

# Florida Judge Says FCA Whistleblower Provision Is Unconstitutional in Trailblazing Ruling

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## Highlights

A district court judge overturned the False Claims Act's whistleblower provision, holding it incompatible with the Constitution's Appointments Clause

This is the first holding of its kind and will certainly be appealed

Until the appellate process is completed, it is likely that raising similar arguments, citing to this opinion, will be standard practice for FCA practitioners

The U.S. District Court for the Middle District of Florida dismissed a False Claims Act (FCA) case, holding on Sept. 30 that the qui tam, or whistleblower provision of the FCA, is unconstitutional. It is the first decision of its kind involving the FCA.

The FCA allows the U.S. government to investigate and prosecute individuals and entities who submit false or fraudulent claims for payment to the government. The FCA is unique among federal anti-fraud laws in that it also allows private whistleblowers (called relators under the act) to file FCA cases pursuant to a qui tam provision.

Once a case is brought by a relator the United States has a certain amount of time to investigate the case and decide how to proceed: either intervene and take over the case or decline to intervene. If, after investigation, the government chooses not to proceed with the prosecution, the qui tam provision allows the relator to continue to prosecute the case they brought in the name of the government, subject to some limitations.

## Overtaking the FCA's Qui Tam Provisions

In the Florida case, *U.S. ex rel. Zafirov v. Florida Medical Associates et al.*, Clarissa Zafirov sued her employer and other defendants under the qui tam provision alleging the defendants had misrepresented patients' medical conditions to Medicare in order to receive increased capitation

payments. The government originally declined to intervene in Zafirov's case. After litigating the case for nearly five years, the defendants challenged the constitutionality of the FCA's qui tam provision.

The defendants, citing a prior dissent by U. S. Supreme Court Justice Clarence Thomas and a singular concurrence by Justice Brett Kavanaugh, argued the qui tam provision violates the Appointments Clause. Under the Appointments Clause the president may nominate and, with the advice and consent of the Senate, appoint public officials. In *Zafirov*, the defendants argued that by bringing a qui tam claim where the government refuses to intervene, the relator becomes an officer of the U.S. who was neither nominated by the president nor confirmed by the Senate.

Judge Kathryn Kimball Mizelle agreed with this argument, finding an FCA relator, proceeding in a non-intervened case on behalf of the U.S., meets the definition of an officer of the government because: 1) relators exercise civil enforcement authority on behalf of the U.S., and 2) a relator "occupies a continuing position established by law."

Accordingly, FCA relators are officers that must be appointed under the procedures enumerated in the Constitution. Since the FCA's whistleblower provision is inconsistent with the Appointments Clause, Judge Mizelle ruled the whistleblower provisions unconstitutional and dismissed the case.

## Key Takeaways

The decision is the first of its kind. To date, no court has found the qui tam provision violates the Constitution, and circuit courts have universally upheld those FCA provisions. The decision is not binding precedent and an appeal to the Eleventh Circuit is virtually certain. It is expected the appellate court will not uphold this decision. However, as Justice Thomas and Justice Kavanaugh have raised this concern in non-majority opinions, there may be votes in favor of the district court's position should the case reach the Supreme Court.

There are several practical implications of this decision as well, and given the uncertainty, defendants in FCA cases should be aware of at least two things. First, even though non-binding, best practice dictates that unless and until this case is heard and decided by the Supreme Court, all defendants in non-intervened FCA cases being prosecuted by a relator should consider moving to dismiss. Second, where the government has argued that it has complied with the statute of limitations based on a relation back to the relator's qui tam complaint, a viable challenge to that argument may now exist.

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