

DOJ's False Claims Suit Against Armstrong Faces Uphill Climb

By Jake Simpson

Law360, New York (May 02, 2013, 7:10 PM ET) -- In the fraud suit it filed against Lance Armstrong after he admitted to cheating throughout his career, the government will face an uphill battle to prove that its claims are not time-barred and that it suffered financial injury because of Armstrong's cover-up, attorneys say.

The Department of Justice **sued** Armstrong on April 23, making good on its promise to intervene in a whistleblower suit a former teammate had filed against the seven-time Tour de France winner. The government's complaint alleges Armstrong, his team and its manager submitted false claims to the U.S. Postal Service, which sponsored the team from 1996 to 2004, and violated the sponsorship agreements through widespread use of steroids and other banned substances.

The Postal Service paid Armstrong and his companies roughly \$40 million over the life of their sponsorship agreements.

The government, which is seeking the maximum treble damages allowed under the False Claims Act, also filed several common law claims against the defendants, including fraud, breach of contract and unjust enrichment.

Despite the severity of its accusations and the comprehensive list of instances it says Armstrong cheated during a race, the government faces a few legal hurdles that mean it might not survive a motion for dismissal or summary judgment.

One potential issue for the government is that it claims Armstrong had been defrauding the Postal Service since at least 1998, but the statute of limitations for FCA claims tops out at six years, according to attorneys with expertise in this type of suit.

"I thought damages would have been the main issue with the complaint, but the statute of limitations really popped out to me," said Akin Gump Strauss Hauer & Feld LLP partner Robert Huffman, chair of the firm's government contracts practice.

The government will likely argue that Armstrong's repeated public denials that he used performance-enhancing drugs tolled the statute of limitations until January 2013, when the cyclist made his first public admission of cheating. But even if the DOJ successfully argues that point, the FCA does not allow claims for events that occurred more than 10 years in the past, whether or not the statute of limitations is tolled.

"The general six-year statute of limitations can be extended if U.S. government officials did not and should not have known of the alleged fraud because of Armstrong's continued public denials," said Akin Gump partner Peter Hutt, Huffman's colleague. "However, the statute cannot be extended past 10 years ... even by Armstrong's public denials."

The government could argue that the statute of limitations should be effective from the date Armstrong's teammate Floyd Landis filed his whistleblower action in May 2010. That would give the DOJ access to the full \$31.6 million Armstrong and the co-defendants allegedly received under an amended contract the team, Tailwind Sports Corp., signed with the Postal Service in November 2000.

Another avenue for the DOJ would be to rely on the Fourth Circuit's March **ruling** that the Wartime Suspension of Limitations Act tolls the statute of limitations for FCA claims during a time of war.

Given that the U.S. has rarely been at peace for more than five years, this reading of the WSLA, which stops the clock until five years after the formal end of any conflict, would extend the statute of limitations nearly indefinitely for any government contract — even one as far removed from wartime concerns as the cycling team's sponsorship deal.

If the government can convince the court that the Fourth Circuit's opinion applies in this case, it will be able to pursue claims against Armstrong dating back to the beginning of his alleged misconduct, Huffman said.

The DOJ may also have trouble proving the defendants made a false claim under the FCA. The government's primary false claim allegation is that Tailwind "submitted invoices for payment ... knowing it was not entitled to payment" because Armstrong was violating the prohibition on performance-enhancing drugs in his sponsorship contract with the Postal Service.

"The complaint alleges many lies — but none of them are in the claims for payment," said Steve Shaw, a senior government contracts attorney with Covington & Burling LLP. "Here the government will attempt to prove that a false statement was implied by the defendants' mere presentment of invoices."

However, the complaint lacks any detail about the invoices, attorneys noted, which could put the government on the wrong side of a federal pleadings requirement for the level of specificity in false claims complaints. That could leave the suit vulnerable to a motion to dismiss, they said.

"It could be that the government may not have all the invoices, that there's an imperfect paper trail," said Hutt, speculating on why the DOJ's complaint had not included more details about the invoices. "Or it could be that they're not helpful — perhaps there is nothing on the face of the invoice that conditions payment on compliance with the provisions in the [sponsorship] contracts."

Even if the government is able to beat the statute of limitations obstacles and prove the elements of fraud under the FCA, it may not be able to prove damages, according to attorneys.

The DOJ may be hamstrung by a series of studies the Postal Service did on the economic benefits it gained from the sponsorship. The studies reportedly found that the infamous cyclist brought in between \$100 million and \$140 million in positive global exposure for the agency between 2001 and 2004 — well in excess of the \$40 million it paid the defendants.

"Proving damages will be the most difficult part of the government's case," Shaw said. "They are claiming here that the Postal Service would not have signed the sponsorship agreement but for the defendants' lies, and it therefore received nothing for its \$40 million. Translating that into a \$120 million treble damages award — particularly where there are studies reportedly showing a significant benefit to the Postal Service — will be a challenge."

The issue will be one of first impression for the Washington federal court because of the unique nature of Armstrong's "contract" with the government: a sponsorship agreement with an agency that typically receives little to no federal funding. But the basic principle behind fraud and breach of contract cases — that a plaintiff must prove it was financially injured by a defendant's misconduct to receive damages — still applies, said Loeb & Loeb LLP partner Brian Socolow.

"Armstrong's argument would be that the [Postal Service] received widespread and positive publicity from its association with Armstrong and did not suffer any damages," he said. "The fact that he subsequently admitted [drug] use doesn't take away from the benefits that the [agency] received under its contract with Armstrong's team."

The government will likely respond that the Postal Service will sustain long-term economic damages because it will be associated with "an infamous cheater and fraud, and one of the biggest doping scandals in sports history," said George Stamboulidis, co-chair of BakerHostetler's white collar defense and corporate investigations team.

"That, the government will argue, establishes materiality and gives rise to massive damages, which can be trebled," Stamboulidis said.

The DOJ will also be able to rely on its non-FCA charges against the defendants, particularly its unjust enrichment claim, to seek damages. Because the unjust enrichment claim is equitable, the court will be able to consider whether Armstrong should in good conscience be able to keep any benefits from his contract with the Postal Service.

The government will likely hammer home the point that he knowingly cheated for years and received his sponsorship dollars based on a lie, Socolow said.

"The unjust enrichment charge will help the strength of the government's case very much," said Weil Gotshal & Manges LLP partner Lori Pines.

Most of the partners interviewed said they expected the government ultimately to settle the case with Armstrong. Most FCA cases are settled in the pretrial stage, according to Hutt.

"It is very uncommon for FCA cases to go to trial," he said. "There have only been a handful in the past 25 years."

The parties have already engaged in settlement talks this year, though they were unable to reach a deal. However, the addition of new claims in the DOJ's complaint and the prospect of facing two plaintiffs may convince Armstrong and his co-defendants to return the table, Pines said.

Counsel for the parties did not return calls seeking comment.

Armstrong is represented by Elliot R. Peters of Kecker & Van Nest LLP.

Landis is represented by the Law Offices of Paul D. Scott PC.

The case is U.S. ex rel. Landis v. Tailwind Sports Corp. et al., case number 1:10-cv-00976, in the U.S. District Court for the District of Columbia.

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