11th Circ. May Bring Tectonic Shift To FCA Qui Tam Actions

By **James Chou, Jason McElroy and Christie McGuinness** (February 25, 2026)

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According to the U.S. Department of Justice, in fiscal year 2025, enforcement of the False Claims Act was responsible for more than $6.8 billion in settlements and judgments.[1]

Of that amount, more than $5.3 billion was attributable to actions first brought by qui tam relators — private citizens who brought suit on behalf of the U.S.[2] As a reward, the government awarded those citizens over $330 million as a share of the recovered funds.[3]

Despite the many years of success that whistleblower actions have enjoyed recovering vast sums for the government, the ability of private relators to bring these actions may soon come to an end.

Both the practitioners who focus on the FCA and the entities subject to it are anxiously awaiting the U.S. Court of Appeals for the Eleventh Circuit's decision in U.S. ex rel. Zafirov v. Florida Medical Associates LLC, which was **argued** last December.

This case may be the first where an appellate court could find that the qui tam provisions of the FCA unconstitutionally permit ordinary citizens to stand as officers of the federal government when they have not been appointed as such. Regardless of how it decides, the Eleventh Circuit is likely not the last stop for this issue.

Enacted in 1863, the FCA prohibits the knowing submission of false claims for payment to the federal government, making it the federal government's primary tool to combat fraud by individuals and entities that misappropriate federal funds.

A unique aspect of the FCA is the qui tam provisions, which empower private relators to bring civil lawsuits in the name of, and on behalf of, the U.S. Relators whose cases are successful can share in the financial recovery to the government.

The ability of private individuals to bring such suits has been integral to enhancing government enforcement of the FCA, recovering billions of taxpayer funds, and

safeguarding the public interest by increasing accountability for those that contract with the government.

In September 2024, U.S. District Judge Kathryn Kimball Mizelle of the U.S. District Court for the Middle District of Florida issued a decision in Zafirov, finding the FCA's qui tam provisions unconstitutional under the appointments clause in Article II of the U.S. Constitution.[4]

The district court reasoned that relators constitute officers of the U.S. within the meaning of Article II because they exercise significant and continuing government authority — acting essentially as private attorneys general.

The decision breaks with decades of circuit court authority. Since the decision, some other courts and jurists have also questioned the constitutionality of the qui tam provisions.[5]

The District Court Litigation

Background

In 2019, Clarissa Zafirov sued her employer and other defendants for violating the FCA by misrepresenting patients' medical conditions to Medicare, and defrauding the government into overpaying the defendants amounts they were not entitled to receive under the Medicare Advantage Program.

The government declined to intervene, leaving Zafirov and her counsel to litigate the claims on behalf of the U.S. for the next five years. In February 2024, the defendants made a motion for judgment on the pleadings, asking the district court to decide as a matter of law that Zafirov's complaint should be dismissed because it violated Article II of the Constitution.[6]

The government intervened solely to defend the constitutionality of the FCA's qui tam provisions.

The Defendants' Arguments In Support of Constitutionality

The defendants made two main arguments: (1) that relators possess significant government authority through the relator's ability to maintain FCA litigation in the name of the U.S., set government enforcement policy through the maintenance of FCA litigation,

and bind the government through settlement; and (2) that relators occupy a permanent position in the Executive Office, akin to a special prosecutor, because the FCA qui tam provisions created the office of relators.

According to the defendants, these two features of the FCA require appointment by the executive branch, and because relators are not so appointed, the FCA's qui tam provisions are unconstitutional.

The Government's Response

The government argued that the authority the FCA confers on relators is not the same nature and does not rise to the same level of that exercised by an officer of the U.S. because: (1) the government can move to dismiss qui tam actions at any juncture, and (2) relators do not set government enforcement policy, as the government has an opportunity to review the FCA complaint before it is unsealed to decide whether it has merit.

Based on these facets of FCA litigation, the government posited that relators do not possess nor exercise executive authority.

The government further argued that relators do not occupy a permanent position, reasoning that a particular relator's position is unique to that relator, as the relator's interest in the litigation cannot be transferred or assigned.

Finally, the government reminded the court that FCA relators have recovered billions of dollars for the government and FCA qui tam cases are part of its anti-fraud enforcement infrastructure.

Zafirov's Arguments

Zafirov emphasized the FCA's qui tam provisions have deep roots in both English and American history, providing nearly a hundred historical examples, including some of the Founding Fathers' own participation in similar relator-type litigation.

Zafirov also submitted historical evidence showing that since the FCA's enactment in 1863, Congress has refined the FCA to meet modern challenges, but has never written out the qui tam provisions of the FCA nor questioned its constitutionality.

The District Court's Decision

On Sept. 30, 2024, the district court held that an FCA relator exercises significant authority and is an officer of the U.S., given the relator's civil enforcement authority on behalf of the U.S.

The district court also held that the statutorily created relator occupies a continuing position, mirroring that of a special prosecutor.[7] Thus, the district court found the qui tam provisions violated Article II's appointments clause.

In so doing, the district court referenced other precedents reinforcing the proposition that the enforcement authority a relator exercises is inherent in executive power, including Justice Clarence Thomas' dissent in U.S. ex rel. Polansky v. Executive Health Resources Inc. in 2023.

Observing that "a relator exercises core executive power by deciding how to prioritize and how aggressively to pursue legal actions against defendants who violate the law," the district court reasoned that a relator's ability to initiate an FCA enforcement action on behalf of the U.S. is no different from the executive branch's exclusive authority to decide whether to prosecute a case, and thus, a relator performs a traditionally exclusive function of the government.[8]

The district court additionally held that the FCA relator is a persistent, continuous office, merely by operation of the statute's qui tam provisions, regardless of whether the relator is continually occupying the post.[9]

Lastly, the district court rejected Zafirov's historical arguments, finding them devoid of any coherent rationale for how the qui tam provisions of the FCA can coexist with the appointments clause.[10]

Notably, because Zafirov arose in the context of a nonintervened case, it has been widely read to apply only to cases where the government has declined to intervene — which is the vast majority of cases. The decision's broad language, however, has left the door open for facial challenges to the constitutionality of the FCA qui tam provisions irrespective of whether the government intervenes.

The Eleventh Circuit Appeal

Zafirov and the government appealed the decision to the Eleventh Circuit, challenging the

two prongs of its holding concerning the (1) nature of a relator's authority, and (2) the duration of the relator position. Both appellants emphasized the government's oversight and control over FCA litigation, including its broad power to dismiss the case. The government also argued that the appointments clause cannot apply to private persons.

The defendants focused on a relator's perceived ability to force the government to expend time and resources investigating alleged fraud that the government may otherwise not have chosen to pursue.

The defendants thus raised a facial challenge, contending that all authority to investigate and punish wrongdoing vests solely in the executive branch, which must specifically appoint individuals to exercise that authority on its behalf. The defendants also underscored the permanent nature of the relator position under the statutory framework.

On reply, the government refined its position, acknowledging that in some circumstances, a relator's exercise of governmental authority could trigger an appointments clause issue, and instead shifted its focus on contending that relators do not occupy a continuing office under the FCA.

The government also honed its position on the nature and scope of a relator's authority, focusing on what it deems the proper inquiry: whether the relator performs a function only the government can undertake. The government contended that the answer to that question is necessarily no.

Appellate Oral Argument

On Dec. 12, 2025, the parties appeared for oral argument before a particularly engaged Eleventh Circuit panel. The panel kept focusing on the executive authority prong of the analysis and was particularly interested in hearing from all counsel about the government's ability to control an FCA case, including in nonintervened cases.

The panel also asked about comments that certain Supreme Court justices previously made expressing skepticism about the constitutionality of the FCA qui tam provisions. In particular, the panel repeatedly asked the litigants how Justice Thomas' remarks in his dissent in Polansky were wrong and how they should be interpreted.

Key Takeaways

As it currently stands, the district court's decision appears to apply only to qui tam litigation where the government declines to intervene. Indeed, the district court's hook for finding the qui tam provisions of the FCA unconstitutional was the relators' seemingly sole exercise of executive authority because the government declined to intervene. Thus, it would appear that if the government intervenes in an FCA case, the constitutional concerns about relators should not arise.

Yet, the Eleventh Circuit is poised to rule on the constitutionality of the qui tam provisions irrespective of whether the government intervenes. Thus, the qui tam framework as we know it may hang in the balance. No matter the outcome, all observers expect further review.

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[1] See US DOJ Press Release, "False Claims Act Settlements and Judgements Exceed $6.8B in Fiscal Year 2025," January 16, 2026, available at https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-68b-fiscal-year-2025, (last visited February 16, 2026).

[2] See US DOJ Statistics Sheet, "Fraud Statistics - Overview October 1, 1986 - September 30, 2025" Civil Division, U.S. Department of Justice, at *3, available at https://www.justice.gov/opa/media/1424121/dl, last visited February 16, 2026).

[3] Id.

[4] See, e.g., United States ex rel. Zafirov v. Florida Medical Associates, LLC, 751 F. Supp. 3d 1293, 1302 (M.D. Fla. 2024).

[5] See, e.g., United States ex rel. Montcrief v. Peripheral Vascular Assocs., P.A., 133 F.4th 395, 411 (5th Cir. 2025) (Judge Stuart Kyle Duncan, concurring); United States ex rel. Gose v. Native Am. Servs. Corp., No. 16-cv-03411 (KKM) (AEP), 2025 WL 1531137, at *1 (M.D. Fla. May 29, 2025); Contrast, United States v. Sporn Co. Inc., No. 24-cv-00617 (CR), 2025 WL 1371272, at *17 (D. Vt. May 12, 2025).

[6] Zafirov also argued that the FCA's qui tam provisions violated the Take Care Clause and the Vesting Clause of Article II. This article focuses solely on the Court's analysis and decision addressing the Appointments Clause.

[7] See, Zafirov, 751 F. Supp. 3d at 1307.

[8] See, e.g., Zafirov, 751 F. Supp. 3d at 1309.

[9] See, id. at 1314.

[10] See, id. at 1317 — 18.