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ALERT

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Federal Judge Strikes Down Private Party's False Claims Act Suit

Enacted in 1863 during the Civil War to combat "stupendous abuses" in the sale of provisions and munitions to the War Department, the False Claims Act (the "FCA") imposes civil liability on those who knowingly submit or cause to submit false claims to the government. The qui tam provision of the FCA allows a private party (known as a relator) to sue on the government's behalf under the FCA. If successful, the relator can recover a portion of the recovery.

In its current form, the FCA permits the government to intervene and take over a relator's case. If the government chooses to do so, a relator may continue to litigate its case alongside the government. If the government does not intervene, which is usually the case, it is up to the relator to prosecute the case independently without the government's assistance. The majority of FCA claims today are brought via the *qui tam* provision.

For the first time since its enactment, this year a judge ruled in a federal case in Florida, *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, 2024 Case No: 8:19-cv-01236 (M.D. Fla. 2024), that the FCA's *qui tam* provision is unconstitutional, finding that a relator is an officer of the United States who has not been properly appointed pursuant to Article II of the Constitution. The case was decided by United States District Court Judge Kathryn Kimball Mizelle, a former law clerk of Supreme Court Justice Clarence Thomas. Judge Mizelle was nominated to the bench by President Trump in 2020.

In *Zafirov*, the government had declined to intervene, so the relator prosecuted the suit on their own. The defendants moved to dismiss the case, arguing the *qui tam* provision is unconstitutional. Judge Mizelle agreed, holding that the *qui tam* provision violates the Appointments Clause of Article II of the Constitution because a relator in a non-intervened FCA case is an "officer of the United States" improperly appointed to that role.

The constitutionality of this issue has never been ruled upon by the Eleventh Circuit Court of Appeals (where Judge Mizelle sits), or the Supreme Court. However, in 2022, Supreme Court Justice Clarence Thomas, Judge Mizelle's former boss, issued a dissenting opinion in *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449, 143 S. Ct. 1720, 1740, 216 L. Ed. 2d 370 (2023)(Thomas, J. dissenting) that addressed this issue. In *Polansky*, Justice Thomas questioned whether the *qui tam* provision conflicts with the Constitution and said he would have remanded the case to the appellate court to consider its constitutionality. The genesis of his concern was that the Constitution does not expressly permit relators to represent the interests of the United States in FCA suits. Justices Brett Kavanaugh and Amy Coney Barrett signed a concurring opinion stating that they would agree that there are substantial arguments that the *qui tam* provision is inconsistent with the Constitution, and that "the Court should consider the competing arguments on the Article II issue in an appropriate case."

Zafirov is a trial court decision with no immediate binding effects, but it is almost certain to be appealed where it will be a case of first impression in the Eleventh Circuit. Judge Mizelle cited Justice Thomas's dissent multiple times in her ruling and may have confidence that the conservative majority of the Supreme Court will ultimately uphold her decision. While five Justices would be needed to strike down the *qui tam* provision nationwide, three out of the nine Justices have already signaled they would be open to that argument. If that were to happen, the FCA's *qui tam* provision could be limited or even eliminated, and the number of FCA actions would likely plummet.