

## In The News

# Trinity Industries pursues \$4.4 MM claim after EPA-FBI agents' extramarital affair

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Dallas-based Trinity Industries has the green light to pursue a \$4.4 million malicious prosecution claim against the U.S. government after a panel of judges found that two federal agents prolonged an environmental investigation of the company in order to continue their love affair.

Trinity Industries (NYSE: TRN), one of North America's largest manufacturers of transportation, construction and industrial products, was being prosecuted by the Environmental Protection Agency for allegedly storing hazardous waste without a permit. The initial indictment of Trinity subsidiary Trinity Marine Products Inc. dates back to 1999, and stemmed from a joint EPA-FBI investigation.

After 16 years of litigation and the revelation of an affair between a married EPA agent from Dallas and an unmarried Louisiana FBI agent, the Fifth Circuit Court of Appeals ruled in favor of Trinity Industries on Feb. 9. The three-judge appellate panel found that a Louisiana federal judge wrongly applied a two-year statute of limitations to Trinity, and that the company shouldn't be penalized for not suing the government sooner because the key evidence — the lead investigating agents' affair — was being concealed.

Now the matter heads back to the trial court.

Nolan C. Knight of Munsch Hardt Kopf & Harr PC, the Dallas law firm representing Trinity, said the company is seeking more than \$4.4 million, most of which is for lost business opportunity.

"Because of the government overreach, Trinity exited the barge cleaning business," Knight said in an interview with the Dallas Business Journal. "They figured it was too risky. They were staring down the barrel of charges leveled by the United States government."

The government is represented by David H. Fulcher with the U.S. Department of Justice. Fulcher and media representatives for the department did not respond Thursday to requests for comment.

In the Feb. 9 decision, the Fifth Circuit disagreed with the government's arguments that Trinity should have been aware of the affair sooner because of a lawsuit filed by Hubert P. Vidrine Jr., the manager of a Canal Refining Co. facility, who was indicted along with Trinity in 1999 and accused of storing hazardous waste without a permit.

The charges against both Vidrine and Trinity were dropped four years later. Vidrine sued in 2007 and won a nearly \$1.7 million malicious prosecution judgment against the government in September 2011.

Vidrine's case alleged that EPA Agent Keith Phillips concealed the affair with FBI Agent Ekko Barnhill well into 2011, Circuit Judge Edward C. Prado wrote for the Fifth Circuit panel.

“According to Agent Barnhill, (the agents) were only physically intimate while working together on the (Trinity) case, as the investigation offered an opportunity for them to be together without raising the suspicions of Agent Phillips’s wife,” Prado wrote in the appellate ruling.

He also wrote: “Agent Phillips’ extramarital affair was, at least in part (if not in whole), a motivation for Agent Phillips’ continued pursuit of Hubert Vidrine and Trinity, without probable cause.”

In 2011, Phillips was indicted for perjury for lying during a deposition by denying the affair. That’s when Trinity says it found out about the agents’ off-duty relationship, according to the ruling and Knight.

The United States has sovereign immunity, meaning that the government can’t be sued except under an extremely narrow set of circumstances, Knight said in the interview.

“Malicious prosecution cases are seldom ever brought,” Knight said. “Qualitatively, you can’t even bring a malicious prosecution case against the United States unless you can prove that the prosecution was motivated by misconduct of law enforcement or investigative officers ... It’s exceedingly rare.”

In Vidrine’s case in 2011, Louisiana Judge Rebecca Doherty wrote in her decision that Phillips, the EPA’s lead investigatory agent, lied at work to drag out the refinery investigation so the affair with Barnhill could continue. In the course of Phillips’ investigation, he reported a series of false and distorted findings, which eventually resulted in Vidrine’s indictment, the judge ruled.

“The evidence strongly indicated Agent Phillips deliberately used his investigation and prosecution of Hubert Vidrine to foster, further, facilitate and cloak his extramarital affair with Agent Barnhill,” Doherty wrote. “Agent Barnhill candidly testified that she and Agent Phillips began a physical, sexual relationship while assigned to this matter, which lasted from approximately 1996 until January or February 2001 ... Thus, the case granted the opportunity for those rendezvous, as well as providing justification for Agent Phillips wife.”

In his own case, Phillips pleaded guilty to obstruction of justice and served a prison term of about six months, Knight said. He called the cases “a near surreal set of facts.”

“I’ve never seen facts as bad as this,” Knight said.

In her ruling, Doherty wrote:

“During the investigation and prosecution, Agent Barnhill, who was single, lived in South Louisiana; Agent Phillips, who was married, lived in Dallas, Texas with his wife. Prior to and at trial, plaintiffs’ counsel consistently argued Agent Phillips used the Vidrine investigation as a cover, excuse and opportunity to facilitate his illicit affair with Agent Barnhill and to hide the affair from his wife.

“Plaintiffs consistently argued Keith Phillips manufactured a case, both in law and fact, against Hubert Vidrine,” Doherty’s ruling further states. “(Phillips) carefully fed his supervisors only the information which would further that end and perpetuate the case, all to promote access to Agent Barnhill and perpetuate and conceal their illicit affair.”

The next step is for the case to be formally sent back to the trial court within the next two weeks.

“We are fairly confident that we are going to be able to prove our court claim,” Knight said. “The question is going to be the quantification of the damages. We fully intend to pursue every penny.”

In unrelated litigation, Trinity Industries’ guardrails have been the focus of more than a dozen personal injury and wrongful death lawsuits across the country. The metal guardrails are supposed to flatten when hit,

absorbing the vehicle's impact and reducing the chance of death or injury. But several lawsuits against Trinity nationwide say that changes made to the design cause it jam, turning it into a deadly spear upon impact.

In June 2015, a federal judge in Texas ordered Trinity to pay \$663 million in damages for failing to tell the federal government about the design changes. Trinity is appealing that decision and has used newspaper and online ads and the company's website to defend the guardrails, which Trinity says function properly when correctly installed and maintained.

An estimated 200,000 of the guardrail units that are the subject of the lawsuits are on the nation's roadways. But more than 40 states have quit installing the devices since October 2014, when a federal jury found that the company had defrauded the government.

## Primary Contacts



**Nolan Knight**

Dallas  
214.855.7516  
[nknight@munsch.com](mailto:nknight@munsch.com)

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**Frederick Addison**

Dallas  
214.855.7570  
[raddison@munsch.com](mailto:raddison@munsch.com)