Whistleblower Defense Alert: Sixth Circuit Affirms Importance of Government Witnesses in Materiality Analysis

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A recent Sixth Circuit opinion provides defendants a valuable roadmap for using government witness testimony to defeat False Claims Act (FCA) claims on materiality grounds at the summary judgment stage. In *U.S. ex rel. American Systems Consulting, Inc. v. ManTech Advanced Systems Int'l Inc.*, Case No. 14-3269 (6th Cir.), the court rejected the relator's argument that materiality decisions should be left to a jury. Instead, the court expressly held that "a judge may decide as a matter of law whether a misrepresentation was material under the FCA." Because all of the key government decision-makers testified that the alleged misrepresentations did not affect their decisions, the Sixth Circuit held that the alleged misrepresentations were objectively immaterial.

As discussed in a previous *Whistleblower Defense Alert*, the district court in this case granted summary judgment to the defendant based on the favorable testimony of key government witnesses. The Sixth Circuit opinion adopted the district court's reasoning on the key factual and legal issues.

First, the Sixth Circuit rejected the relator's attacks on the consistent testimony of the key government decision-makers, holding that the relator could not create a fact dispute based on the speculative testimony of a government official not involved in the decision-making process or the speculative opinion of an expert. This holding is consistent with the line of cases stating that a relator cannot substitute his own subjective interpretation for that of the relevant decision-makers.

Second, the Sixth Circuit also adopted the district court's approach to applying the natural tendency materiality test. In rejecting the relator's argument that the district court incorrectly applied the subjective outcome materiality test rather than the more lenient and objective natural tendency test, the Sixth Circuit explained that "[s]tatements by the actual decision-makers may be (and often are) the best available

evidence of whether alleged misrepresentations had an objective, natural tendency to affect a reasonable government decision-maker." While this statement may seem obvious, relators (and sometimes the Department of Justice) have argued that the natural tendency test merely requires a showing that on some day, some government decision-maker could have been influenced to some extent by the representations at issue. The Sixth Circuit correctly explained that the natural tendency test is more concrete than theoretical and that actual evidence of immateriality cannot be ignored.

The Sixth Circuit stopped short of issuing a bright-line pronouncement that favorable testimony by the key government decision-makers always necessitates a finding of immateriality. The court left open the possibility that the government-decision makers could have been tainted by bias or have acted irrationally. Although the Sixth Circuit did not explicitly say it was imposing a burden-shifting approach, it may be the practical effect of the opinion. When a defendant introduces uncontroverted evidence that the representations at issue were immaterial, summary judgment is appropriate unless the relator can show that the government decision-makers acted unreasonably.

Similarly, the Sixth Circuit noted that the government's decision to continue doing business with a contractor after it discovers an alleged misrepresentation weighs against a finding of materiality but is not dispositive. The court observed that the evidence may demonstrate that other factors led the government to continue a contract despite a material misrepresentation. *See United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 917 (4th Cir. 2003). Again, the Sixth Circuit appears to put the burden on the relator to come forward with specific evidence in order to avoid summary judgment.

This opinion reaffirms the fact that government decision makers can be a defendant's strongest witnesses. The Sixth Circuit blessed the use of government decision-maker testimony to prove immateriality as a matter of law by resolving the inherent tension that exists whenever a defendant attempts to use subjective testimony to prove immateriality under the objective "natural tendency" standard. In our previous *Whistleblower Defense Alert*, we suggested that "*ManTech* instructs that FCA defendants should seek helpful evidence regarding all three "phases" of the government's decision-making process: (1) that the government did not intend to condition payment on the issues in question; (2) that the government did not consider the misrepresentations at issue when making the payment decision; and (3) that, after being informed of the misrepresentations at issue, the government continued to do business with the defendant. By obtaining comprehensive evidence of immateriality in discovery, a defendant can foreclose any theoretical arguments by the relator that the misrepresentations at issue *could* have influenced the government's payment decision." The Sixth Circuit's decision has only reinforced the importance of obtaining that evidence.

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