

LEGAL UPDATES

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Florida Federal Court Strikes Down False Claims Act *Qui Tam* Provisions as Unconstitutional

A federal judge in Florida issued a ruling this week holding that the *qui tam* provisions of the False Claims Act (FCA) are unconstitutional. In the lawsuit, a relator named Clarissa Zafirov accused the defendants of violating the False Claims Act under a theory of fraud on the Medicare program. *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC*, No. 8:19-CV-01236-KKM-SPF (M.D. Fla. Sept. 30, 2024). The federal government declined to intervene in the lawsuit, so Zafirov prosecuted the lawsuit on her own under the *qui tam* provisions of the FCA, which enable private litigants to pursue FCA actions standing in the shoes of the government and receive a sizeable share of any recovery.

The defendants in the *Zafirov* case moved for judgment on the pleadings, arguing the *qui tam* provisions of the FCA are unconstitutional. The Florida court agreed, holding the process violates the Appointments Clause of Article II of the U.S. Constitution because a relator – here Zafirov – in a non-intervened FCA case is an “officer of the United States” improperly appointed to that role.

The decision of the Florida court breaks with a number of other courts that have examined constitutional challenges to the FCA’s *qui tam* provisions, most notably and directly the United States Court of Appeals for the Fifth Circuit. There, in a decision issued *en banc* in 2001, the Fifth Circuit held to the contrary: namely that the FCA’s *qui tam* provisions do not violate the Appointments Clause. *Riley v. St. Lukes Episcopal Hospital*, 252 F.3d 749, 758 (5th Cir. 2001). The *Riley* court also addressed the Constitution’s Take Care clause, an issue presented but not addressed in detail by the Florida court in light of the Appointments Clause analysis.

Unlike the Florida decision, other courts have also upheld the constitutionality of the FCA's *qui tam* provisions, including a decision issued the same day as *Zafirov* by a court in Illinois. *See 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). *See also United States ex rel. Wallace v. Exactech, Inc.*, 703 F. Supp. 3d 1356 (N.D. Ala. 2023); *United States ex rel. Miller v. ManPow, LLC*, No. 2:21-cv-05418-VAP-ADSx, 2023 WL 8290402, at *1 (C.D. Cal. Aug. 30, 2023); *United States ex rel. Thomas v. Care*, No. CV-22-00512-PHX-JAT, 2023 WL 7413669, at *4 (D. Ariz. Nov. 9, 2023); *United States ex rel. CLJ, LLC v. Halickman*, No. 20-cv-80645, 2024 WL 3332055, at *21 n. 5 (S.D. Fla. June 14, 2024); *United States ex rel. Butler v. Shikara*, --- F.Supp.3d ----, 2024 WL 4354807, at *10-13 (S.D. Fla. Sept. 6, 2024).

However, the Florida court's decision does enjoy support in recent statements in the United States Supreme Court. Most notably, in his dissent in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023), Justice Thomas raised questions about the constitutionality of the FCA's *qui tam* provisions, stating, "There are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation." Justice Kavanaugh and Justice Barrett concurred, agreeing that the court should take up those questions in an appropriate case. And even in the Fifth Circuit's *Riley* decision, two Fifth Circuit judges dissented in a lengthy discussion that includes support for the Appointments Clause analysis ultimately articulated by the Florida court.

Contact us

The *Zafirov* decision is certain to be appealed to the United States Court of Appeals for the Eleventh Circuit. Other similar challenges will no doubt be raised in other district courts. *Qui tam* defendants should continue to monitor this space and consult with experienced and knowledgeable counsel. If you have any questions regarding this decision or other False Claims Act issues, contact Jody Rudman, Lorinda Holloway, Julia Shagovac, or any member of the Husch Blackwell False Claims Act litigation team.

This legal update was written with assistance from Fall Clerk Winston Bribach.