LITIGATION NEWS
ABA Section of Litigation

Civil False Claims Require New Materiality Standard

Erik A. Christiansen – March 7, 2018

False claim relators are now required to prove materiality in all cases, according to one federal circuit court. In a landmark ruling, a federal court of appeals incorporated for the first time the materiality standard from "false certification" cases into a "factual falsity" case under the False Claim Act (FCA), 31 U.S.C. §§ 3729–3733.

The U.S. Supreme Court first required proof of materiality in a false certification case in *Universal Health Servs., Inc. v. United States ex rel, Escobar*, 136 S.Ct. 1989 (2016). Expanding *Escobar*, the U.S. Court of Appeals for the Fifth Circuit held in *United States ex rel., Harman v. Trinity Industries, Inc.*, No. 15-41172 (5th Cir. September 29, 2017). that in a factual falsity case a relator must prove materiality, a first for a federal court of appeals.

The holding means "that every false claims relator in the Fifth Circuit must prove that fraud was material to the government's payment," according to John T. Boese, a member of the ABA Task Force on New Contractor Business Ethics and Compliance Program Regulations. *Trinity* extends the materiality requirement to both false certification and factual falsity cases. The case defines a false statement as material if it has "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

Government Purchasing After Disclosure of Alleged Fraud Negates Materiality

At issue in *Trinity* was whether a guard rail design change and associated failed crash tests were material to the Federal Highway Administration (FHWA). The government learned about the

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modified design and failed tests and yet continued to pay for the guard rails anyway. One of the five alleged design changes included a one-inch difference in the width of the guard rail channel.

Judge Patrick E. Higginbotham wrote for the unanimous court that when "the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated," evidence of materiality is lacking. The government itself, *Trinity* held, was not "persuaded" that it had "been defrauded."

Trinity Makes Filing Factual Falsity Cases More Difficult in Multiple Ways

"*Trinity* was a statement case" that "drives a stake in the heart of relators," says Boese, adding, "*Trinity* will have a profound impact on damages claims."

In false certification cases, defendants often assert the government knew what it got and suffered no damage when it paid after disclosure. "It is not junk value if the government accepts it," Boese opines.

Trinity expands the same defense to factual falsity cases. When the government knowingly pays for an allegedly defective product, it suffers no damage, he explains. The defect is not material to the decision to pay. Scienter also will be "difficult to prove if the government accepts something with knowledge" of false facts, Boese says. When the government knows of the defect and continues to buy the product, an intent to defraud will be harder to prove after *Trinity*.

Trinity Defers to Agency Expertise

Koji Fukumura, chair of the ABA Section of Litigation, agrees. "The Fifth Circuit got it exactly right" because "the court looked at fraud from a practical standpoint," says Fukumura. "The agency looked at the information and accepted the product," states Fukumura, explaining, "*Trinity* showed deference to the agency and its own expertise in making purchasing decisions."

The long-term impact of *Trinity* is that "relators will be more selective about cases they bring," concludes Boese. Based on Section leader comments, the government's knowledge of allegedly false facts will likely affect everything going forward in false claims cases, including materiality, scienter, and damages.

Erik A. Christiansen is a contributing editor for Litigation News.

Hashtags: #FalseClaimsAct #FCA #Materiality

Resources

- *United States ex rel. Wall v. Circle C. Construction, LLC*, No. 14-6150, 2016 WL 423750 (6th Cir. Feb. 4, 2016).

- *United States ex rel. Purcell v. MWI Corp.*, No. 14-5210 (D.C. Circ. Nov. 24, 2016).
- *United States v. Science Applications International Corp.*, 626 F.3d 393 (D.C. Cir. 2010)