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### **Whistleblower Defense Alert: The Fifth Circuit Issues Strong Damages and Materiality Decision**

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On September 29, 2017, the Fifth Circuit overturned a \$664 million False Claims Act (FCA) judgment in *U.S. ex rel. Harman v. Trinity Industries, Inc.*, Case No. 15-41172 (5<sup>th</sup> Cir). The court's reasoning offers substantial ammunition to FCA defendants, and further demonstrates that courts really will enforce the strict materiality requirements outlined by the Supreme Court in *Universal Health Servs., Inc. v. United States ex rel., Escobar*, 136 S. Ct. 1989, 1995 (2016).

Every aspect of the trial court litigation in this case was a defendant's worst nightmare. Relator Harman claimed that Trinity Industries had implemented unapproved changes to the design of highway guardrails Trinity had manufactured, rendering them less safe. After a six-week trial, the jury found for Harman. Shortly after the trial, the Federal Highway Administration oversaw a joint task team's analysis of over 1000 guardrail installations across the country and concluded that the rails were fine. A few weeks later, the district court nevertheless denied Trinity's motion for judgment as a matter of law and entered final judgment against Trinity for \$663,360,750, based upon the assumption that the perfectly fine guardrails had no value beyond scrap.

On appeal, the Fifth Circuit rejected the trial court's scrap value damages award, noting that the government's continued payment for the rails demonstrated that the government believed it was receiving the full value it had been promised:

*"The problem with this figure is that nothing in the record supports the scrap valuation of the ET-Plus. Instead, FHWA's continued approval of reimbursement for the ET-Plus at the same amount strongly suggests that the government, the supposedly aggrieved party, considers the value of the units with the 2005 changes to be identical to the value of previous ET-Plus units. If 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."*

The Fifth Circuit noted that Trinity could still be liable for penalties, even in the absence of damages, if the relator had proved an actual violation of the FCA. But the court concluded there was no liability under the FCA, in part, because the government's continued payment for the rails shows that any deviations were not material:

*"[T]hough 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. . . . Given FHWA's unwavering position that the [the guardrail system] was and remains eligible for federal reimbursement, Trinity's alleged misstatements were not material to its payment decisions. The other evidence in the record, viewed most favorably to Harman, is insufficient to overcome this 'very strong evidence.'"*

Notably, the "other evidence" included that fact that the government refused to volunteer witnesses to testify in support of the relator's case suggested it was not material:

*Following discovery, as he made his eve-of-trial Touhy request that the government produce officials to testify, the Department of Justice declined, once again sending the message that the government did not believe itself to be a victim of any fraud, a position from which it has not to this day retreated.*

This language may permit defendants to argue that a jury may draw an adverse inference from the failure of government witnesses to testify at a trial in a non-intervened case.

The final paragraph of the decision reflects the courts' responsibility to ensure that relators' claims are not inconsistent with government policy:

*It is charged that the accused product remains along nigh every highway in America, killing and maiming, but the government will not remove it. We can assume that this and contrary views are debatable, but we must accept that the choice among them lies beyond the reach of seven citizens of Marshall, Texas, able though they may be. As revered as is the jury in its resolution of historical fact, its determination of materiality cannot defy the contrary decision of the government, here said to be the victim, absent some reason to doubt the government's decision as genuine. For the demands of materiality adjust tensions between singular private interests and those of government and cabin the greed that fuels it. As the interests of the government and relator diverge, this congressionally created enlistment of private enforcement is increasingly ill served. When the government, at appropriate levels, repeatedly concludes that it has not been defrauded, it is not forgiving a found fraud— rather it is concluding that there was no fraud at all.*

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