

## How False Claims Act Abuse Can Lead To Highway Robbery

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Law360's MVP awards last month unwittingly identified a key problem with a high-profile lawsuit against Trinity Highway Products over the ET Plus guardrail end terminal system that Trinity manufactures. The plaintiffs' attorney who captained last year's \$663 million verdict garnered a "Product Liability MVP" award. However, the case was not a product liability case; it was a False Claims Act case. The distinction between product and FCA liability may not mean much to the average person, but it could be a deciding factor when the U.S. Court of Appeals for the Fifth Circuit hears this case next year.

FCA cases are supposed to be about fraud, such as intentionally overcharging the government or selling a product to the government, but never delivering it. To discourage fraud against the federal government, the FCA first places harsh penalties, including treble damages, on people who defraud a government agency. Second, it incentivizes people to expose these fraudulent activities by giving up to 30 percent of the recovery to the private citizens who bring the claims. Thus, anybody can file an FCA claim, and, as this case demonstrates, the incentive for winning a case can generate life-changing wealth.

As we detailed in an article published in the Harvard Journal on Legislation last year, these factors have led private FCA litigation to become the subject of major lawsuit abuse. Today's FCA claims, like here, often do not involve fraud, but regulatory compliance, paperwork errors, or contract disputes. In the last decade, as lawyers have found ways to turn these traditional business disputes into FCA claims, the number of private FCA claims has doubled. The government, perhaps appreciating the difference between these types of disputes and fraud, has joined only 20 percent of them. The other 80 percent are believed to be of questionable merit, yet the private plaintiffs pursue them in hopes of hitting it big.

In the Trinity lawsuit, despite the jury's verdict, it is more than challenging to see where the U.S.

government was defrauded. The allegations are that Trinity failed to inform the Federal Highway Administration (FHWA) when, in 2005, the width of the guide channels attached to the head component of the ET Plus System were reduced from 5 inches to 4 inches. Engineers at the Texas A&M Transportation Institute (“TTI”) who developed the product said they recommended these modifications to improve it. In looking at the total picture of this litigation, it is important to note that the ET Plus System is a roadway device that was the next generation of breakthrough technology developed at TTI in the 1990s. It attaches to the end of a guardrail and, should a car crash into it, can slow a car’s momentum by sliding down the rail.

In 2012, the FHWA investigated the allegations at the heart of the FCA suit and concluded that the ET Plus System with the 4-inch channels is compliant with its standards which specifically apply to these types of products. It declined to join the FCA action. The FHWA also issued a statement that the ET Plus System remains eligible for federal reimbursement and restated this position before the trial, saying this “unbroken chain of eligibility for Federal-aid reimbursement has existed since September 2, 2005 and the ET Plus System continues to be eligible today.” FHWA also affirmed this position after the jury award.

The repeated statements from FHWA sets forth a key question: How can our legal system allow a private individual to generate a massive \$663 million dollar award for defrauding the government when the federal agency at issue has repeatedly said that it got what it paid for?

In part, as we understand it, the answer is that the plaintiffs’ lawyers showed the jury inflammatory photos of serious car accidents involving end terminals. Because this was not a product liability case, there was no requirement to show that the photos were of ET Plus System failures. Indeed, no such evidence was presented.

Guardrails and end terminals are not like life preservers on a boat that are all-purpose safety devices. End terminals are designed to provide a benefit under specific crash criteria; no end terminal is expected to be perfect in all accident circumstances. People who lose control of their cars — from driving drunk, texting or valid reasons — and violently crash into guardrails and end terminals risk major injury. Without these products, though, there would be far more and much more serious injuries.

To be sure that the ET Plus System is up to standard, federal and state highway authorities undertook a comprehensive assessment of the product this year. FHWA requested additional testing of the ET Plus System, which passed all eight crash scenarios, and had outside experts verify the passing grades. Then, in September, the FHWA and the American Association of State Highway and Transportation Officials released a study of actual crashes involving end terminals, finding that the modified ET Plus System performed as expected and presented no greater risk than other end terminals of its class. Thus, even if this were a product liability case, a true analysis suggests the product was not defective.

What is additionally concerning to those of us who study litigation abuse generally is the compounding effect from the large FCA jury verdict. Since last year’s trial, there has been a major piling on of “follow on” lawsuits from state and local governments, shareholders and individual product liability claimants. Lawyers file pleadings that copy each other word for word; it would appear that this is done without in-depth investigation. Verifiable facts and scientific evidence, including the crash tests and studies done this past year, are being ignored. There is chum in the water, and a number of lawyers are trying to get a share of the action.

At this point, Trinity has no choice but to pursue its appeal to the Fifth Circuit in an effort to set the

record straight. If this judgment stands, it will be the largest in the history of the FCA where the government did not join the suit. Yet, there is no evidence of any attempt to defraud the government. Despite current perceptions, this case can readily become a poster child for FCA litigation abuse. Highway safety should be too important for such litigation gamesmanship.

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*The Harvard Journal on Legislation published their article, "Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law," in its Summer 2014 edition.*

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