief concurrence in the Polansky decision inviting Justice Thomas' constitutional arguments on qui tam to be considered in an appropriate case.

'Ripple Effects'

Across the board, attorneys told Law360 they would be surprised if the Trump team, who've touted their commitment to government efficiency, would want a full-fledged pullback on FCA enforcement given the billions in healthcare fraud recoveries that flow into federal coffers annually, often with the help of relators.

Attorney Jacklyn DeMar, president and CEO of The Anti-Fraud Coalition, a nonprofit that empowers whistleblowers, called the FCA a natural tool to help pay the government's bills — which is particularly relevant given Trump's ambitious campaign promises.

The FCA may also prove an important tool in furthering Trump's strategy of imposing additional tariffs and customs duties, as it could be used to crackdown on fee-dodgers.

"Trump has called for massive tax cuts, and the FCA is the government's number-one tool for recouping stolen taxpayer funds," she said.

Andrew O'Connor, a partner at Ropes & Gray whose practice focuses on FCA defense, said that on the brink of a second Trump presidency, "everybody is recognizing that there may not be a precedent for this particular transition."

"That being said, there are ways that even the Trump administration could be looking to take credit for an active enforcement regime in the False Claims Act space," he added.

Incoming DOJ officials may be more willing to intervene or dismiss relators' cases they determine to be based on regulatory overreach, he said, adding that he wouldn't be surprised if the DOJ becomes "more muscular" in its interactions with relators' counsel and moves to dismiss more cases.

He also pointed to the controversial 2018 memo by then-director of the DOJ's civil fraud section Michael Granston, which instructed U.S. attorneys' offices to push for dismissal of whistleblower cases not aligned with the government's priorities.

"Certainly in the last Trump administration, the DOJ was pretty clear that self-regulatory guidance, guidance documents … weren't binding and shouldn't be the basis for enforcement," he said.

The Trump-era HHS also created an FCA working group to weed out certain whistleblower cases and interpreted the U.S. Supreme Court decision in the medical billing case Azar v. Allina Health Services to narrow FCA enforcement.

Matthew Benedetto, co-chair of WilmerHale LLP's False Claims Act Practice, told Law360 it would be "a momentous department shift" if the DOJ moves to dismiss more qui tam cases.

Rumsey, the former Trump administration prosecutor, predicted that in the coming administration, the DOJ may once again prioritize immigration or violent crime cases over other cases, including government fraud.

"For example, in the last Trump administration, where I was in the DOJ, there was no discretion with regard to immigration cases we were allowed to take — we had to take on all of them, which meant that we had less ability to take on other matters, like healthcare fraud," Rumsey said. "That has ripple effects into other areas of the DOJ with regard to resources."

"It is very likely we may see less FCA cases overall. What that means for the industry and patient care is hard to tell," Rumsey said.

'Tempest in a Teapot'

Ever since U.S. District Judge Kathryn Kimball Mizelle, a Trump-appointee and a former clerk of Justice Thomas, issued her landmark ruling in Zafirov v. Florida Medical Associates LLC in late September — marking the first time the FCA's qui tam provisions had been held unconstitutional — their fate has been up in the air.

In Zafirov, a group of Medicare Advantage and provider organizations, backed by the U.S. Chamber of Commerce, argued that qui tam flouts the appointments clause by shifting power to execute laws from the executive branch to private third parties.

Diego Pestana, a defense attorney with the Florida-based Suarez Law Firm who formerly clerked for Judge Mizelle, said he assumes, based on Trump's first administration, that the incoming DOJ "will be led by well-qualified attorneys who adhere to textualism and originalism."

That cohort may find Judge Mizelle's originalist understanding of the appointments clause persuasive

enough to change the department's legal position in Zafirov, he said.

The case is currently being appealed to the Eleventh Circuit. If Judge Mizelle's ruling is upheld and survives other appeals, it would mean relators' cases wouldn't be able to proceed without the government.

Pollock said that in light of Judge Mizelle's ruling, he expects more FCA defendants will try out the constitutional argument, resulting in "a ton more decisions" either in agreement or in tension with Zafirov.

Zafirov or a similar case is "almost certainly heading to the Supreme Court," given that qui tam has been found constitutional by other courts, including the Supreme Court, Pollock said.

Justice Thomas' dissent and Justices Kavanaugh and Barrett's brief on the matter in Polansky "paved the way — if not invited — the very type of opinion authored by Judge Mizelle in Zafirov, an opinion which seems destined for Supreme Court review via the Eleventh Circuit," said Rhoad.

Not everyone thinks the FCA's qui tam provisions are essential for catching fraud on the government.

Rhoad argued that HHS could create its own agency whistleblower program such as those run by other federal agencies, which he thinks would result in greater fairness and efficacy in terms of fraud enforcement in the healthcare industry.

The constitutional debate "may just be a tempest in a teapot," he said.

O'Connor likewise questioned the necessity of the qui tam provisions, telling Law360, "I'm not sure that in a world in which you didn't have relators pursuing cases, there would be significantly less whistleblowing activity."

But whistleblower attorneys worry it would result in fewer people coming forward with fraud allegations.

DeMar with the TAF Coalition told Law360 that any deprioritization of the FCA and qui tam cases "would be detrimental to patients and the public, in that the FCA serves as a deterrent to those in the industry that would put profit over patient safety, leaving patients at further risk of harm without firm guard rails or knowledge that their fraudulent schemes may be uncovered."

Healthcare companies would also feel emboldened to push the limits in reimbursement or other areas.

That would lead to "losses to the taxpayers and to patient harm [as well as] to an anticompetitive marketplace in the healthcare industry where those who are trying to play by the rules are outgunned by those who are less scrupulous," DeMar said.

--Editing by Philip Shea.
