

Jury Verdict in Declined Civil FCA Action Need Not Bar Criminal Prosecution for Same Conduct

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by Betsy Sellers

The *qui tam* provisions of the False Claims Act allow private citizens to file FCA claims on behalf of the government. The government may elect to intervene in the action—or it may not. The United States District Court for the Western District of Virginia held earlier this month that when the government does not intervene, it is a party in interest, but not a party to the *qui tam* suit—a distinction of significance for purposes of collateral estoppel. See *United States v. Whyte*, No. 4:12-cr-21-2, 2016 U.S. Dist. LEXIS 172560 (W.D. Va. Dec. 16, 2016).

The federal government indicted William R. Whyte and Armet Armored Vehicles, Inc. in 2012 on three counts of major fraud against the United States, six counts of wire fraud, and three counts of false, fictitious, and fraudulent claims. Mr. Whyte is the owner and CEO of Armet, a manufacturer and supplier of armored vehicles. *Id.* The indictment alleges that Mr. Whyte and Armet contracted with the government to manufacture and supply vehicles for use in Iraq, but the vehicles were delivered late and did not conform to contract specifications.

Mr. Whyte avoided prosecution for a few years by fleeing to Canada, but he was extradited in September 2016. In the meantime, Armet's former president filed a *qui tam* action against Mr. Whyte and Armet based on the same conduct underlying the government's indictment. The government chose not to intervene. In Mr. Whyte's absence, that case was tried to a jury, which returned a verdict in favor of Mr. Whyte and Armet. When Mr. Whyte returned to the United States this fall, he moved to dismiss the indictment against him on grounds of collateral estoppel.

The court denied Mr. Whyte's motion, reasoning that although the government was a party in interest to the *qui tam* action, it was not technically a "party" for purposes of a collateral-estoppel analysis. Because it did not intervene, the government could not "issue subpoenas, conduct depositions, propound discovery, call witnesses, or cross-examine the defendant's witnesses"—that is, it could not exercise the degree of "practical control over the litigation [such] that it would be fair to bind it to the prior ruling

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[in the *qui tam* action].” The court emphasized that its holding recognizes a policy decision behind the framework of the FCA: it is the government’s choice whether to intervene in a civil *qui tam* action or pursue criminal charges, and the government should not be forced to be a party to a *qui tam* action.