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Client Alert

White Collar Defense

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Florida District Judge Invites Flood of Litigation Over Constitutionality of *Qui Tam* Suits

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In an astonishing break from decades of False Claims Act (FCA) precedent, a Florida district court judge deemed the FCA's *qui tam* provisions unconstitutional in *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024). The court held that the FCA's whistleblower device enabling private parties to represent the interests of the United States was inconsistent with the Appointments Clause, inviting a flood of litigation in the near term.

The FCA, also known as the Lincoln Law, was signed into law by President Abraham Lincoln in 1863 in response to widespread fraud by government contractors and suppliers during the Civil War. The FCA is a whistleblower law that permits private citizens, called "relators," to act on behalf of the federal government in bringing *qui tam* lawsuits against any individuals or entities that have defrauded the federal government.

In the September 30, 2024 *Zafirov* opinion, U.S. District Judge Kathryn Kimball Mizelle sided with the defendants' argument that Clarissa Zafirov, a *qui tam* relator, improperly acted as an officer of the executive branch without being appointed by the President as required by the Article II Appointments Clause. Based on her conclusion that a *qui tam* relator under the FCA "exercises significant authority, indeed executive power . . . but lacks proper appointment under the Constitution," Judge Mizelle granted defendants' motion for judgment on the pleadings and dismissed Zafirov's FCA case with prejudice.

Although Judge Mizelle's opinion dismissing an FCA suit is the first of its kind, three Supreme Court Justices opened the door for this type of dismissal in the June 2023 opinion in *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419 (2023). In his dissent, Justice Clarence Thomas referenced "substantial arguments that the *qui tam* device is inconsistent with Article II," noting in particular that "there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits." Justice Brett Kavanaugh and Justice Amy Coney Barrett added to the conversation in a concurring opinion, which noted that "the Court should consider the competing arguments on the Article II issue in an appropriate case." Judge Mizelle's opinion follows their lead. If appealed, *Zafirov* could provide a basis for the Supreme Court to address the Article II question in the coming months or years.

Companies exposed to potential FCA liability should keep their eyes peeled for how other courts respond to the *Zafirov* decision. While the FCA's *qui tam* provisions remain intact, defense attorneys now have a new basis for seeking dismissal—with persuasive authority from the Supreme Court and the Middle District of Florida to back it up. The future of *qui tam* suits by private relators may become unpredictable until the issue reaches the Supreme Court. Until that time, courts will be deluged with motions targeting the matter.

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