

Federal Government Urges Court of Appeals to Uphold Constitutionality of FCA Qui Tam Provisions

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Headlines that Matter for Companies and Executives in Regulated Industries

Federal Government Urges Court of Appeals to Uphold Constitutionality of FCA *Qui Tam* Provisions

In a brief filed earlier this week, the US federal government has urged the Eleventh Circuit Court of Appeals to uphold the constitutionality of the False Claims Act's (FCA) *qui tam* provisions, challenging a Florida district court's ruling that found them to be unconstitutional.

The appeal stems from an underlying case with relator Clarissa Zafirov, who filed a *qui tam* action in 2019 against several health care entities, accusing them of misrepresenting patient conditions to Medicare. While the government initially declined to intervene, it later elected to defend the constitutionality of the FCA's provisions.

At the district court level, the court found that whistleblowers are officers of the United States and must be appointed according to the appointments clause, leading to the dismissal of Zafirov's suit. Per the government's appellate brief, the district court decision is an "outlier ruling" that contradicts US Supreme Court precedent. The government specifically pointed to the decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 US 765 (2000), in which the Supreme Court held that the FCA's *qui tam* provisions are consistent with Article III and argued that

this makes clear that relators do not exercise executive power when they sue under the Act. Instead, relators are “pursuing a private interest in the money they will obtain if their suit prevails.” As such, they do not exercise executive power and do not require appointment under the appointments clause.

The government further emphasized that *qui tam* actions are subject to government oversight and cannot proceed without the government’s decision on intervention. Accordingly, the federal government now seeks to reverse the district court’s decision and has urged the Eleventh Circuit Court of Appeals to maintain the established legal framework supporting whistleblower actions under the FCA.

The case is *Clarissa Zafirov v. Florida Medical Associates LLC et al.*, Nos. 24-13581 and 24-13583, in the US Court of Appeals for the Eleventh Circuit. The government’s appellate brief is available [here](#).

Community Health Network Reaches Third FCA Settlement in 10 Years, Agreeing to Pay \$135 Million to Resolve Outstanding Claims

In a deal reached two years after the Indiana health care system agreed to pay \$345 million to settle FCA allegations with the federal government, Community Health Network has now agreed to pay \$135 million to resolve federal health care fraud claims brought by its former chief financial officer.

Over 10 years ago, in 2014, Community Health CFO and COO Thomas Fischer filed a lawsuit under the FCA’s *qui tam* provisions, alleging that Community Health overpaid physicians to secure referrals in violation of state and federal laws, including the federal Stark Law and Anti-Kickback Statute (AKS). Per the complaint, Community Health utilized an “aggressive strategy” to grow its physician network and garner referrals, including the recruitment of doctors by providing payment in excess of the market rate through large base salaries and sizable bonuses, among other means.

The US Department of Justice (DOJ) elected to intervene in the case. The \$345 million settlement addressed some of Fischer’s claims, leaving others unresolved. In 2020, the district court allowed Fischer to file an amended complaint that asserted additional FCA claims separate from those pursued by the government. This latest settlement with Community Health resolves those remaining claims. Among other things, the deal resolves claims that (1) Community Health paid above fair-market value rent to a physician-owned real estate partnership to induce those doctors to refer patients to a Community Health-owned ambulatory surgical center in violation of the AKS, and (2) Community Health overpaid physicians employed by the organization and also by an independent oncology group that contracted exclusively with the health nonprofit.

Notably, Community Health additionally reached a \$20.3 million settlement with the DOJ in 2015 to resolve civil allegations that the health nonprofit submitted false claims to Medicare and Medicaid programs. All told, Community Health has now paid more than half a billion dollars to resolve three FCA matters over the past 10 years. Nonetheless, Community Health has emphasized that all claims were resolved with no finding of wrongdoing, and the issues were unrelated to the quality or appropriateness of the health care provided by Community Health to its patients.

The case is *US and State of Indiana ex rel Fischer v. Community Health Network, Inc., et al.*, Case No. 1:14-cv-1215, in the US District Court for the Southern District of Indiana.

The DOJ’s press release on the 2015 \$20.3 million settlement is available [here](#). The DOJ’s press release on the 2023 \$345 million settlement is available [here](#).

Athira Pharma Inc. Agrees to Pay Over \$4 Million to Settle FCA Allegations

Athira Pharma Inc., based in Bothwell, Washington, has agreed to pay \$4,068,698 to settle allegations that it violated the FCA.

Per the DOJ, this settlement will resolve allegations that, between January 1, 2016, and June 20, 2021, Athira failed to report allegations of research misconduct regarding grant applications and grant award progress reports and assurances to both the National Institutes of Health (NIH) and the US Department of Health and Human Services (HHS) Office of Research Integrity. The alleged misconduct included that Athira's former CEO, Leen Kawas, falsified and manipulated scientific images in her doctoral dissertation and in published research papers that were referenced in several grant applications submitted to NIH, including in a grant that NIH funded in 2019.

Notably, Athira immediately notified NIH of the research misconduct after the full board of directors learned of it. Underscoring the significance of cooperation credit, the DOJ noted specifically that "the company's transparency significantly helped Athira mitigate its damages and demonstrated its resolve towards coming into compliance with the relevant law and regulations."

The settlement additionally resolves claims brought under the FCA's *qui tam* provisions, with whistleblower Andrew P. Mallon, Ph.D., receiving \$203,434.

The DOJ's press release is available [here](#).

Iron Man 2 Actor Sentenced for COVID-19 Scam

Earlier this week, Keith Lawrence Middlebrook, a bodybuilder and actor known for his role in *Iron Man 2*, was sentenced to over eight years in prison for attempting to defraud investors by falsely claiming he had discovered a cure for COVID-19 and that National Basketball Association legend Magic Johnson was a major investor.

Middlebrook was arrested in March 2020, becoming the first person in the United States charged with a COVID-19-related scam. The case included recorded calls with an undercover FBI agent where Middlebrook claimed his treatments could generate significant profits. Middlebrook's scheme involved promoting fake COVID-19 treatments and soliciting investments through social media and other channels, falsely claiming Johnson's involvement to lend credibility.

The recent sentencing follows a guilty verdict on all 11 counts of wire fraud faced by Middlebrook, rendered by a 12-person jury after a three-day trial. During sentencing, and among other things, Middlebrook denied any wrongdoing and claimed to have a relationship with Johnson, who testified that he did not recall meeting Middlebrook. While video evidence showed Middlebrook and Johnson at the same event, the court was unmoved by the defense counsel's suggestion at trial that Johnson gave false testimony. Specifically, the court noted that it was "inconceivable" that Johnson would have forgotten some of the lengthy interactions that Middlebrook had alleged occurred between them.

In the end, the court's sentence of 98 months aligned with the sentence sought by the prosecutors.

The case is *USA v. Keith Middlebrook*, No. 2:20-cr-00229, in the US District Court for the Central District of California.

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