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False Claims Act

\$663M Reversal Has Silver Lining For Whistle-Blowers, Attorneys Say

BY DANIEL SEIDEN

The Fifth Circuit's conclusion that Trinity Industries Inc. couldn't be liable if the government always paid for and approved of its product despite knowledge of alleged wrongdoing marked a major victory for false claims defendants.

The result wasn't surprising given the Supreme Court's decision in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, which raised the bar a plaintiff must reach to prove the materiality element of a case, Aaron P. Silberman, a shareholder at Rogers Joseph O'Donnell in San Francisco, told Bloomberg BNA.

"Where the government knows of the alleged falsity and continues to pay, it will be difficult for a plaintiff to prove materiality," he said. "Where the government's knowledge is complete and reasoned, as it was here, proving materiality will be impossible."

However, the silver lining for whistle-blowers is that the court didn't "absolve contractors of liability anytime the government takes no action in response to fraud allegations," Claire Sylvia, partner at whistle-blowers' law firm Phillips & Cohen LLP, San Francisco, told Bloomberg BNA.

Materiality can exist, according to the court, in a case where the government takes no action because of a lack of full knowledge of alleged fraud, she said.

Product Never Lost Eligibility Trinity made false representations about its guardrail product complying with federal regulations so it could receive payments, whistle-blower Joshua Harman said. A jury returned a \$663 million verdict.

Compliance wasn't material to payment decisions under *Universal Health* because the Federal Highway Administration knew about the allegations but continued to pay anyway, Trinity said on appeal.

Given the government's unwavering position that Trinity's product was and remains eligible for federal reimbursement, Trinity's alleged misstatements were not material to payment decisions, Judge Patrick E. Higginbotham said, throwing out the verdict.

"It is surprising that the court would overturn a jury verdict and decide the case for the defendant, but the court's articulation of the materiality standard is not surprising," Sylvia said.

Admitting to Being Defrauded Getting a government agency to admit to being duped is a challenge in false claims cases, said David Chizewer, who represents whistle-blowers as a principal with Goldberg Kohn in Chicago.

"No one wants to admit that they have been defrauded," he said. "A government agency is made up of individuals and the personal, psychological, and possibly professional costs to them of admitting that they may have missed something or worse can outweigh the possibility of getting money back for their agency."

In cases where a whistle-blower litigates without the government's help, "you hope that the government will play a cooperative role even if they are not part of the case, be a cheerleader, or at least be neutral as to the outcome," Chizewer said.

Court Tipped Hand The materiality ruling was also expected given the court's posture in an order issued years ago, said Gary W. Eiland, a partner with King & Spalding LLP in Houston.

Higginbotham showed concern in an October 2014 order that the trial court had failed to issue a reasoned ruling rejecting Trinity's legal arguments.

A letter from the Federal Highway Administration "seems to compel the conclusion" that the agency found Trinity's product "sufficiently compliant with federal safety standards, and therefore fully eligible, in the past, present and future for federal reimbursement," the order said.

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