

Florida Federal Court Holds the False Claims Act's Qui Tam Provision Unconstitutional

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PRACTICES Government Contracts, False Claims Act and Qui Tam Defense

Since its enactment in 1863, the False Claims Act (FCA) has contained a *qui tam* provision that permits private claimants (also known as “relators” and sometimes referred to as “private attorneys general”) to sue on behalf of the federal government and, if successful, obtain a share of the recovery. Now, this long-standing provision’s viability has been directly challenged by a recent decision issued by the U.S. District Court for the Middle District of Florida.

On Sept. 30, 2024, Judge Kathryn Mizelle held in *United States ex rel. Zafirov v. Florida Medical Associates* that the FCA’s *qui tam* provision is unconstitutional because, by allowing relators to “appoint[] themselves as the federal government’s avatar in litigation,” it permits “unaccountable, unsworn, private actors to exercise core executive power with substantial consequences to members of the public.”¹

In *Zafirov*, the relator alleged that a group of Medicare Advantage and provider organizations misrepresented patients’ medical conditions to Medicare.² The Department of Justice (DOJ) declined to intervene. According to Judge Mizelle, the relator never claimed that “the defendants’ allegedly illegal conduct harmed her,” but “[i]nstead, like a United States Attorney, [] proceed[ed] on behalf of the real party of interest in this case, the United States of America,...to avenge a wrong to the public as a whole.”³

Despite objections from the government and several *amici*, Judge Mizelle held that the *qui tam* provision runs afoul of the U.S. Constitution’s Appointments Clause, which requires all “Officers of the United States” to be appointed by the president, subject to the advice and consent of the Senate. Judge Mizelle concluded a relator is an Officer of the United States for two reasons.

First, she found that a relator exercises significant authority on behalf of the United States by being able to “determine which defendants to sue, which theories to raise, which motions to file, [] which evidence to obtain, [and] which arguments to preserve [for appeal], further binding the federal government.”⁴ She also emphasized that the FCA allows relators to act “with greater independence than a Senate-confirmed United States attorney or assistant attorney general,” since they can independently lead litigation and choose whether to appeal, “thereby shaping the broader legal landscape for the federal government.”⁵

Second, Judge Mizelle found that a relator occupies a continuing position because “the FCA prescribes a relator’s statutory duties, powers, and emoluments, and the position mirrors the role of a bank receiver or special prosecutor in its duration and non-personal nature.”⁶ But because “no one—not the President, not a department head, and not a court of law—appointed [the relator],” it violated the Appointments Clause.⁷ As such, Judge Mizelle dismissed the lawsuit with prejudice.

Though *Zafirov* is the first court decision to rule the *qui tam* provision unconstitutional, there have been warning signs in recent years. For instance, DOJ has expressed frustration that *qui tam* suits

sometimes operate at cross purposes with government policies and objectives. The 2018 memorandum issued by DOJ Civil Frauds Section Director Michael Granston (the “Granston Memo”) identified multiple *qui tam* cases where relators’ actions undermined executive agency policies, interfered with the administration of its programs or exposed the government to other substantial economic, operational, or reputational risks.⁸ The Granston Memo argued that the government should have unfettered discretion to dismiss *qui tam* actions.

In addition, in *United States ex rel. Polansky v. Executive Health Resources, Inc.*—in which the U.S. Supreme Court bolstered DOJ’s dismissal authority—Justices Brett Kavanaugh and Clarence Thomas wrote separately to contend there are “substantial arguments” that the *qui tam* provision does not conform with Article II of the Constitution and that the Court should consider its constitutionality in an appropriate case.⁹ Justice Thomas added in dissent that the *qui tam* provision’s “long historical pedigree” does not overcome the potential constitutional infirmity of a relator wielding executive authority to represent the United States’ interests in civil litigation.

Multiple circuit courts had addressed this question and ruled the *qui tam* provision constitutional under Article II. But the decision in *Zafirov* is the first to take the cue from Justices Kavanaugh and Thomas in *Polansky* and reach the opposite conclusion. Notably, Judge Mizelle is a former clerk to Justice Thomas and cited his dissent in *Polansky* repeatedly in her decision.

The *Zafirov* decision currently stands alone among district courts and will likely be appealed to the Eleventh Circuit. The issue could eventually be taken up by the U.S. Supreme Court. In the meantime, the decision could nonetheless bolster DOJ’s efforts to increase the government’s authority over FCA actions in the wake of *Polansky*.

Stay tuned to Haynes Boone’s News page for the latest on this decision and other important legislation, enforcement actions, and court opinions interpreting the various elements of and defenses to an FCA claim. For more information, please contact a member of Haynes Boone’s [False Claims Act, Qui Tam and Litigation](#), [Government Contracts](#), or Government Enforcement and Litigation practice groups below. Also, please refer to the firm’s annual [False Claims Act - Year in Review publication](#).

¹ Order Granting Defendants’ Motion for Judgment on the Pleadings, *United States ex rel. Zafirov v. Fla. Med. Assocs.*, No: 8:19-cv-01236 (M.D. Fla. Sept. 30, 2024), ECF No. 346.

² *See id.* at 8.

³ *Id.* at 9.

⁴ *Id.* at 1.

⁵ *Id.* at 5.

⁶ *See id.* at 16–17.

⁷ *Id.* at 1.

⁸ Memorandum from Michael Granston, Dir., Commercial Lit. Branch, Fraud Div., *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)* (Jan. 10, 2018).

⁹ 599 U.S. 419, 442 (2023) (Kavanaugh, J., concurring); *see also id.* at 447–50 (Thomas, J., dissenting).

¹⁰ 599 U.S. at 449–51 (Thomas, J., dissenting).

¹¹ *See* Client Alert, *Courts Should Finally Rule That the False Claims Act Qui Tam Provisions Are Unconstitutional*, n.2, AKIN GUMP (March 15, 2024),

https://www.akingump.com/en/insights/alerts/courts-should-finally-rule-that-the-false-claims-act-qui-tam-provisions-are-unconstitutional#_edn12 (collecting cases).