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Client Alert Commentary

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Middle District of Florida Accepts Justice Thomas's Invitation: FCA Qui Tam Provision Unconstitutional

The Zafirov decision finds that the False Claims Act qui tam provision violates Article II of the US Constitution.

On September 30, 2024, in *United States ex rel. Zafirov v. Florida Medical Associates LLC,* Judge Kathryn Kimball Mizelle in the Middle District of Florida dismissed a declined qui tam action under the False Claims Act (FCA) on the basis that its qui tam provision is unconstitutional.[1] The court held that the provision violates the Appointments Clause of Article II by authorizing private individuals (relators) to prosecute cases on behalf of the United States.

Several FCA defendants have unsuccessfully challenged the FCA's qui tam provision in the wake of Justice Thomas's dissent last year in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, which called into question the constitutionality of that provision.[2] (See Latham's Client Alert, US Supreme Court Upholds Broad, but Not Unfettered, Government Authority to Dismiss FCA Cases.) Justices Kavanaugh and Barrett, writing separately, noted their agreement with Justice Thomas that there are "substantial arguments" the qui tam provision — which dates back to the FCA's enactment in 1863 — violates Article II.[3] The *Zafirov* ruling from Judge Mizelle, who clerked for Justice Thomas, marks the first time a court has held that the qui tam provision is unconstitutional.

Zafirov provides FCA defendants a basis to challenge the constitutionality of qui tam actions. Preserving this issue will be particularly important if *Zafirov* is appealed and affirmed by the US Court of Appeals for the Eleventh Circuit, which would create a circuit split and set the stage for a petition for certiorari to the US Supreme Court.

Zafirov Holds That FCA Relators Are Officers of the United States, Subject to the Appointments Clause

Relator Clarissa Zafirov filed a qui tam action against the defendant medical service providers, alleging that they misrepresented patients' medical conditions to Medicare. The government declined to intervene. The defendants filed an answer, and while discovery was underway, they moved for judgment on the pleadings, arguing that the FCA's qui tam provision violates the Appointments Clause, Take Care Clause, and Vesting Clause of Article II.[4] The government then intervened, however, only with respect to the constitutionality of the qui tam provision.[5]

The court agreed with the defendants' Appointments Clause arguments, framing its ruling around three central conclusions: "First, an FCA relator is an officer of the United States. Second, historical examples of qui tam provisions do not exempt an FCA relator from the Appointments Clause. Third, because Zafirov is not constitutionally appointed, dismissal is the only permissible remedy."[6]

The court devoted most of its analysis to the first issue — determining that Zafirov, as a relator, acted as an officer of the United States when prosecuting her case against the defendants. Applying the Supreme Court's framework from *Lucia v. SEC*, the court examined whether Zafirov (1) "exercise[d] significant authority pursuant to the laws of the United States," and (2) "occup[ied] a continuing position established by law."[7] Answering both questions affirmatively, the court determined that relators are officers of the United States and "subject to the Appointments Clause."[8]

The court emphasized the "significant authority" that relators exercise when prosecuting cases on behalf of the United States in instances where the government declines to intervene. Specifically, the court focused on how relators "conduct civil litigation in the courts of the United States for vindicating public rights," similar to the authority wielded by other executive officials — officials that the Supreme Court has determined qualify as "officers" of the United States.[9] The court further found that "[t]he existence of statutorily defined duties, powers, and emoluments confirms that a relator holds a continuing office . . . even if [that office] is not continually filled."[10] Accordingly, the court determined that Zafirov was an officer of the United States and was "unconstitutionally appointed."[11]

The court then considered and rejected counterarguments from Zafirov, the United States, and amici. It reviewed five proposed distinctions between a relator's power and the "significant authority" of an officer of the United States, finding none of them persuasive: "(1) a categorical line between civil and criminal law enforcement, (2) a relator's lack of rulemaking or other administrative powers, (3) the fact that a relator pursues ordinarily only one enforcement action rather than many, (4) the Attorney General's ability to intervene or pursue a parallel action and to dismiss a relator's suit over her objection, and (5) a relator's lack of pre-suit investigatory resources from the federal government."[12] The court then addressed at length the historical arguments in support of the qui tam provision, which dates back to 1863, ultimately concluding that because the Constitution is "clear" on this issue, "no amount of countervailing history" may overcome it.[13] After its analysis on the merits, the court concluded that the appropriate remedy was to dismiss Zafirov's qui tam action with prejudice.[14]

The core analysis in *Zafirov* closely tracks Justice Thomas's dissent last year in *Polansky.* There, Justice Thomas expressed doubts that Article II permits relators to represent the federal government in prosecuting FCA suits, observing that civil litigation "for vindicating public rights of the United States is an 'executive function'" reserved for officers of the United States.[15] In addressing the "long historical pedigree of *qui tam* suits," Justice Thomas cautioned that, without more, such "historical patterns cannot justify contemporary violations of constitutional guarantees."[16] While Justices Kavanaugh and Barrett did not join Justice Thomas's dissent, they made a point to write separately to express their agreement with his concern about the qui tam provision.[17] It is uncertain where the other justices stand on this issue.

Takeaways for FCA Defendants

In the wake of *Zafirov*, defendants in qui tam actions — which outnumbered government-initiated FCA actions 712 to 500 last year[18] — should consider challenging or at least preserving a challenge to the constitutionality of the FCA's qui tam provision, particularly if the government declines to intervene.

While the Fifth, Sixth, Ninth, and Tenth Circuits have rejected the Article II challenge to the FCA's qui tam provision,[19] many of the courts of appeal have not yet addressed this issue. In addition to the Eleventh

Circuit, the other federal appellate courts that have not yet ruled on the constitutionality of the provision are the First, Second, Third, Fourth, Seventh, Eighth, and D.C. Circuits. Notably, several individual appellate judges have expressed doubts about the constitutionality of the qui tam provision, suggesting that it may violate Article II.[20] FCA defendants should preserve the argument for appeal — regardless of the circuit — as this issue works its way through the federal courts. If the Eleventh Circuit affirms the *Zafirov* ruling, there is a strong likelihood that the Supreme Court will grant review and establish a nationwide rule either approving or striking down the qui tam provision.

FCA defendants opting to bring constitutional challenges should be mindful of the timing for doing so. In *Zafirov*, the defendants successfully challenged the constitutionality of the FCA's qui tam provision in a motion for judgment on the pleadings while discovery was underway. However, other courts have ruled that a constitutional challenge to the FCA's qui tam provision is an affirmative defense that defendants must raise in the answer or earlier or it will be forfeited.[21] Given this uncertainty about timing, FCA defendants should protect their rights by raising challenges to the qui tam provision as early as possible in the litigation.

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Endnotes

[1] *U.S. ex rel. Zafirov v. Fla. Med. Assocs. LLC*, No. 8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).

[2] 599 U.S. 419, 449 (2023) (Thomas, J. dissenting). Since *Polansky*, unsuccessful challenges to the *qui tam* provision include *United States ex rel. Butler v. Shikara*, No. 9:20-cv-80483, slip op. at 25-26 (S.D. Fla. Sept. 6, 2024); *United States ex rel. Bolinger v. 24th Street, Inc.*, No. 18-cv-15446, 2024 WL 3272828, at *9 n.3 (D.N.J. June 30, 2024); *United States ex rel. Wallace v. Exactech, Inc.*, 703 F. Supp. 3d 1356, 1363-64 (N.D. Ala. 2023); *United States ex rel. Miller v. ManPow, LLC*, No. 2:21-cv-05418, 2023 WL 8290402, at *5 (C.D. Cal. Aug. 30, 2023); *United States ex rel. Thomas v. Care*, No. 22-cv-00512, 2023 WL 7413669, at *4 (D. Ariz. Nov. 9, 2023).

[3] *Polansky*, 599 U.S. at 442 (Kavanaugh, J., concurring).

[4] *Zafirov*, 2024 WL 4349242, at *4.

[5] *Id.*

[6] *Id.*

[7] *Id.* at *6 (quoting *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (internal quotation marks omitted)).

[8] *Id.*

[9] *Id.* at *7 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126, 140 (1976) (per curiam)).

[10] *Id.* at *11.

[11] *Id.* at *20.

[12] *Id.* at *9.

[13] *Id.* at *18.

[14] *Id.* at *19.

[15] *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 449 (2023) (Thomas, J. dissenting).

[16] *Id.* at 450 (quoting Marsh v. Chambers, 463 U. S. 783, 790 (1983)).

[17] *Polansky*, 599 U.S. at 442 (Kavanaugh, J., concurring).

[18] DOJ Fraud Statistics Overview, Oct. 1, 1986 – Sept. 30, 2023, https://www.justice.gov/opa/media/1339306/dl?inline.

[19] *See Riley v. St Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001); *U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993); *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787 (10th Cir. 2002). These decisions were issued prior to Justice Thomas's dissent last year that called into question the constitutionality of the *qui tam* provision.

[20] *See, e,g.*, *U.S. ex rel. Cimino v. Int'l Bus. Mach.*, 3 F.4th 412, 426 (D.C. Cir. 2021) (Rao, J., concurring) (there are "serious constitutional questions about placing the execution of the laws in private hands because it contravenes Article II's vesting of all executive power in the President."); *Riley*, 252 F.3d at 758-75 (Smith, J., dissenting); *U.S. ex rel. Taxpayers Against Fraud*, 41 F.3d at 1050 (Nelson, J., concurring) (stating that the constitutionality of *qui tam* actions is a "troubling" question); *cf. Sierra v. City of Hallandale Beach, Fla.*, 996 F.3d 1110, 1135 (11th Cir. 2021) (Newsom, J., concurring) (stating that *qui tam* actions are "idiosyncratic and unchallenged").

[21] *See* Order, *U.S. ex rel. Shepherd v. Fluor Corporation*, No. 13-cv-02428 (D.S.C. Sept. 13, 2024), Dkt. No. 461 (requiring defendants to raise constitutional challenges to the FCA's *qui tam* provision in their answer).