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The Beginning of the End for False Claims Act *Qui Tam* Cases?

Florida District Judge Holds Whistleblower Provisions Unconstitutional

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On September 30, Judge Kathryn Kimball Mizelle held that the *qui tam* provision of the False Claims Act (FCA) violates the Appointments Clause of the U.S. Constitution because FCA relators are acting as "officers of the U.S." who require a presidential appointment to carry out their duties. Judge Mizelle's opinion represents a stark departure from the decisions of other courts that have previously addressed this issue, although Justice Thomas' recent dissent in *Polansky v. Exec*. *Health Res*., 599 U.S. 419 (2023), which Judge Mizelle cited favorably in her decision, may have opened the door to such reconsideration. Nevertheless, the opinion is a significant development for companies and firms in private equity, life sciences, health care, and government contracting that face FCA risk. This alert examines key aspects of Judge Mizelle's order and highlights the importance of the decision for your business.

In 2019, the relator in *United States ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*, Case No. 8:19-cv-01236-KKM-SPF (M.D. Fla.), sued her former employer and other defendants, alleging that they misrepresented patients' medical conditions to the federal government in violation of the FCA. After the U.S. declined to intervene, the defendants moved to dismiss the *qui tam* complaint on the grounds that the FCA's *qui tam* provision violated the Appointments Clause by allowing a relator to act as an officer of the U.S. without proper appointment, and the Take Care and Vesting Clauses by denying the president necessary removal or supervisory authority over relators.

Judge Mizelle granted the motion to dismiss. In doing so, she stated that FCA relators exercise significant authority pursuant to the laws of the U.S. because they initiate enforcement actions on behalf of U.S. without government oversight. If the government does not intervene in the case, relators prosecute and control an enforcement action designed to vindicate public rights through final judgment, including litigating appeals which may become binding precedent. Because of this role, Judge Mizelle explained that relators occupy a continuing

and permanent position established by law, rather than an occasional or temporary one — rejecting the relator's argument that the position is not continuous because it only lasts for the duration of one case. Judge Mizelle found further support for the continuous nature of the position in relators' statutorily defined duties under the FCA, their inherent powers under the statute (such as making decisions throughout litigation), and the emoluments (partial receipt of an award) that they can receive for their work.

Judge Mizelle distinguished U.S. Court of Appeals opinions from the Fifth, Sixth, Ninth, and Tenth Circuits that upheld the constitutionality of the FCA *qui tam* provision. Specifically, she explained that, (1) none of those courts examined the long line of Supreme Court precedents explaining that enforcement authority and charging discretion are core executive powers, especially when coupled with the authority to impose a punitive sanction; and (2) the long history of *qui tam* actions in the U.S. was not sufficient to exempt it from scrutiny since the provision directly contradicted the Constitution.

As noted above, at least four circuit courts have held that the FCA's *qui tam* provision does not violate the Constitution, and courts have tended to expand FCA jurisdiction over time. For instance, as recently as September 24, in *Stein v. Kaiser Foundation Health Plan, Inc.*, Case No. 22-15862 (9th Cir. Sep. 24, 2024), the Ninth Circuit made it easier for FCA relators to bring actions on behalf of the government when it unanimously held that the FCA's first-to-file rule is not jurisdictional and must be litigated through the more restrictive provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure, rather than a 12(b)(1) motion for lack of jurisdiction.

While Judge Mizelle's decision may be a surprise to some, many FCA practitioners and commentors foresaw such a result following Justice Thomas's dissenting opinion and Justice Brett Kavanaugh's concurrence in *Polansky v. Exec. Health Res.,* 599 U.S. 419 (2023), in which both questioned the constitutionality of the FCA *qui tam* provision under Article II of the Constitution. Judge Mizelle cites both throughout the opinion and in its conclusion as evidence that, despite her departure from previous Supreme Court and Eleventh Circuit precedent, this interpretation is "neither novel nor surprising."

An appeal of Judge Mizelle's opinion is likely to follow; however, the opinion provides another bow in defendants' quivers in their efforts to convince a court to dismiss an FCA case. Defendants faced with FCA *qui tam* actions should assess whether Judge Mizelle's opinion can be used in their cases and take steps to preserve the arguments that led her to grant the motion to dismiss in *Florida Medical Associates*.

This alert is intended as a guide only and is not a substitute for specific legal advice. ????Please ?reach out to the authors for any specific questions. We will continue to monitor the ????topics ?addressed in this alert and provide future ?client updates when useful.?

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