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Motions in Limine Filed in Lance Armstrong/US Postal Service Litigation Raise FCA Damages, Government Knowledge and Relator Character Issues on Which Court's Rulings May Have Widespread Impact

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We reported back in March on the US District Court for the District of Columbia's summary judgment decision in the Lance Armstrong/Floyd Landis/US Postal Service (USPS) False Claims Act (FCA) litigation, centered on Lance Armstrong's use of performance enhancing drugs (PEDs) while he was leading a professional cycling team sponsored by the USPS. A pack of motions in limine (MILs) filed by the parties over the past few weeks suggest that the case may well be headed to trial this fall, and raise some notable legal issues to watch as it continues to unfold, including:

1. As we previously reported, the key takeaway from the February summary judgment decision was the Court's rejection of the government's "tainted claims" theory of damages and associated ruling that, if liability is ultimately proven, the proper measure of (single) damages would be the $32 million the USPS paid in sponsorship, ***minus*** the actual value (if any) of the net benefits the USPS received from that sponsorship notwithstanding Armstrong's admitted PED use and resulting fall from grace. Expect more pre-trial, and potentially appellate, litigation on that front in the coming months, as the parties' very first MILs take the form of *Daubert* challenges to the economists proffered by each side to give expert testimony on that very subject. The government and relator have even sought to exclude from evidence consultant reports commissioned by the USPS in the normal course of business over time estimating the return on investment from the Armstrong sponsorship. The Court's eventual rulings on these motions should give FCA watchers more detailed guidance about how the "benefit of the bargain" approach to single damages will be applied in practice.

2. While the government did not join, the relator also filed an "objection" (not styled as an MIL) to Armstrong's damages experts *writ large* based on a rehash of the "tainted claims" and "worthless services" arguments the Court already had rejected at summary judgment. The relator "wishe[d] to preserve for the record his objections" to any evidence from Armstrong "on the purported value of benefits the USPS received from the sponsorship, on the grounds that such evidence is irrelevant because no value should be attributable to such 'services' as a matter of law." The relator also attempted to preserve a distinction between the value of the

benefits of the Armstrong sponsorship to the government and "the fair market value of the sponsorship itself." If the government and relator ultimately prevail on liability, expect these damages methodology fights to continue into the US Court of the Appeals for the DC Circuit next year.

3. The government and relator also have moved to exclude expert testimony and other evidence proffered by Armstrong to the effect that PED use was widespread in professional cycling and was (or at least should have been) known to the USPS when it signed its sponsorship agreement with Armstrong—*e.* the basis for an Armstrong argument that the USPS knew exactly what it was getting into at the time it agreed to pay out sponsorship funds despite its more recent arguments that PED-tainted services from Armstrong were worthless. As the government succinctly put it: "Cycling at-large is not on trial here; Armstrong is." The Court's eventual ruling is likely to be relevant across a number of FCA contexts in which the government or a relator decides to allege that false claims resulted from common industry practices.

4. Finally, the government and relator also have jointly moved to exclude all evidence of relator's (former Armstrong teammate and rival, Floyd Landis, who also admitted PED use) character and potential motivations for filing his *qui tam* complaint—noting that the government does not intend to call Landis as a trial witness and, thus, any testimony or evidence directed at him would be irrelevant and unduly prejudicial. In its motion, the government has likened the *qui tam* mechanism to other mechanical aspects of the FCA, such as treble damages and civil monetary penalties, and argued that any evidence focused on Landis would simply distract the jury from the core issues being litigated: whether false claims for sponsorship payments were submitted and to what extent the USPS was damaged by those claims. The Court's ultimate ruling on this MIL—on which there is very little precedent directly on point—could prove important in pending or future FCA litigation driven by whistleblowers who themselves participated in an alleged fraudulent scheme or otherwise behaved inequitably but still stand to profit from the outcomes of the FCA cases they have commenced.

All MILs are scheduled to fully briefed by mid-July, so we expect to start seeing argument, possibly evidentiary hearings, and rulings popping up in August and September as the Court and parties ride on toward the November trial date.

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