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Is the False Claims Act's whistleblower provision illegal?

The judge in Zafirov said "yes." But now the government says "no."

Who's right? Will 'blowers be whistling in the wind or whistling to the bank?

That was the subject of Monday's blog post, **Will the Whistleblower Law Be Whistled Out.** You can follow the link to read the post online, or just keep reading.

The False Claims Act ("FCA") is a powerful tool to fight fraud against the government, especially in healthcare. It contains a "qui tam" provision that lets regular people—called "relators" or whistleblowers—sue individuals and entities for fraud on behalf of the government.

If they win, or if the government takes over the case and wins, the whistleblower gets a bounty in the range of 15% to 30% of the amount collected. And it's not just the whistleblower who has a great payday—since the mid 1980s, the federal government's share of collections from whistleblower cases has amounted to more than $75 billion.

Sounds like a win-win, right? Well, yes, if the Constitution actually allows a whistleblower to bring suit, a proposition that was upheld by courts in the past.

Then last year, in United States ex rel. Zafirov v. Florida Medical Associates (discussed here on the blog), a federal District Court from the Middle District

of Florida ruled that the whistleblower provision is unconstitutional. It dismissed the case.

The court found that Article II of the Constitution, the Appointments Clause, requires that legal action on behalf of the government be brought by certain appointed individuals referred to as “officers of the United States”, that a whistleblower under the FCA is not such an officer (although the whistleblower acts as such in prosecuting the case), and that Congress can’t authorize a whistleblower to wield executive branch authority.

The court also noted that whistleblowers basically appoint themselves, deciding who to sue, what claims to make, and even whether or not to appeal without anyone in the government overseeing them.

But now, liking both the billions to keep flowing and the fear of exposure to keep chilling fraudulent conduct, the government’s appealed the District Court’s decision, punching back with a three-pronged argument in its brief filed with the U.S. Court of Appeals for the 11th Circuit.

First, it argues that the Supreme Court, in a 2000 case referred to as Stevens, makes clear that relators are not acting as agents of the Executive branch when they sue under the FCA. Rather, they are pursuing a private interest in the money, that is, the bounty, they will obtain if their suit prevails. As a result, they don’t need to be appointed in the manner required by the Appointments Clause because it’s not an Appointments Clause issue.

Second, it argues from an historical context. The qui tam concept predates the Constitution, with actions in England dated back to the 13th century—first at common law, then under statutes. That precedent carried over to the American Colonies. An example is allowing informers to sue for, and receive shares of, fines upon officers who neglect their duty to pursue pirates. Early qui tam statutes were regarded as consistent with the Constitution.

And, third, it argues that as private parties pursuing their own, not the government’s, interests, relators don’t receive government employee salaries or benefits, have no access to the government’s internal files, their counsel have no attorney-client relationship with the defrauded government agency, and so on.

Moreover, the government insists it’s far from hands-off. It retains control over FCA cases through mechanisms like dismissing cases, monitoring relators’ actions, and intervening at any stage.

So, Who's Right?

Other courts in other federal Circuits have found the whistleblower provision to be constitutional.

Whether the Court of Appeals affirms or denies the decision of the District Court in Zafirov, I think it's highly likely that the disappointed party will petition for the case to be heard by the Supreme Court.

What You Should Know

1. **Even within the 11th Circuit, Whistles are Still Blowing:** Other than as it currently affects the government (and the underlying relator, Clarissa Zafirov) in the Zafirov case, the District Court's opinion isn't binding on other FCA actions. Fraud against the government is still a fast track to big penalties.
2. **Stay Informed: The Zafirov debate is far from over.** What the Court of Appeals decides can change the landscape within the 11th Circuit, at least until the expected ultimate determination from the Supreme Court.
3. **Don't Conflate Whistleblowing with the FCA:** Even if whistleblowing becomes a thing of the past, the FCA will still be enforced, as it also is today, by direct government investigation and litigation. Because it brings in billions of dollars every year, it's probable that the government will simply devote more resources to filing FCA cases.

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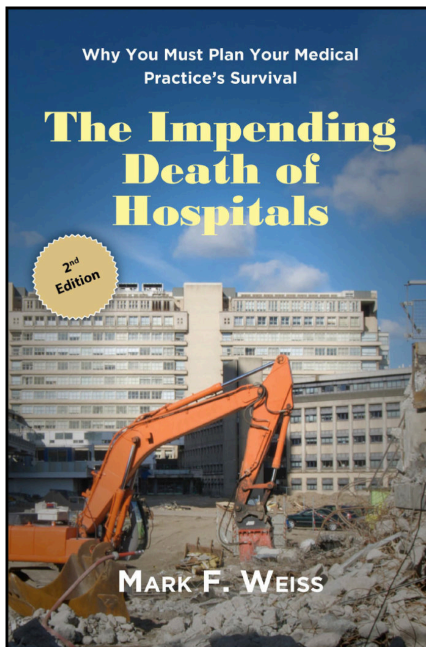

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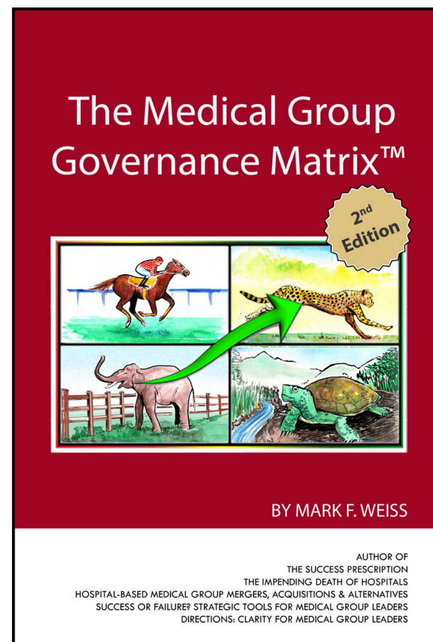

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