How 11th Circ.'s Qui Tam Review Could Affect FCA Litigation

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On Dec. 12, the U.S. Court of Appeals for the Eleventh Circuit is scheduled to hear oral arguments in U.S. ex rel. Zafirov v. Florida Medical Associates LLC, a case that squarely presents the question of the constitutionality of the qui tam provisions of the False Claims Act.

Justice Clarence Thomas drew new attention to the question in a dissent to the U.S. Supreme Court's 2023 **decision** in U.S. ex rel. Polansky v. Executive Health Resources. And U.S. District Judge Kathryn Kimball Mizelle's 2024 decision in Zafirov, in the U.S. District Court for the Middle District of Florida, became the first in the country **to hold** the provisions unconstitutional.

But 2025 is, of course, a different world.

The U.S. Department of Justice relies heavily on FCA whistleblowers to further enforcement goals in the areas of healthcare fraud, discrimination, gender-affirming care and more. Further, the Trump administration has recognized the FCA as a strong revenue source for the federal government.

With the matter in the hands of the Eleventh Circuit — and likely on the Supreme Court's radar — we explore this key question.

Justice Thomas' dissent in Polansky — calling the qui tam provisions of the FCA a "constitutional twilight zone" — lit the spark for FCA defendants to challenge their constitutionality.[1] On Sept. 30, 2024, Judge Mizelle's Zafirov ruling stoked the flames.[2]

In an otherwise ordinary FCA case, relator Clarissa Zafirov sued her former employer and others pursuant to the qui tam provisions of the FCA for allegedly misrepresenting patients' diagnosis codes to obtain inflated reimbursements and submitting hundreds of thousands of false claims to the Medicare program.

Judge Mizelle dismissed the case, stating in her opinion,

> Zafirov has determined which defendants to sue, which theories to raise, which motions to file, and which evidence to obtain. ... Yet no one — not the President, not a department head, and not a court of law — appointed Zafirov

> to the office of relator. Instead, relying on an idiosyncratic provision of the False Claims Act, Zafirov appointed herself. This she may not do.[3]

The Eleventh Circuit's decision in Zafirov may present the first opportunity to seek Supreme Court review of the constitutionality of the qui tam provisions, an opportunity Justice Brett Kavanaugh apparently welcomed in his February **concurrence** in Wisconsin Bell Inc. v. U.S. ex rel. Todd Heath.[4]

The Qui Tam Provisions

Section 3730(b) of the FCA authorizes private persons — relators — to bring civil actions for violations of the FCA "for the person and for the U.S. government."[5] Once the relator initiates the action, the government may elect to intervene and proceed with the action.

If the government intervenes, it has primary responsibility for prosecuting the action or choosing to dismiss it, and is not bound by any acts of the relator. If the government elects not to intervene, however, the relator has the right to proceed with the litigation.

Section 3730(d) provides that if the government intervenes in an action brought by a qui tam relator, the relator will receive between 15% and 25% of any proceeds, subject to exceptions and limitations, as well as reasonable expenses, attorney fees and costs.

If the government does not intervene, the relator will receive an amount that the court decides is reasonable, but not less than 25% and not more than 30% of the proceeds.

A Constitutional Twilight Zone

In Zafirov, Judge Mizelle found the FCA's qui tam provisions problematic. Specifically, she held that the provisions violate the appointments clause of the U.S. Constitution by improperly vesting executive power in private litigants.

Evaluating the role of a qui tam relator, Judge Mizelle determined that relators qualify as officers of the United States under Article II because they (1) exercise significant authority pursuant to the laws of the U.S., and (2) occupy a continued position established by law.

She reasoned that Article II requires that officers to be appointed by "The President alone, in the Courts of Law, or in the Heads of Departments."[6] Yet a relator does not consult with the government before filing suit, receive a commission or swear an oath of loyalty, the judge stated.

A relator has wide discretion regarding, for example, whom to charge, which claims to bring, which legal theories to pursue, whether and how to appeal, and which arguments to preserve. Further, the office of a relator persists by operation of the FCA regardless of the occupant and regardless of any vacancy, making that office "continuous and permanent."[7]

Other Cases Addressing the Constitutionality of the FCA's Qui Tam Provisions

Judge Mizelle identified four cases holding that an FCA relator is not an officer of the United States. Yet she noted that they were nonbinding, and that only two addressed the significant authority question.

In one of these, the 1993 case of U.S. ex rel. Kelly v. Boeing Company, the U.S. Court of Appeals for the Ninth Circuit held that the FCA's qui tam provisions (1) did not violate Article III standing requirements; (2) did not violate separation of powers principles; (3) did not violate the appointments clause; and (4) did not violate due process.[8]

On the appointments clause question, the Ninth Circuit concluded that qui tam relators do not have "primary responsibility" and "significant authority" for enforcing the FCA through litigation, as opposed to officers of the U.S.

As it happens, on Sept. 30, 2024 — the same day as the Zafirov decision — the U.S. District Court for the Central District of Illinois refused to dismiss another FCA case on constitutional grounds, U.S. ex rel. Lagatta v. Reditus Laboratories LLC.[9]

The Illinois district court concluded, among other things, that the defendants in that case cited no binding precedent to support their Article II argument.

The Zafirov Briefs

In her opening brief to the Eleventh Circuit, plaintiff-appellant Zafirov pointed out that every federal court to address Article II challenges to the qui tam provisions has rejected them, uniformly recognizing, according to Zafirov's brief, that qui tam relators are "private parties pursuing partially assigned claims, not Government officers wielding executive power."[10]

Qui tam relators fall outside the Supreme Court's test for a government employee to be an officer of the U.S., Zafirov contended, because they neither occupy a continuing position established by law nor exercise significant authority pursuant to the laws of the U.S.

The U.S., as the intervenor-appellant, notes in its brief that in the Supreme Court's 2000 decision in Vermont Agency of Natural Resources v. U.S. ex rel. Stevens — in which the Supreme Court held that the qui tam provisions are consistent with Article

III and expressing no view relative to Article II — made clear that relators do not exercise executive power when they sue under the FCA.[11]

The U.S. also argued that qui tam relators are not officers of the U.S. because (1) the appointments clause applies only to government workers, not to private citizens; (2) relators do not occupy a continuing position because their role is limited in time and scope; and (3) relators do not exercise significant government authority.

Finally, the U.S. points out that Judge Mizelle's decision does not apply to cases in which the government has not yet decided whether to intervene or in which it has intervened.

In their answer brief, the defendants-appellees argued that the FCA's qui tam provisions violate the appointments clause because relators exercise significant authority, including the authority to choose whether and when to file suit on the government's behalf.[12]

They also argued that the qui tam provisions violate the constitution's vesting and take care clauses because, by operating outside the supervision and control of the executive branch, relators intrude on the president's authority to execute the laws and his duty to ensure that they are faithfully executed.

A number of amicus curiae filed briefs in support of each position.

The Fifth and Sixth Circuits

In two concurring opinions, U.S. circuit judges in the U.S. Court of Appeals for the Fifth Circuit have questioned the constitutionality of the FCA's qui tam provisions.

In March, in U.S. ex rel. Montcrief v. Peripheral Vascular Associates PA, U.S. Circuit Judge Stuart Kyle Duncan opined that the qui tam provisions of the FCA violate the appointments clause by allowing private citizens to exercise executive power, despite being neither appointed nor confirmed as officers of the U.S., citing Zafirov.[13]

On Nov. 3, U.S. Circuit Judge James C. Ho, concurring in U.S. ex rel. Gentry v. Encompass Health Rehabilitation Hospital of Pearland LLC, wrote "in an appropriate case, we should revisit whether there are serious constitutional problems with the qui tam provisions of the [FCA]."[14]

Meanwhile, in July, U.S. District Judge Douglas R. Cole of the U.S. District Court for the Southern District of Ohio certified an order for interlocutory appeal to the U.S. Court of Appeals for the Sixth Circuit in United States ex rel. Murphy v. TriHealth Inc., where the defendants argued that the FCA qui tam provisions violate both the appointments clause and the take care clause.

Takeaways

On May 29, Judge Mizelle again **ruled** that the qui tam relator provisions of the FCA are unconstitutional in U.S. ex rel. Gose v. Native American Services Corp., applying the same logic outlined in the Zafirov decision with respect to the appointments clause.[15] Yet at least eight other district court decisions since Sept. 30, 2024, have not gone this route.

More defendants throughout the country are attempting to argue that the FCA's qui tam provisions are unconstitutional, and more courts are putting in their two cents on the issue. Regardless of how the Eleventh Circuit decides Zafirov, a petition for certiorari to the Supreme Court seems inevitable.

Unsurprisingly, the DOJ is defending the constitutionality of the qui tam provisions, as it has historically benefited from significant monetary rewards when pursuing entities under the FCA, topping $2.4 billion in fiscal year 2024.

If Zafirov becomes the law of the land, relators may be limited in their ability to pursue qui tam cases, and the government may be solely responsible for initiating and pursuing cases under the FCA. This could lead to a decrease in the overall number of FCA cases initiated, as new qui tam cases have historically outnumbered non-qui tam cases by at least 2-to-1. Of course, alternatively, such a ruling may result in the government devoting significant additional resources to FCA enforcement to ensure the FCA continues to serve as a revenue generator for the federal government.

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[1] U.S. ex rel. Polansky v. Exec. Health Res. , 599 U.S. 419 (2023).

[2] U.S. ex. rel. Zafirov v. Fla. Med. Assocs. LLC , 751 F. Supp.3d 1293 (M.D. Fla. 2024).

[3] Id. at 1300.

[4] Wisconsin Bell Inc. v. U.S. ex rel. Heath , No. 23-1127 (U.S. Feb. 21, 2025) ("The [False Claims] Act's qui tam provisions raise substantial constitutional questions under Article II. Those constitutional questions are not before the Court in this case. But in an appropriate case, the Court should consider the competing arguments on the Article II question." (Kavanaugh, J., concurring)).

[5] 31 U.S.C. § 3730(b).

[6] U.S. ex rel. Zafirov , 751 F. Supp.3d 1293, at 1300.

[7] Id. at 1314.

[8] U.S. ex rel. Kelly v. Boeing Co. , 9 F.3d 743 (9th Cir. 1993).

[9] United States ex rel. Lagatta v. Reditus Laboratories LLC , No. 1:22-CV-01203-SLD-JEH, 2024 WL 4351862 (C.D. Ill. Sept. 30, 2024).

[10] Zafirov's Br., Zafirov v. Fla. Med. Assocs. LLC , No. 24-13581 (11th Cir. Jan. 8, 2025).

[11] 529 U.S. 765 (2000); United States' Br., Zafirov v. Fla. Med. Assocs. LLC , No. 24-13581 (11th Cir. Jan. 6, 2025).

[12] Fla. Med. Assocs. LLC's Br., Zafirov v. Fla. Med. Assocs. LLC , No. 24-13581 (11th Cir. Mar. 10, 2025).

[13] U.S. ex rel. Montcrief v. Peripheral Vascular Assocs. P.A. , 133 F.4th 395 at 411 (5th Cir. Mar. 28, 2025) (Duncan, J., concurring).

[14] U.S. ex rel. Gentry v. Encompass Health Rehab. Hosp. of Pearland L.L.C. , No. 25-20093 (5th Cir. Nov. 3, 2025).

[15] U.S. ex rel. Gose v. Native Am. Srvs. Corp. , No. 8:16-cv-03411-KKM-AEP (M.D. Fla. May 29, 2025).