

NOT SO FAST! DISTRICT COURT HOLDS QUI TAM RELATORS CANNOT REACH INTO THE GOVERNMENT'S POCKETS IN CRIMINAL FORFEITURE PROCEEDINGS

The Eleventh Circuit recently held that a *qui tam* relator cannot intervene in criminal forfeiture proceedings when the Government chooses to criminally prosecute fraud rather than intervene in a *qui tam* action.

In *United States v. Couch*,^[1] a former employee ("Relator") of a pain management clinic in Alabama tried to recover amounts she believed were owed to her as a relator in a *qui tam* action. The Relator brought evidence to the Government's attention that her former employer was submitting false claims for reimbursement. The Government advised the Relator to file a *qui tam* action but later declined to intervene in the case.

While the *qui tam* action was pending, the Government criminally charged two doctors from the clinic with conspiracy to distribute controlled substances and conspiracy to commit health care fraud, along with several other counts in two additional superseding indictments. Criminal charges filed against the doctors overlapped with the claims alleged in the Relator's *qui tam* action. While the *qui tam* action was pending, the criminal case was tried and the two doctors were convicted on several counts, including fraud. The Relator moved to intervene in the criminal forfeiture proceedings in order to collect her relator's award. The Relator relied on an FCA provision allowing relators to collect a whistleblower's share when the Government pursues remedies other than a *qui tam* action.^[2]

The District Court ruled that the Relator was not entitled to an award because the criminal forfeiture statutes explicitly prevented third parties from receiving forfeited property. And, while the FCA generally allows *qui tam* relators to recover in alternative actions, the specificity of the forfeiture statutes superseded the FCA's general terms.

Despite this holding, the court advised the Relator that she was not precluded from all recovery. The court reiterated a promise that the Government made in their filings: the Relator cannot recover from the criminal forfeiture without separately prosecuting her own *qui tam* action. If the Relator succeeds in her *qui tam* action, her relator's share will be based on the entire *qui tam* award, even if the defendant is entitled to credit for money already recovered by the Government in restitution of forfeiture. The court cautioned the Government to honor its promise.

PRACTICAL TAKEAWAYS

- Relators have several options at their disposal to recover large awards in FCA actions. Though criminal forfeiture proceedings may be off limits, relators can still benefit in alternative actions, providing ample incentive for continued whistleblower claims.
- This holding encourages relators to maintain *qui tam* actions, even if the Government declines intervention by incentivizing relators with additional opportunities for reward under the FCA.
- Beyond the specific holding, the Government's launch of a criminal investigation and prosecution against individuals for health care fraud *after* being alerted to the potential fraud by a *qui tam* action highlights the Government's continued dedication to actively pursuing individuals for health care fraud.

If you have any questions, please contact:

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[1] *United States v. Couch*, No. 17-13402, 2018 WL 5019480 (11th Cir. Oct. 17, 2018).

[2] 31 U.S.C. § 3730(c)(5).