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Courts Renew Scrutiny of the False Claims Act's Qui Tam Provisions

Key Takeaways

- **Courts Revisit the Constitutionality of the FCA**: Recent federal decisions reflect renewed judicial scrutiny of the False Claims Act's *qui tam* provisions, which authorize private individuals to bring enforcement actions on behalf of the United States.
- **Federal judges call for Supreme Court review of FCA *qui tam* provisions:** A district court ruling and a Fifth Circuit concurrence both urge reconsideration of prior precedent, citing separation-of-powers concerns under Article II.
- **Potential circuit split may prompt broader change in FCA enforcement:** If the Eleventh Circuit affirms the *Zafirov* decision, the issue could head to the Supreme Court and reshape whistleblower-driven enforcement across regulated industries.

Background

The False Claims Act (FCA) allows private citizens (relators) to file suits on behalf of the United States against entities that submit false claims for payment. Successful whistleblowers may recover up to 30% of any government recovery, and the FCA has become one of the government's most powerful enforcement tools, particularly in healthcare and defense contracting.

Federal Courts Reexamine Constitutionality of FCA's Qui Tam Provisions

For decades, courts have upheld the constitutionality of the FCA's *qui tam* provision. However, on Oct. 1, 2024, Judge Kathryn Mizelle of the U.S. District Court for the Middle District of Florida ruled that the FCA's *qui tam* mechanism violates the Appointments Clause because it allows private individuals — who are not appointed pursuant to Article II of the Constitution — to exercise executive power by litigating on behalf of the U.S.[1]

Fifth Circuit Flags Separation-of-Powers Concerns in FCA Dismissal

Judge Mizelle's ruling was not an isolated development. In a recent decision, the Fifth

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Circuit affirmed the dismissal of a whistleblower's *qui tam* action in *United States ex. rel. Gentry v. Encompass Health Rehab. Hosp. of Pearland, L.L.C.*[2]. The relator, a former sales representative at a rehabilitation hospital, alleged that the facility submitted false Medicare claims by allowing nonclinical employees to influence patient admission decisions. The Fifth Circuit held that the complaint failed to allege sufficient facts or particular details showing that false claims were submitted or that any alleged misconduct was material to government payments.

Notably, in a concurring opinion, Judge James C. Ho agreed with the outcome — but urged the court to revisit "serious constitutional problems" with the *qui tam* provisions. The Fifth Circuit previously affirmed the constitutionality of the FCA's *qui tam* structure in *Riley v. St. Luke's Episcopal Hosp.*[3] Nonetheless, Judge Ho called on the Fifth Circuit to reconsider *Riley*. Judge Ho reiterated Judge Mizelle's reasoning in *Zafirov* and emphasized that relators exercise executive authority on behalf of the U.S. without appointment or accountability to the President, raising separation-of-powers concerns under Article II. Judge Ho's opinion echoed Justice Thomas's dissent and Justice Kavanaugh's concurrence (joined by Justice Barrett) in *United States ex rel. Polansky v. Executive Health Res., Inc.*[4], which questioned whether allowing private relators to litigate on behalf of the country is consistent with the Constitution's separation of powers.

Rising Judicial Skepticism Could Reshape FCA Enforcement

Judge Mizelle's ruling in *Zafirov* and Judge Ho's concurring opinion in *Gentry* together signal a growing judicial willingness to revisit the constitutionality of the FCA's *qui tam* provisions. The *Zafirov* decision has been appealed by the U.S. to the Eleventh Circuit, where briefing is underway. The Eleventh Circuit's eventual ruling could create a circuit split if it affirms Judge Mizelle's reasoning and diverges from prior decisions by the other circuits.

At the same time, the Fifth Circuit's decision in *Gentry*, and Judge Ho's explicit call to revisit what he described as "serious constitutional problems" with the FCA, demonstrate that these concerns are not confined to a single court or circuit. At least three Supreme Court justices have signaled a willingness to examine the issue. In *United States ex rel. Polansky v. Executive Health Resources, Inc.,*[5] Justices Kavanaugh and Barrett questioned whether the *qui tam* provisions align with Article II, while Justice Thomas dissented on similar grounds. Both Judge Mizelle and Judge Ho relied in part on these separate opinions in shaping their constitutional analyses.

For now, these rulings apply only to the parties involved and, more broadly, to FCA cases in which the government has not intervened. However, defendants and relators alike should closely monitor the progression of the *Zafirov* appeal and any subsequent cases that adopt or reject its reasoning. If other courts follow suit, or if the Supreme Court ultimately agrees to address the issue, the outcome could fundamentally reshape FCA enforcement.

Given that the vast majority of FCA recoveries arise from *qui tam* actions, the implications are significant. A constitutional shift in how these actions proceed would therefore have sweeping effects across the healthcare, defense, and government contracting industries.

For more information about how these developments may impact your organization, contact your Polsinelli attorney or a member of the firm's Government Investigations practice.

[1] *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, Case No. 8:19-

cv-01236, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).

[2] *United States ex. rel. Gentry v. Encompass Health Rehab. Hosp. of Pearland, L.L.C.*, No. 25-20093, 2025 WL 3063921 (5th Cir. Nov. 3, 2025).

[3] *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (en banc)

[4] *United States ex rel. Polansky v. Executive Health Res., Inc.*, 599 U.S. 419 (2023)

[5] *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023)