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11th Circ. Ruling Won't Prevent Qui Tam Constitutional Tests

By **Madeline Lyskawa**

Law360 (September 11, 2026, 9:19 PM EDT) -- The Eleventh Circuit's holding that the False Claims Act's provisions letting private individuals sue on the federal government's behalf pass muster under the U.S. Constitution may do little to halt the growing wave of challenges seeking to knock down those provisions.

Although the court vacated a first-of-its-kind federal court ruling that the FCA's qui tam provisions contravene the Constitution's appointments clause by allowing non-presidentially appointed whistleblowers to sue on behalf of the U.S. government, it left room for the lower court to consider whether the provisions violate other clauses under Article II of the Constitution.

How the district court judge rules on remand on whether the provisions violate the take care and vesting clauses — which vest executive power in the president and require the president to take care that laws are faithfully executed — could inform how much control the U.S. Department of Justice must have over qui tam cases to keep constitutional challenges at bay, said Noam Fischman, co-team leader of the healthcare litigation group at Akerman LLP.

"If I had to guess through the crystal ball, I suspect that a court finding, as applied, the qui tam provision being unconstitutional might provide a roadmap for the government of what sort of control is necessary to pass constitutional muster," Fischman said. "At this point, I doubt that the qui tam provision is just going away forever. What might happen is that the government has to reconstitute how it controls cases, how it supervises cases."

Jackie Kelly, a partner at Boies Schiller Flexner LLP whose practice focuses on white collar defense, said how the DOJ's enforcement of the FCA changes would depend heavily on what a ruling finding the qui tam provisions are unconstitutional looks like. If it's the U.S. Supreme Court weighing in and the justices lay out clear parameters for what would or would not violate Article II, Kelly said that decision will dictate what the enforcement regime looks like going forward.

"In a hypothetical world, if we're six chess moves ahead, I think it would be possible to still have qui tam actions brought by private citizens if the United States was choosing to intervene or join at the outset, and so what's really going to be affected are the cases where DOJ is not intervening. And how that exists, if at all, if there were a successful challenge, that's really what's in question," Kelly said.

The panel's decision overturned U.S. District Judge Kathryn Kimball Mizelle's September 2024 ruling, which threw out claims by relator Clarissa Zafirov, a physician and former employee of one of the

defendants, accusing Medicare Advantage and provider organizations of bringing patients in for medically unnecessary doctor visits and submitting unsubstantiated diagnosis codes to increase reimbursements, among other things.

The defendants argued in response that the qui tam provisions violate the appointments clause, the take care clause and the vesting clause, echoing Justice Clarence Thomas' 2023 dissent in *U.S. ex rel. Polansky v. Executive Health Resources*, in which he said he doubted the qui tam provision would pass muster under Article II.

Judge Mizelle, who clerked for Justice Thomas, ultimately ruled that the qui tam provisions violate the appointments clause, saying Zafirov "exercises significant authority, indeed core executive power," in her role as a relator, despite not being presidentially appointed, in violation of the clause. The Eleventh Circuit, however, did not opine on this issue of executive authority, instead choosing to narrowly focus on whether Zafirov occupied a "continuing position" as a relator, as required for the appointments clause to apply.

"You could have seen a decision where the circuit said, look, we're upholding the qui tam provisions as constitutional under the appointments clause because, No. 1, it's not a continuing position, but No. 2, the plaintiffs aren't exercising significant executive authority, and instead they left that part unaddressed," said Matt Yelovich, a partner and member of Cleary Gottlieb Steen & Hamilton LLP's FCA Task Force.

"If you view this as constitutionally problematic, as the challengers to the law do, you might take heart in the fact that the Eleventh Circuit left that question open, and that the judge you're getting on remand has already written that, in the judge's view, this is core executive power that the relator is exercising," Yelovich said.

While the DOJ has maintained, in defending the qui tam provisions, that it retains control over relators even after declining to intervene in their cases, thereby stripping relators of core executive power, Akerman's Fischman said there will be a dispute on remand over how much control the DOJ is actually exerting.

The DOJ could argue that it has the power to intervene in or decline to intervene in a relator's case, that the DOJ oversees discovery and that it has the power to settle a case with the defendants, Fischman said. However, to make those claims, there needs to be evidence of the level of control the DOJ has over relators' counsel in declined cases, which the government could argue is privileged information, creating a "quagmire," the attorney said.

Qui tam cases also play out over many years, making it difficult to discern just how involved the government is over time, Fischman said.

"You've got situations where the government, although within their definition of control, might actually only touch a case very sporadically over the course of a decade, and the question is functionally: Is theoretical control enough for the constitutional threshold to be met, or does it require active de facto control? These are all things the courts are still going to have to unpack for us," Fischman said.

Claire Sylvia, a whistleblower attorney and partner at Phillips & Cohen LLP, viewed things differently, saying the executive branch has "all kinds of control over what relators do," including the ability to seek restrictions on a relator's participation in a case.

"If the executive branch doesn't think its power is being undermined, then it's a harder argument to make that the executive branch's power is being undermined. So I think it's very important that they're supporting the statute, and I think the statute benefits the executive branch," Sylvia said.

Rather than focusing their efforts on getting a favorable ruling on remand, the defendants could also ask the Supreme Court to review the panel's decision, according to Lyndsay Gorton, a government contracts partner at Crowell & Moring LLP.

"One of the most interesting parts of this decision, though, is going to be what happens next," Gorton said. "Obviously, the Eleventh Circuit remanded for analysis on the vesting and take care clause argument, but there is also a potential question that the parties might make a decision to try to petition the Supreme Court for certiorari on the appointments clause argument."

While the defendants might be tempted to seek certiorari on the appointments clause question — given that three Supreme Court justices have written or joined opinions indicating a willingness to review the constitutionality of the qui tam provisions — Cleary's Yelovich said this decision is "not the best vehicle for Supreme Court review" because it only focuses on a narrow part of the appointments clause.

"If you're their counsel, you're sort of debating, what is in our client's best interest? Is it to take a narrower question to the Supreme Court now, or is it to wait, see what we can get on remand, and then see what happens on appeal after that remand, and then possibly have a much broader challenge to the False Claims Act available for seeking certiorari later down the road?" Yelovich said.

Although it's unclear whether the defendants will seek Supreme Court review now, Boies Schiller's Kelly said most attorneys are confident that the question of whether the qui tam provisions pass constitutional muster will be taken up by the justices at some point.

"A lot of ink is being spilled about the Eleventh Circuit decision, but to me, it doesn't really change the playing field all that much because you still have two other avenues of constitutional challenges available in that particular case," Kelly said.

"I think most people predict, and reasonably so, that this will end up in front of the Supreme Court, one way or the other, and until we see how that plays out, and if the court takes the case, we really won't know if there's going to be this sea change or not," she said.

--Editing by Kelly Duncan and Brian Baresch.