A $600 million jury loss with an appellate win three years later. A case study on what it means to obtain that win.

By Rebecca Weinstein Bacon[1]

An Invention Approved by The Federal Government

The highway guardrail. As you speed past it on the highway, it looks like a simple and commonsense technology. But, it turns out, it is an elegant invention that resulted from years of research and testing.

Early guardrails prevented drivers from running off the road or veering into oncoming traffic. But in their early iterations, if a car hit the blunt end of a guardrail head-on, the guardrail could spear the car. The next design, which buried the ends of the guardrails, mitigated the spearing problem, but sometimes served as a launch ramp for the cars and could send them rolling off the road or back into traffic.

The engineers at the Texas A&M Transportation Institute led the way in researching how to end or terminate a stretch of guardrail. Their efforts resulted in a system called the ET-2000 and then the ET-Plus. If a vehicle hit the ET-Plus head-on, the system flattened and extruded the guardrail away from the car which helps to dissipate the energy of the vehicle after impact. Trinity Highway Products, LLC licenses the system from Texas A&M and manufactures the ET-Plus system. Who buys the systems? The states and their highway contractors who install it on the highways.

Highway contractors look to state and federal governments for guidance on what to install on our nation's roads. And the federal government subsidizes highway improvements by reimbursing states for installing guardrail systems according to the federal government's standards. To be eligible for federal reimbursement, the guardrails must meet the Federal Highway Administration's standards. Trinity had submitted Texas A&M's testing of the ET-Plus to the FHWA. The FHWA determined that the ET-Plus met the federal safety performance standards and accepted the ET-Plus system for use on government-regulated highways.

Whistleblower and Competitor

Joshua Harman had been a Trinity customer and a Trinity competitor. He manufactured his own guardrail heads via two of his own businesses that ultimately failed.

Mr. Harman hoped to compete with Trinity. He was looking for a way to do that, and later he admitted that he intended to use the proceeds from litigation against Trinity to restart his business and manufacture guardrail terminals again. He presented this business strategy to potential funders.

As part of his strategy, he took a cross country road trip, seeking accidents involving guardrails. He claimed that changes to the design that he observed caused the accidents.

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He met with FHWA in 2012 and presented his alleged findings. FHWA then met with Trinity to ask questions related to his findings and then met twice more with Mr. Harman and his lawyers. During this period, FHWA continued to respond to state departments of transportation asking if the ET-Plus was eligible for reimbursement. FHWA confirmed that the ET-Plus met all federal safety standards and qualified for reimbursement – even after they heard Mr. Harman's claims.

Mr. Harman Files A False Claims Act Suit

On March 6, 2012, Mr. Harman filed a sealed False Claims Act suit in the Eastern District of Texas. The federal government reviewed the complaint, declined to intervene, the court unsealed the complaint, and discovery began.

While the case was pending, on June 7, 2014, the FHWA released an official memorandum stating that there was an "unbroken chain of eligibility for Federal -aid reimbursement" for the ETPlus and that the ET-Plus continued to be eligible. *U.S. ex rel. Harman v. Trinity Indus., Inc.*, 872 F.3d 645, 650 (5th Cir. 2017).

Trinity moved for summary judgment based on FHWA's memo. Their motion was denied from the bench.

The First Trial and A Warning from The Fifth Circuit

A jury trial began on July 14, 2014. After four days of trial, the court ordered a mistrial.

Trinity then asked the Fifth Circuit for a writ of mandamus, which the court denied, but expressed its skepticism for the claims in the denial: "This court is concerned that the trial court, despite numerous timely filings and motions by the defendant, has never issued a reasoned ruling rejecting the defendant's motions for judgment as a matter of law. On its face, FHWA's authoritative June 17, 2014 letter seems to compel the conclusion that FHWA, after due consideration of all the facts, found the defendant's product sufficiently compliant with federal safety standards and therefore fully eligible, in the past, present and future, for federal reimbursement claims. While we are not prepared to make the findings required to compel certification for interlocutory review by mandamus, a course that seems prudent, a strong argument can be made that the defendant's actions were neither material nor were any false claims based on false certifications presented to the government." *In re Trinity Indus., Inc*., No. 14-41067 (5th Cir. Oct. 10, 2014).

Despite this caution from the Fifth Circuit, the case went to trial a second time. The jury returned a verdict for Mr. Harman. Trinity renewed its motion for judgment as a matter of law.

Testing After the Second Trial

After the jury's verdict, the FHWA requested independent testing of the ET-Plus system. In early 2015, the FHWA, an independent testing agency, and an independent engineering expert retained by the FHWA, each evaluated the crash results and determined that all tests passed the federal testing standard. And a joint task force consisting of state, federal, and foreign transportation experts examined over one thousand ET-Plus guardrails and concluded the units that were successfully crash tested were representative of the devices installed across the country. After the testing and examination, the government continued its approval of the systems. A second task force was formed with FHWA and other representatives from state Departments of

Transportation and the American Association of State Highway and Transportation Officials. Its report, issued September 11, 2015, again supported the safety of the ET-Plus.

The $660 Million Verdict

After the first task force's post-trial tests had been released, on June 9, 2015, the district court again denied Trinity's motion for judgment as a matter of law and awarded judgment for Harman in the amount of $663,360,750.00 Trinity moved for a new trial based on the post-trial crash tests and findings of the task force, which the district court denied.

The Appeal

Trinity appealed. The federal appellate court reversed the jury's verdict and rendered judgment for Trinity, concluding that Trinity was entitled to judgment as a matter of law on the issue of materiality. *U.S. ex rel. Harman v. Trinity Indus., Inc.*, 872 F.3d 645, 650 (5th Cir. 2017). The court found that the jury's liability determination could not stand because Harman failed to establish that Trinity made a material false claim to the government. The Fifth Circuit harkened back to the FHWA's June 17, 2014 memorandum, which affirmed that the ET-Plus was and continues to be eligible for federal reimbursement. Citing cases from other Circuits that examined materiality when the government continued to pay, the court observed that the lack of materiality in this case was especially acute, given both "the gravity and clarity of the government's decision here." 872 F.3d at 663. As for gravity, the Court explained that FHWA approval is entitled to special deference because "the government has strong incentives to reject nonconforming products." *Id.* . As for clarity, the court said that "this case is not about inferring governmental approval from continued payment. Here, the government has never retracted its explicit approval, instead stating than an 'unbroken chain of eligibility' has existed since 2005." *Id.* at 663-64. The court also noted that eleven states filed an amicus brief in support of Trinity. *Id.* at 665.

An Appellate Win – But the March Continues

Mr. Harman filed a petition for rehearing *en banc*, which the Fifth Circuit denied. On February 12, 2018, he filed a petition for certiorari with the United States Supreme Court. Mr. Harman has also filed several, separate state *qui tam* actions. And as this case has been watched, it has been copied. Three economic-injury class action lawsuits were filed in the United States relating to the ET-Plus. Two of those lawsuits, in Illinois and Wisconsin, were dismissed by plaintiffs for zero dollars. A third, in Missouri, remains pending. In addition, individuals have filed personal injury cases related to the ET-Plus.

Lessons

While unique, Trinity's (continuing) journey provides lessons for other cases and litigants.

1. **Juries are unpredictable.** All trial lawyers know this, but it bears repeating. Here, the government had weighed in – in writing – on the key issues in the case. These are good facts and, ultimately, case dispositive facts. But juries are not predictable. Outside counsel should not overpromise and in-house counsel must socialize their own clients to this truism, while still going forth into battle if the case and situation warrants.

2. **An early jury loss is not the end of the battle, but the battle requires fortitude.** If you lose the jury trial but settlement is not an option for various reasons, the jury loss marks only the beginning of a journey you and your client will take. The road ahead will require counsel to continue to creatively tweak theories and arguments and require in-house counsel to keep its own stakeholders engaged and on board. In-house and outside counsel must dig deep, keep morale up, and continuously generate creative ideas.

3. **Consider your resources carefully.** If you face a protracted battle, in-house and outside counsel will need to honestly assess the necessary resources, both internal and external. You will want to evaluate, together, the likely trajectory of the litigation and line up resources commensurate with that likely path. Ideally, your resources would be scalable to the plaintiffs' demands.

4. **Plan, plan again, plan more.** "In preparing for battle I have always found that plans are useless, but planning is indispensable." – Dwight D. Eisenhower. You will need a plan you have articulated to the client and that the client articulated to its client about an end game. Think early and often about your end game strategy and engage the business so you have buy-in. In thinking through the resolution strategy, you will want to sketch out all options and the unintended consequences of each option. For example, if you settle with one entity, will you just be inviting other entities to sue? How can you prevent follow-on suits? What timing makes the most sense for the business?

Postscript

Over 600 federal False Claims Act qui tam cases are filed each year. This year, the DOJ issued a memo advising DOJ attorneys to consider seeking dismissal of "meritless" or "parasitic" whistleblower lawsuits that the government decides not to join.[2] Perhaps, if acted upon, this exhortation will prevent future Trinity-like cases from proceeding. As the Fifth Circuit stated in its explanation of the importance of the strong materiality requirement: "For the demands of materiality adjust tensions between singular private interests and those of the 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 is no fraud at all." *Trinity Indus., Inc.*, 872 F.3d at 669-70.

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[22] http://www.businessinsurance.com/article/20180129/NEWS06/912318805/DOJ-seeks-to-curtail-soaring-False-Claims-Act-cases