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False Claims Act

Lance Armstrong Must Pedal Back to Court to Face Doping Case

BY DANIEL SEIDEN

Former cyclist Lance Armstrong will face claims at trial that he defrauded team sponsor the U.S. Postal Service by not disclosing his use of performance-enhancing drugs, the U.S. District Court for the District of Columbia ruled (*United States ex rel. Landis v. Tailwind Sports Corp.*, D.D.C., 10-cv-00976, 2/13/17).

A jury should decide whether not knowing about the drug usage was material to the Postal Service's decisions to pay Armstrong and continue their sponsorship agreement, Judge Christopher R. Cooper said.

Armstrong also failed to demonstrate, at this stage, that the Postal Service couldn't have been damaged from fraud given the benefits Armstrong provided under their partnership.

The ruling is noteworthy on multiple levels -- one being that the court diverted from other recent false claims decisions by not requiring the government to assert that Armstrong made specific representations about his performance.

That was the right approach, plaintiffs' attorney Robert L. Vogel, a partner with Vogel, Slade & Goldstein LLP, Washington, told Bloomberg BNA, adding that other courts have misinterpreted the Supreme Court on this matter.

That court's ruling, which allowed the government's unjust enrichment claim to advance, could spell trouble for Armstrong, he said.

If there is a disgorgement remedy based on a claim of unjust enrichment, "then Armstrong could be in a lot more jeopardy," Vogel said.

"It isn't clear from the court's opinion whether Armstrong could be forced to pay restitution regardless of how much the government benefited from his services," he said. "If a jury is allowed to find that Armstrong has to repay the money he got paid, even though the jury might believe that the government got the full benefit of his services, then that is a way the jury could penalize him for misleading the government and the public."

Drug Use Concealed. The government and former cyclist Floyd Landis accuse Armstrong and other defendants of improperly obtaining money under a sponsorship agreement with the U.S. Postal Service by concealing the use of performance-enhancing drugs.

Armstrong claimed that the case couldn't succeed under standards established by *Universal Health Servs. v. United States ex rel. Escobar*, U.S., No. 15-7, 6/16/16, whereby the Supreme Court adopted the implied certification theory of liability under the False Claims Act.

This theory allows cases to proceed without broken express promises of compliance with contract requirements or statutes.

He said the claims against him didn't cite specific representations about his performance as required by *Universal Health*, and his involvement with the Postal Service was so monetarily beneficial that the government couldn't show any damages.

Materiality Satisfied. The court cited *United States v. Science Applications Int'l Corp.*, D.C. Cir., No. 09-5385, 12/3/10, to conclude that a valid implied certification claim needs an assertion that a defendant withheld information about its noncompliance with material contractual requirements — but specific representations about performance are not required.

The case satisfies the materiality requirement, the court said, because the government offered evidence that Armstrong withheld information about doping, and that anti-doping provisions in the sponsorship agreement were material to the Postal Service's decision to continue the sponsorship and make payments.

The government wasn't required to identify specific representations about contract performance, as Armstrong contended, because *Universal Health* is silent on that issue, the court said.

Vogel agreed with the court, stating that the Supreme Court clearly declined to decide whether every valid implied certification case needs specific representations.

Other courts, such as the Seventh Circuit in *United States v. Sanford-Brown Ltd.*, 7th Cir., No. 14-2506, 10/24/16, have demanded satisfaction of this two-part test, Vogel acknowledged,

Jury Will Assess Damages Question. The court also decided that if the government can show liability, a jury should weigh evidence from both sides as to whether there are damages, and how much.

Armstrong argued that the sponsorship agreement was so lucrative the Postal Service couldn't have been damaged by any alleged fraud, which the court called "persuasive" but not enough to end the case.

The court didn't appear to be enthusiastic about the government's damages argument, but felt that the government presented sufficient information about being harmed or that the government lost some of the promotional value it had received as a result of the after-the-fact drug-use disclosures, Vogel said.

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