

Fourth Circuit Court Rejects Criminal Defendant's Attempt to Dismiss Indictment Based on Favorable Defense Verdict in Non-Intervened FCA Case

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On January 26, 2017, the US District Court for the Western District of *Virginia* rejected a defendant's attempt to invoke collateral estoppel principles to dismiss an indictment for fraud. In ***United States v. Whyte***, the defendant, Whyte, argued that the indictment should be thrown out because a jury had previously found in his favor after trial of a relator's civil *qui tam* claims under the False Claims Act (*U.S. ex rel. Skinner v. Armet Armored Vehicles and William Whyte*, W.D. Va. June 4, 2015), based on allegations of fraud that overlapped with those in the indictment. Whyte argued that the jury's verdict established that no fraud was committed, and that the government, as real party in interest in the *qui tam* case, had the full opportunity to litigate the issues. Accordingly, Whyte contended that collateral estoppel mandated dismissal.

The district court disagreed, and its opinion rested on the fact that the government did not intervene in the *qui tam* action. The court found that the government's declination meant that the collateral estoppel doctrine's requirement that the parties to the prior case and the case at bar be identical was absent. The court acknowledged that party identity for estoppel purposes can exist where there where "there is such a degree of affinity of interests of the person who was not a formal party to the prior proceeding, as to render the doctrine of collateral estoppel applicable." *In re Goldschein*, 241 B.R. 370, 374 (D. Md. 1999) (citing *Va. Hosp. Assoc. v. Baliles*, 830 F.2d 1308, 1312 (4th Cir. 1967)). But it held that in such cases, the non-party must have had the ability to control the prior proceedings. While the government is a "real party in interest" in a declined *qui tam*, the court determined that it lacks the ability to control the litigation. The court reasoned:

By statute, if the government elects not to intervene, it retains no right to control the litigation in any meaningful way. It may not issue subpoenas, conduct depositions, propound discovery, call witnesses, or cross-examine the defendant's witnesses. It is entitled to receive pleadings and deposition transcripts, but no more. In instances in which the government elects not to intervene, it cannot reasonably be argued that the government had a 'full and fair opportunity to litigate' the issues.

The court further opined that any contrary holding would render meaningless the government's statutory election decision. "If the government were bound by private actors prosecuting FCA cases in its name, there would be no purpose to Congress's decision to permit the government to elect to

intervene, or to decline to intervene. Under Whyte’s proposed interpretation, the government would be forced to be a party regardless of its intervention decision.”

The court’s characterization of the government’s lack of control over a declined *qui tam* case fails to address the statutory tools available to the government. Among other things, the government can seek a stay of discovery if the discovery being conducted by the relator is interfering with a parallel criminal investigation or prosecution; it frequently files statements of interest in declined *qui tams* espousing its views on the legal issues in play in the case; it can object to a settlement between the relator and the defendant and must consent to any dismissal of the action by the relator; the government can settle a case over the objection of the relator and has a broad right to dismiss any FCA case. Further, a declination decision is not final—the government can later seek to intervene for “good cause” as the case progresses. Whether these examples suffice to establish “control” for collateral estoppel principles is a question that the *Whyte* court would presumably answer in the negative, but the notion that the government lacks any control over an FCA case in which it has declined to intervene ignores the many avenues pursuant to which the government can (and does) exert control. And the irony here is that while the defendant escaped civil fraud liability notwithstanding the lower preponderance of the evidence standard of proof applicable to such claims, he now must face criminal fraud charges which the government must prove beyond a reasonable doubt.

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