CLIENT ALERTS & INSIGHTS

False Claims Act (FCA) Recent Developments: Constitutional Scrutiny Mounts for Relator-Based Actions

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Key Takeaways

- Federal courts are now split on whether FCA qui tam relators violate the Constitution's Appointments Clause, following Judge Mizelle's Zafirov decision, increasing the likelihood of Supreme Court review.
- If the qui tam provision is struck down, the volume and nature of FCA enforcement could shift substantially, reducing relator-driven cases and placing greater responsibility on the federal government.
- Companies should reassess FCA exposure, strengthen compliance controls and monitor pending appellate cases, as upcoming decisions could reshape how FCA matters are initiated and litigated.

I. Introduction

In a remarkable opinion, *United States ex rel Zafirov v. Florida Medical Association LLC*, 751 F. Supp. 3d 1293 (S.D. Fla. Sep. 30, 2024) (Mizzele, J.), a Southern District of Florida Court found the *qui tam* component of the False Claims Act unconstitutional. With the passage of over a year since that opinion issued, more district courts have had the opportunity to weigh in on this important question-one that could have seismic consequences for False Claims Act litigation. This client bulletin provides an overview of relevant cases, opinions and related analysis for companies and industries subject to potential allegations and litigation under this Act.

II. False Claims Act ("FCA") (31 U.S.C. §§ 3729 - 3733) Overview

Liability arises under the FCA when one knowingly submits or causes to submit false claims to the government.[1] The FCA not only allows the United States to pursue potential violators, but it also permits private citizens to file suits on behalf of the government.[2] Those claims are called "qui tam" suits and the private citizen is known as the relator.[3]

When our clients become aware that FCA allegations are being investigated against them, it raises concerns about civil liability and the prospect of significant damages inherent in claims of this nature. It often comes with the knowledge that a colleague or employee began this investigation and is in the role of the relator.

A qui tam case requires the relator to file the civil complaint under seal with the court and serve a copy of the complaint and a disclosure of material evidence to the Attorney General and the United States Attorney under Federal Rule of Civil Procedure 4.[4] The government can then decide if it wants to intervene in the case, meaning the government will take ownership of the case from the relator.[5] If the government does not intervene, the relator is responsible for the litigation.[6]

The Constitutional question presented is whether the qui tam provision of the FCA, which permits a private citizen to bring and litigate an FCA claim, violates the Appointments Clause of the Constitution. For purposes of the FCA, relators are "private Attorneys General" bringing claims on behalf of the government.[7] Typically, the President of the United States nominates an individual to be the Attorney General and then the nominee must be confirmed by a majority vote of the Senate. As such, the appointment of the Attorney General falls under the Appointments Clause of the U.S. Constitution. The Appointment Clause is Article 2, Section 2, Clause 2, reading: "… [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." The Supreme Court has interpreted this clause as distinguishing between "principal officers," whom must be appointed by the President, and "inferior officers," who can be appointed by the President, the judiciary or department heads. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

Given that FCA relators step into the shoes of the Attorney General when litigating alleged FCA violations, courts have begun to consider whether the qui tam provision of the FCA violates the Appointments Clause of the United States Constitution.

III. *United States ex rel Zafirov v. Florida Medical Association LLC*, 751 F. Supp. 3d 1293 (S.D. Fla. Sep. 30, 2024) (Mizzele, J.)

On September 30, 2024, United States District Judge Kathryn Kimball Mizelle, sitting in the Middle District of Florida, issued an opinion declaring the qui tam provision of the FCA an unconstitutional violation of the Appointments Clause.

In this case, the relator litigated an action on behalf of the United States for five years. Judge Mizelle issues three concluding opinions: "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 [relator] is not constitutionally appointed, dismissal is the only permissible remedy."

Judge Mizelle concludes that a relator is an officer, not an employee, as the relator has civil enforcement authority on behalf of the United States. Initiating and litigating a lawsuit that often binds the federal government is a "significant authority pursuant to the laws of the United States" and is responsible for "vindicating public rights." Judge Mizelle compares the relator role to traditional executive responsibilities of prosecution and enforcement of the law, noting that the President is the Chief Prosecutor. The enforcement power alone makes the role of the relator an executive function, according to Judge Mizelle, with no rulemaking or administrative powers required.

Judge Mizelle also establishes that the relator is a "continuing position" - an argument she makes more explicit in *United States of America ex re. Sean Gose v. Native American Services Corporation and Great American Insurance Group, Inc.*, No. 8:16-CV-03411-KKM-AEP, 2025 WL 1531137, at *1 (M.D. Fla. May 29, 2025). Judge Mizelle compares more traditional roles, such as government-appointed bank receivers and special prosecutors, to the role of the relator-that these roles are defined by terms lasting for a single action and which the person responsible may change.

Judge Mizelle rejected the argument that the FCA qui tam provision is an "exception" to the Appointments Clause; as she describes, the enactment directly contradicts the Constitution. The fact that the use of the FCA-style relator is somewhat of a historical practice within the United States is not convincing when balanced against the plain text of the Constitution.

Finally, Judge Mizelle concluded that as a relator is an officer, self-appointment into this role violates the Appointments Clause.

IV. Additional Courts Weigh In

Judge Mizelle confirmed her opinion that the FCA violates the Appointments Clause through her May 29, 2025, opinion in *United States ex rel. Gose v. Native Am. Servs. Corp.*, No. 8:16-CV-03411-KKM-AEP, 2025 WL 1531137 (M.D. Fla. May 29, 2025). In that case, the relator pursuing the FCA claim died during the course of litigation. Following the original relator's death, her son was appointed by a state court judge to be the personal representative of the original relator's estate. As such, her son took over the relator role his mother previously occupied. The original relator was "stepping in" for the Attorney General, and then the relator's son was "stepping in" for the original relator. The Defendants in this case claimed that this violated the Appointments Clause.

Judge Mizelle's opinion focuses on the niche issue this case presented-whether a relator occupies a "continuing position." An Office of the United States is one with which the "duties continue" even though the person in the role can change. *United States v. Maurice*, 26 F. Cas. 1211,1214 (C.C.D. Va. 1823) (Marshall, C.J.). Judge Mizelle considered "the impersonal nature and interchangeability of the individual to the role remains a touchstone, as the government and relators readily embrace." In the opinion, Judge Mizelle states that the very fact that the relator's son assumed the original relator's role in the qui tam action shows that the relator's role is a "continuing position." Judge Mizelle concludes that the fact that the FCA permits a nearly universal pool of persons to bring an action, and that role is alienable from relator to relator, demonstrates that the existence of the relator under the FCA is a violation of the Appointments Clause.

The Fifth, Sixth, Ninth and Tenth Circuits have held that qui tam relators are not officers under Article II because of the lack of a "continuing position." *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (holding there is no [continuing] relationship with regard to qui tam relators); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993)
noting that factors such as tenure, duration, continuing emolument or continuous duties establish whether a person is an officer under the Appointments Clause); *U.S. ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994) (same); and *U.S. ex rel Stone v. Rockwell Int'l. Corp.*, 282 F.3d 787 (10th Cir. 2002) (same).

A case out of the Southern District of Florida, however, concluded that the qui tam provision does not violate Article II of the Constitution. *United States ex rel. Butler v. Shikara*, 748 F. Supp. 3d 1277, 1295 (S.D. Fla. 2024). In this case, Judge Donald M. Middlebrooks also notes that there is a plethora of Supreme Court cases upholding the historical practice of qui tam lawsuits and not a single Supreme Court case holding the FCA unconstitutional. This ultimately created a split within the district itself.

Nonetheless, Judge Adelman in the Eastern District of Wisconsin held that "the position of the relator is fundamentally personal." *United States ex rel. Heath v. Wisconsin Bell, Inc.*, No. 08-CV-724, 2025 WL 3033792, at *11 (E.D. Wis. Oct. 29, 2025). Judge Adelman concluded that a qui tam action begins and ends with a particular relator, in contrast to the office of the Attorney General, where the role transcends any specific individual. *Id.* Finally, Judge Alderman also notes the relator's role does not have "significant authority" because the government can intervene and take over prosecution of the case at various points throughout the litigation. *Id.*

Currently, the *United States ex rel. Shahbabian v. Trihealth, Inc.*, No. 1:20-CV-67, 2025 WL 2108197 (S.D. Ohio July 28, 2025), arising out of the Southern District of Ohio, certified a question for interlocutory appeal to the Sixth Circuit with respect to the constitutionality of the FCA qui tam provision. The Third Circuit will also be addressing this issue in *United States v. Janssen Prods., L.P.*, No. 25-1818 (3d Cir. 2025). Those cases, combined with the Eleventh Circuit considering *United States ex rel Zafirov v. Florida Medical Association LLC,* 751 F. Supp. 3d 1293 (S.D. Fla. Sep. 30, 2024) (Mizzele, J.), creates a real possibility that the Supreme Court will eventually weigh in.

Supreme Court jurisprudence with respect to the Appointments Clause has been evolving for decades now. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court upheld the Ethics in Government Act of 1978, which gave the Attorney General the right to recommend the appointment of an independent counsel to prosecute government officials, concluding that this appointment scheme did not violate the Appointments Clause. With this decision as the background, similar appointments were brought under legal scrutiny. In 2018, the Supreme Court held that Administrative Law Judges of the SEC are subject to the Appointments Clause because the position is "continuing" and "exercises significant authority pursuant to the laws of the United States." *Lucia v. Securities and Exchange Commission*, 55 U.S. 237 (2018). In doing so, the Court remanded the ALJ's decision against the plaintiff because the judge who made the ruling was not appointed in accordance with the Appointments Clause. *Id.* In light of the current circuit split regarding the qui tam relator, it is interesting that Justice Sotomayor and Justice Ginsburg dissented in the case and noted that the "continuing office" requirement is " relatively easy to grasp" and focused their conclusions on the "significant authority" prong. *Id*

. at 270. Still, the Supreme Court continued to build on this precedent in 2021, holding that Administrative Patent Judges could not be inferior officers under Article II because they held unreviewable authority. *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021). The Court held that Congress violated Article II through the appointment of a federal officer through the head of a department. *Id.* In this case, Justice Thomas dissented, concluding that APJs were inferior officers under the Constitution, indicating his belief that there was no Constitutional violation . *Id.* In a slightly different context, the Supreme Court held that the Consumer Financial Protection Bureau's single Director was an executive official that only the President can supervise or remove, subject to two limited Congressional circumstances that were not present in this case. *Selia Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020). Therefore, in this case, the limitation on the removal of the Director by Congress violated the Appointments Clause. *Id.* This developing jurisprudence suggests that discussions of the scope of the Appointments Clause and its applicability to roles like that of a relator are ripe for the Supreme Court to review.

Furthermore, Justice Thomas has indicated he would agree with Judge Mizelle's interpretation of the qui tam provision of the FCA. *United States, ex rel. Polansky v. Exec. Health Res., Inc.,* 599 U.S. 419, 449 (2023). In his dissent in *Polansky*, Justice Thomas signaled that qui tam lawsuits violate Article III. Justice Thomas made his position clear-a relator is not an appointed officer of the United States and therefore, the qui tam provision violates the U.S. Constitution. Justice Thomas argues that a qui tam relator has Article III standing because of the assignment of the Government's interest in the case. He argues that there is no legal source for such an assignment.

In this case, Justice Kavanaugh and Justice Barrett concurred with the majority opinion (ultimately decided on grounds that did not implicate Article II) but signaled their agreement with Justice Thomas's view that "[t]here 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," and concluded that "the Court should consider the competing arguments on the Article II issue in an appropriate case."

V. Summary Insights

When clients seek counsel regarding allegations against them relating to the FCA, it is often that the case originated with a relator. Given the under-seal period (and almost routine extensions of that period), the government is free to investigate the legitimacy and severity of the claim alleged by a relator-all before the client knows this investigation is pending against him. In these common situations, the relator is the actor bringing alleged FCA violations to the attention of the government. In fact, in the fiscal year 2024, relators initiated 979 new lawsuits, while the government itself initiated only 423.[8]

Given this developing jurisprudence, the Article II issue is ripe for review at the Supreme Court. If the Supreme Court considers a case questioning the legitimacy of the qui tam provision in light of the Article II Appointments Clause, there is a real possibility that Justice Thomas's dissent in *Polansky* becomes the majority's opinion.

Zafirov may just be the "appropriate case" Justice Kavanaugh and Justice Barrett needed to see to join Justice Thomas's opinion on the constitutionality of the FCA's qui tam provisions. It may not be challenging for another justice to come on board to grant certiorari.

If the Supreme Court holds that the FCA qui tam provision is unconstitutional, relators could no longer bring FCA cases on behalf of the U.S. Government. The result: the Government itself will have to dedicate more time and resources to maintain the same level of FCA prosecution, or fewer FCA claims will ultimately be brought.

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Benesch is here to assist your organization in assessing FCA risk and navigating proactive compliance strategies, including the regulations and enforcement policies that come with it. If you have questions regarding the FCA and government investigations related thereto, or enforcement actions more generally, the White Collar and Healthcare+ Practice Groups at Benesch are here to help.

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[1] *False Claims Act*, U.S Dept. of Justice (Jan. 25, 2005), https://www.justice.gov/civil/false-claims-act (last accessed November 10, 2025).

[2] *Id.*

[3] *932. Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act*, U.S Dept. of Justice https://www.justice.gov/archives/jm/criminal-resource-manual-932-provisions-handling-qui-tam-suits-filed- (last accessed Nov. 10, 2025).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024*, U.S. Dept. of Justice (Jan. 15, 2025), https://www.justice.gov/archives/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-ye (last accessed November 10, 2025).