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FCA Qui Tam Provisions Survive Eleventh Circuit Appointments Clause Review

Key Updates

- The Eleventh Circuit held that FCA relators are not "officers of the United States" because they do not occupy a continuing position established by law.
- The court vacated the district court's dismissal of the underlying action and rejected its conclusion that the FCA's *qui tam* provisions violate the Appointments Clause and remanded the case for consideration of defendants' arguments under the Take Care Clause and Vesting Clause.

Why it Matters

- For health care organizations, government contractors and other federal funding recipients, the decision means FCA *qui tam* suits remain a live enforcement threat in the Eleventh Circuit even as defendants continue testing constitutional limits on relators' authority.

Next Steps

- Entities facing relator-initiated FCA suits should review pending *qui tam* actions for opportunities to preserve Article II challenges while the constitutional limits of relators' authority remain unsettled.

On Sept. 1, the Eleventh Circuit issued its long-awaited decision in *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, holding that the False Claims Act (FCA) *qui tam* provisions do not violate the Appointments Clause of Article II. The Court vacated the district court's dismissal of the action and remanded the case for consideration of the defendants' remaining constitutional challenges. This appeal was initially viewed as a potential turning point that could position the issue for Supreme Court review. Rather than creating a circuit split, the Eleventh Circuit joined the Fifth, Sixth, Ninth and Tenth Circuits in rejecting Appointments Clause challenges to the FCA's *qui tam* provisions.

In this alert, we break down what the ruling means for FCA defendants, where constitutional challenges may go next and how organizations can think about preserving

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defenses in pending *qui tam* matters.

District Court Found *Qui Tam* Provisions Unconstitutional

The underlying action was filed in 2019 by Dr. Clarissa Zafirov, who alleged that her employer and related entities knowingly submitted inaccurate diagnosis codes to obtain inflated Medicare payments. After several years of litigation, the defendants moved for judgment on the pleadings or dismissal, arguing that the *qui tam* provisions of the FCA are unconstitutional because they violate Article II's Appointments, Take Care and Vesting clauses. Unpersuaded by historical examples of similar *qui tam* provisions, the district court agreed with defendants' Appointments Clause argument, finding that relators are officers of the United States and that the relator in the instant matter had not been presidentially appointed. The district court dismissed the action, and both Zafirov and the United States appealed.

Eleventh Circuit Finds No Appointments Clause Violations

The Eleventh Circuit disagreed with the district court. The Eleventh Circuit considered whether the False Claims Act's *qui tam* provisions violate the Appointments Clause because relators are not appointed by the president. Although the parties also raised Take Care Clause and Vesting Clause arguments, the Court addressed only the Appointments Clause argument in its decision. The parties agreed that relators are not presidentially appointed, but Zafirov and the United States argued that no appointment is required because relators are not "officers of the United States."

Under the framework from *Lucia v. SEC*, a person qualifies as an officer only if the person both occupies a "continuing" position established by law and exercises significant federal authority. The Court assumed, without deciding, that this framework applies to relators even though they are private parties rather than government employees. The Court then resolved the appeal solely on the continuing-position requirement, finding that a relator does not occupy a continuing position.

First, the Court found that a relator's tenure is temporary and intermittent. A relator acts only in connection with a particular FCA case, may bring multiple cases or none, and has no remaining duties once the case concludes. The fact that some FCA litigation lasts several years does not make the position continuing because a relator's responsibilities do not extend beyond the particular action the relator initiated.

Second, relators receive no "continuing emolument." A relator may receive compensation only through a one-time, contingent share of a successful judgment or settlement, rather than through a salary or regular congressional appropriation. The Court found that this compensation structure weighs against treating relators as federal officers.

Third, a relator's duties are personal rather than attached to an enduring office. If a relator were to abandon a case, no other private party can simply replace that relator. The Court explained that although an estate representative or bankruptcy trustee may continue an existing claim in limited circumstances, those representatives act on behalf of the original relator rather than replacing an independently existing office.

In addition to these three points, the Court also rejected the theory that the FCA created a permanent "office of relator" that exists even when unoccupied. The term does not appear in the FCA, and the proper inquiry is whether the individual occupies a continuing position, not whether a hypothetical office could continually be filled by different people. Since relators have temporary tenure, contingent compensation and personal duties, they do not occupy continuing positions and are therefore not officers subject to the Appointments Clause.

Since it found no continuing position, the Court did not decide whether relators exercise "significant authority" under federal law.

Take Care and Vesting Clause Challenges Remain Unresolved

The Court did not resolve the defendants' two remaining Article II theories:

- The Take Care Clause challenge, which contends that the president lacks sufficient supervision and control over relators who pursue declined FCA actions; and
- The Vesting Clause challenge, which contends that permitting private parties to prosecute civil enforcement actions in the government's name improperly transfers executive power vested in the president.

The Court remanded the case to the district court to evaluate those arguments for the first time.

This decision leaves the current FCA landscape intact for the Eleventh Circuit. As such, organizations should continue to prioritize effective compliance systems, internal reporting, investigation processes and prompt responses to potential FCA exposure. If you have questions about how the Eleventh Circuit's decision may affect your organization or need guidance related to FCA matters, please contact Polsinelli's Government Investigations team.