

Trinity: Divine Fifth Circuit Ruling Gives FCA Defendants Reason for Praise

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Last year, the Supreme Court’s watershed *Escobar* ruling altered the landscape of False Claims Act litigation when it declared that the FCA’s materiality requirement presented a “demanding” barrier to plaintiffs alleging contractual non-compliance. In the 15 months since that time, lower courts have issued a steady stream of rulings interpreting and refining this standard. In the latest—and perhaps most consequential—of these rulings, the Fifth Circuit overturned a \$663 million FCA jury award on materiality grounds in the bellwether case of *U.S. ex rel. Harman v. Trinity Industries, Inc.* While the outcome may not be a surprise given the trend in recent decisions addressing the FCA’s materiality requirement—not to mention an earlier Fifth Circuit ruling involving a strikingly similar issue—*Trinity* serves as a forceful reminder of the formidable barrier to recovery presented by the materiality requirement.

Factual Background

The defendant, Trinity Industries (“Trinity”), manufactured and installed highway guardrail systems around the country. These guardrail systems, purchased by states but subsidized by Federal funds, are eligible for a Federal subsidy only if approved by the Federal Highway Administration (“FHWA”).

In 2005, Trinity performed crash-testing on a new guardrail system that utilized 31-inch high guardrails (taller than a 27-inch design that FHWA had previously approved) to account for the prevalence of larger sport utility vehicles. After reviewing a report summarizing the crash-testing, FHWA approved Trinity’s modified guardrail system. The modified guardrail system also contained other minor design changes from the previous system, notably a decrease in the width of the guardrail’s “guide channel” from five inches to four inches. A diagram reflecting these other changes was inadvertently omitted from the 2005 crash test report submitted to the FHWA on Trinity’s behalf.

The relator in this case, a former competitor of Trinity whose own business had folded, claimed that the undisclosed changes resulted in a “completely new product.” In 2012, the relator met with FHWA officials and provided an extensive PowerPoint presentation laying out his findings, arguments, and supporting information. Afterwards, the FHWA met with Trinity, and Trinity acknowledged that its

2005 crash test report had inadvertently omitted reference to the modified guide channel width and other related changes. The FHWA did not revoke its approval of Trinity's guardrail system and continued to reimburse states that purchased it.

The relator then filed a *qui tam* action claiming that Trinity had fraudulently secured FHWA approval by omitting pertinent details about design changes. After the Government declined to intervene and the case proceeded to trial, the relator requested that FHWA make its employees available for deposition. The Government responded by issuing an official memorandum stating that FHWA had "validated that the [guardrail system] with the 4-inch guide channels was crash tested in May 2005," that the system "with 4-inch guide channels became eligible for Federal reimbursement" following that testing, and that the system "continues to be eligible today." The Government wrote that this memo "should obviate the need for any sworn testimony from any government employees."

Undaunted, the relator proceeded to trial, and the jury returned a verdict in his favor. Following the trial, Trinity suspended sales of the guardrail system pending the results of extensive independent testing. This testing again validated the Trinity system, and the FHWA approval of the system remained in place. Nonetheless, shortly after the completion of the independent testing, the court entered judgment against Trinity in the amount of \$663 million. Trinity appealed.

Fifth Circuit Ruling

While the appeal was pending, the Supreme Court issued its decision in *Escobar*. Among other things, the Court emphasized that the FCA materiality standard is "rigorous" and "demanding," and that Government knowledge and actual course of dealing was critical to assessing materiality. The Court explained that "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material."

Given this directive, the briefing on appeal focused on the materiality of Trinity's failure to disclose the modified guide channel width. Trinity argued that FHWA's continued approval of its guardrail system, despite knowledge of the relator's allegations concerning the previously undisclosed modifications, proved that the omission of these design changes was not material. The relator rejoined that the Government's approval was not determinative because, even post-*Escobar*, the standard for materiality is "holistic."

In assessing these arguments, the Fifth Circuit methodically analyzed recent decisions from the First, Third, Fifth, Seventh, Ninth and D.C. Circuits assessing the impact of government knowledge on the FCA materiality analysis. (Summary descriptions of these decisions, as well as other post-*Escobar* decisions, can be found [here](#).) The court declared that "[t]he lesson we draw from these well-considered opinions is that, though not dispositive, continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality." After examining the record, the court then concluded that "the 'very strong evidence' here of FHWA's continued payment remains un rebutted." Accordingly, the court found that Trinity's alleged fraud could not have been material, and it therefore reversed the district court's judgment and entered judgement as a matter of law in Trinity's favor.

While the *Trinity* ruling turns on the materiality analysis, it is worth noting that the Fifth Circuit also expressed deep skepticism about several other elements of the other elements of the relator's FCA claim. For instance, the relator's falsity argument rested on the assumption that every change in design or fabrication must be disclosed to FHWA. Yet under FHWA guidance, the court found that

there was a “substantial argument” that only changes deemed *significant*, in the engineering judgment of the manufacturer, were required to be disclosed. This finding cast doubt upon both the relator’s falsity theory and the jury verdict, as the court echoed other courts in stating that “[d]isagreement over the quality of [engineering] judgment is not the stuff of fraud.” And the court was similarly dubious about the scienter and damages elements of the relator’s claim, finding that there were “problem[s]” with both arguments.

Key Takeaways

Though it does not blaze a new trail, the *Trinity* decision is further vindication of the rigorous post-*Escobar* materiality standard. But even if the headline of the *Trinity* ruling is not altogether surprising, the case also offers a number of interesting lessons on the current state of FCA litigation:

- **Government knowledge—not the defendant’s disclosure—is key to the materiality analysis.**

In reaching its decision, the *Trinity* court rejected the relator’s alternative argument that Trinity had committed additional fraud by neglecting to disclose certain failed crash tests to FHWA. As a factual matter, the court noted that these tests had no relevance to the case at hand because they concerned a separate, experimental guardrail system that was distinct from the system at issue. And in any event, the relator himself had apprised FHWA of these failed tests. Building on this latter point, the court explained when assessing materiality, “the relevant inquiry is not what Trinity disclosed, but what FHWA knew at the time” it approved the guardrail system, *no matter the source of that knowledge*. By the time FHWA reaffirmed its approval in June 2014, the relator himself already had presented to FHWA all of the relevant information concerning his allegations. The court therefore concluded that “[e]ven if Trinity deliberately withheld information from FHWA, it does not mean that the government’s decision that the [guardrail system] remained eligible for reimbursement was the product of ignorance.”

- **Continued Government payment is relevant to both materiality *and* damages.**

Although the court did not need to reach the issue of damages in order to dispose of the case, it did observe in dicta that the relator’s “failure to rebut the strong presumption against materiality also manifests itself in its effect on damages.” Starting from the principle that the Government’s damages are the difference between what was promised and what was received, the relator argued that the allegedly noncompliant guardrail system had no value aside from its scrap metal value. The court rejected this assumption, noting that the FHWA’s continued approval of reimbursement for the modified guardrail system “strongly suggests that the government . . . considers the value of the [modified units] to be identical to the value of previous [guardrail] units.” The court therefore concluded that “[i]f the government received units of equivalent value, and thus has already enjoyed the benefit of its bargain, then the proper measure of actual damages should be zero.”

- **Relators matter.**

The Fifth Circuit expressed skepticism about the motives of the relator, noting that he was a “one-time competitor of Trinity, with a past history of adversarial litigation,” and that he intended to use the proceeds from the litigation to recapitalize his own failed business in order to challenge Trinity with a

competing “product sharing at least three of the ‘defects’ he railed against at trial.” Especially in non-intervened cases, courts are more likely to view claims of materiality and damage to the federal fisc with similar skepticism if the proponents of the claims are so declaredly self-interested.

- ***Trinity* does *not* set a standard for evidence of nonmateriality.**

The *Trinity* case was closely-watched, but it was not particularly close: simply put, the evidence of nonmateriality was overwhelming. Despite receiving detailed presentations from the relator on the alleged noncompliance of the guardrail system, the Government not only maintained the system’s eligibility for reimbursement, but it also issued on the eve of trial a formal memorandum attesting to its approval of the system. Moreover, even *after* the jury verdict for the relator, the Government continued to maintain its approval—and make reimbursement payments—after extensive independent testing validated the guardrail system’s safety. Given the strength of this evidence, reversal of the jury verdict seemed likely in a post-*Escobar* world. Indeed, in its most recent annual SEC report, Trinity had not set aside any reserve for the case, stating: “We do not believe that a loss is probable.” The point is this: while future FCA litigants will no doubt tussle over the import of the *Trinity* ruling, it is clear that this case presents an extreme example, *not* a new standard for the evidentiary showing required to demonstrate nonmateriality.

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