Federal Court Rules Whistleblower Provision of False Claims Act is Unconstitutional

October 16, 2024

INSIGHTS

- A federal court ruled for the first time that the whistleblower provision of the False Claims Act is unconstitutional.
- The case will be appealed to the Eleventh Circuit and could make its way to the Supreme Court to decide if the *qui tam* provisions violate the Appointments Clause.

Last week, a federal court ruled for the first time that the whistleblower provision of the False Claims Act is unconstitutional. If affirmed on appeal, this decision could dramatically change the landscape of FCA enforcement in the Eleventh Circuit and set the stage for the Supreme Court to weigh in on the issue.

In United States ex rel. Zafirov v. Florida Medical Associates LLC, No. 19-1236 (M.D. Fla. Sept. 30, 2024), Judge Kathryn Kimball Mizelle held that the *qui tam* provision of the FCA – which allows private whistleblowers, known as *qui tam* relators, to sue on behalf of the United States – violates the Appointments Clause of the Constitution. According to Judge Mizelle, a *qui tam* relator is an "officer of the United States," who possesses significant civil litigation authority on behalf of the government. The court then ruled that "the office of an FCA relator" is a "continuing position" established by law, despite the fact that an individual relator's role expires at the end of a matter. Judge Mizelle held that the "office" of relator continually exists, even if it is not always occupied by an individual.

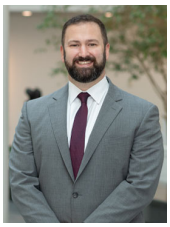
Prior to Judge Mizelle's decision in *Zafirov*, every other court in the country to entertain similar arguments had upheld the constitutionality of the FCA's *qui tam* framework. But the decision of Judge Mizelle, who clerked for Supreme Court Justice Clarence Thomas, does follow Justice Thomas's questions about the constitutionality of the FCA's *qui tam* provision in his recent dissent in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023). These comments were echoed by Justices Kavanaugh and Barrett in a concurrence, which stated that the Court should consider arguments on the Article II issue "in an appropriate case."

The decision in *Zafirov* will almost certainly be appealed to the United States Eleventh Circuit. After that, the case could make its way to the Supreme Court to decide whether Judge Mizelle and Justice Thomas's views on the

Appointments Clause become the law of the land. In the meantime, defendants in other *qui tam* cases are sure to use the decision in *Zafirov* to challenge relators' authority in FCA litigation.

If you have any questions about the *Zafirov* decision or other False Claims Act issues, please contact David A. O'Neal and Bob Brennan.

AUTHORS



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