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Alert | False Claims Act & Qui Tam Defense

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Zafirov Decision: Federal Court Questions Constitutionality of False Claims Act's *Qui Tam* Whistleblower Provisions

Go-To Guide:

- A Florida federal court ruled the False Claims Act's (FCA) *qui tam* provisions unconstitutional, determining that relators—private parties—are not appointed Executive Officers in compliance with the Appointments Clause (U.S. Constitution, Article II).
- The district court's FCA ruling opened the door for Appointments Clause challenges.
- Since there is a decision supporting dismissal of non-intervened *qui tam* cases on Article II grounds, FCA defendants may wish to consider such defenses in their responsive pleadings.
- The Eleventh Circuit is expected to review the *Zafirov* decision.

On September 30, Judge Kathryn Kimball Mizelle of the Middle District of Florida dismissed a *qui tam* case with prejudice and challenged the constitutionality of the FCA's *qui tam* provisions.

Background

Qui tam provisions allow private parties or relators to file suit on behalf of the government, allegedly for the purpose of vindicating the government's interests.

Successful *qui tam* relators receive a portion of the proceeds recovered, ranging from 15 to 30%. This incentive has created a rise in whistleblower-led litigation. In its February 2024 press release, the Justice Department reported that "[w]histleblowers filed 712 *qui tam* suits in fiscal year 2023, and this past year the Justice Department reported settlements and judgments exceeding $2.3 billion in these and earlier-filed suits."

United States ex rel. Zafirov v. Florida Medical Associates

Clarissa Zafirov was one such whistleblower. Zafirov filed a *qui tam* action against her employer, among others, asserting that Florida Medical Associates intentionally misrepresented patients' medical conditions to Medicare, resulting in unnecessary medical services. The government declined to intervene, yet Zafirov still directed the lawsuit against her private employer and enjoyed "unfettered discretion to decide whom to investigate, whom to charge in the complaint, which claims to pursue, and which legal theories to employ." *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, Case No. 8:19-cv-01236, 2024 WL 4349242, at *2 (M.D. Fla. Sept. 30, 2024) (Mizelle, J.). Zafirov's decisions were necessarily without the government's direction. "Instead, like a United States Attorney, Zafirov proceed[ed] on behalf of the 'real party of interest in this case,' the 'United States of America.'" *Id*. at 3. (Internal citation omitted).

In dismissing Zafirov's case, the district court opined that relators filing lawsuits on the federal government's behalf operate as "Officers" of the United States' executive branch, which requires an appointment under Article II of the U.S. Constitution. Specifically, the district court agreed with the defendants' argument: a *qui tam* relator is an "officer" under the Appointments Clause because it (1) exercises significant authority pursuant to the laws of the United States; and (2) occupies a continuing position established by law. *Id*. at *6. Said another way, the FCA's *qui tam* provision violates the Appointments Clause of the Constitution because the President does not appoint relators.

Judge Mizelle summarized her holding: "[a]n FCA relator's authority markedly deviates from the constitutional norm. The provision permits anyone — wherever situated, however motivated, and however financed — to perform a 'traditional, exclusive [state] function' by appointing themselves as the federal government's 'avatar in litigation.'" *Id*. at *19.

Justice Thomas' dissent in *United States, ex rel. Polansky v. Executive Health Resources Inc.*, 599 U.S. 419, 449–50 (2023), foreshadowed the *Zafirov* decision. Justice Thomas questioned whether Congress can "authorize a private relator to wield executive authority to represent the United States' interests in civil litigation." *Id*. Calling the relationship between the FCA's *qui tam* provisions and Article II a "constitutional twilight zone," Justice Thomas concluded that Congress does not possess such power:

> There 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. Because "[t]he entire 'executive Power' belongs to the President alone," it can only be exercised by the President and those acting under him. It thus appears to follow that Congress cannot authorize a private relator to wield executive authority to represent the United States' interests in civil litigation.

Id. (Internal citations omitted). Justices Kavanaugh and Barrett concurred: "the Court should consider the competing arguments on the Article II issue in an appropriate case." *Id*. at 442. (Kavanaugh, J., concurring). *Zafirov* may be that case.

Takeaways

- Any federal law that permits *qui tam* proceedings may now face an Appointments Clause challenge.
- Litigants should consider raising this argument and seeking dismissal when the government has elected not to intervene, *and* the relator is proceeding under the FCA's *qui tam* provisions.
- Delegation and Appointments Clause challenges remain a viable avenue to challenge government enforcement actions where the prosecuting party is not an officer of the executive branch.

Authors

This GT Alert was prepared by the following attorneys on behalf of the firm's White Collar Defense & Investigations Practice:

- Jed Dwyer | +1 305.579.0564 | dwyerje@gtlaw.com
- John Patrick Keller (Jack) | +1 305.579.0632 | Jack.Keller@gtlaw.com