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False Claims Act

The Fourth Circuit Takes a Unique Approach to Implied False Certifications in FCA Cases

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On January 8, 2015, the United States Court of Appeals for the Fourth Circuit reversed a district court decision dismissing the Government's and relator's False Claims Act ("FCA") complaints against security contractor Triple Canopy for allegedly submitting false claims for payment and creating false records for security guards that had failed certain marksmanship tests. *United States ex rel. Badr v. Triple Canopy, Inc.*, 2015 WL 105374.

The Fourth Circuit's decision has been both hailed and criticized for joining other appellate courts in adopting the so-called "implied certification doctrine" of FCA liability. However, this praise and criticism generally overlooks the fact that the Fourth Circuit articulated what may be a unique test for implied false certifications—one that depended heavily upon the Government's allegations of Triple Canopy's actual knowledge of its non-compliance with a material contractual requirement and deliberate falsification of records by Triple Canopy supervisors. Thus, while *Triple Canopy* marks another adoption of the implied certification doctrine in an FCA case, the particular allegations in that case may serve to limit the sweep of that doctrine in subsequent FCA cases in the Fourth Circuit and elsewhere.

The test for implied false certifications articulated by the Fourth Circuit focused not only on the falsity of Triple Canopy's claims, but also on the materiality and knowledge elements of FCA liability. Rather than analyzing each element of FCA liability separately, the Fourth Circuit combined all of these elements into a

single analysis that appears designed to distinguish false claims from ordinary breaches of contract. The court based its conclusion that the contract non-compliance alleged in *Triple Canopy* was no ordinary breach of contract primarily on the Government's allegations that Triple Canopy's supervisory personnel (1) were aware of the guards' repeated failure to meet the contract's marksmanship requirements, (2) understood that this requirement was a material requirement of the contract, and (3) deliberately falsified records to show that the guards met those requirements.

In holding that the Government had adequately pled an implied false certification, the Fourth Circuit swept aside Triple Canopy's arguments that an implied false certification can only be based upon non-compliance with a contractual requirement that is an *express* precondition of payment. The court also equated the precondition of payment required for an implied certification with "materiality" as that term is defined in the FCA, *i.e.*, a condition that has "a natural tendency to influence, or be capable of influencing," the Government's decision to pay a claim. 31 U.S.C. § 3729(b)(4). The Fourth Circuit relied on "common sense" and drew inferences from the alleged falsifications to conclude that compliance with the marksmanship requirement was a "material" condition. The Fourth Circuit also rejected Triple Canopy's argument that the allegedly falsified records were not "material" because they were not reviewed or relied upon by any Government official.

The Fourth Circuit's decision was not without some bright spots for defendants, however. The decision keeps alive the critical distinction between false claims and "garden variety" breaches of contract, and suggests that *qui tam* actions based upon alleged contractual violations unaccompanied by allegations of actual knowledge and fraudulent concealment of those violations will not be treated as implied false certifications. Most importantly, the decision makes clear that defendants alleged to have made implied false certifications must have the requisite scienter of the *materiality* of the contractual requirement that is alleged to have been violated.

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This article briefly describes the allegations and proceedings in the *Triple Canopy* case and assesses the significance of the Fourth Circuit's decision.

Alleged Facts. Triple Canopy was one of several firms awarded an Indefinite Delivery, Indefinite Quantity ("IDIQ") contract to provide security services in Iraq. In June 2009, the Army awarded Task Order 11 ("TO-11") to Triple Canopy under the IDIQ contract to provide security services at the Al Asad airbase in Iraq. Among the 20 "responsibilities" identified in TO-11 was to "ensure that all employees have received initial training on the weapon that they carry, [and] that they have qualified on a U.S. Army qualification course." To satisfy this "marksmanship" requirement, Triple Canopy's employees had to score a minimum of 23 rounds out of 40 from a distance of 25 meters, and the qualifying scorecards for these employees were to be maintained in their personnel files for one year. Nothing in TO-11 or the IDIQ contract expressly conditioned payment on compliance with this marksmanship requirement (or the 20 "responsibilities" generally.)

Omar Badr was employed by Triple Canopy as a medic at the Al Asad base. Badr filed a *qui tam* action alleging that Triple Canopy hired Ugandan guards to provide security services at Al Asad, that these guards were unable to satisfy the qualifying score of 23 on marksmanship tests despite repeated attempts, that Triple Canopy supervisors were aware that the guards failed the qualifying tests, and that one or more Triple Canopy supervisors directed that false scorecard sheets showing the guards had passed the test be placed in their personnel files. Badr alleged that these actions violated the FCA's prohibition against the knowing submission of false claims, § 3729(a)(1)(A). Badr also alleged that Triple Canopy similarly submitted false claims for the guards' services when the allegedly unqualified guards were transferred from Al Asad to other bases in Iraq.

District Court Proceeding. The Government intervened in Badr's *qui tam* suit to the extent of his allegations regarding Al Asad. Count I of the Government's amended complaint alleged that Triple Canopy had knowingly presented false claims for the Ugandan guards' services at Al Asad in violation of § 3729(a)(1)(A). Count II of the Government's amended complaint alleged that Triple Canopy violated § 3729(a)(1)(B) by knowingly creating false qualification records for those guards that were material to the alleged false claims. The amended complaint also alleged several common law claims.

Triple Canopy moved to dismiss the Government's amended complaint and Badr's complaint pursuant to F.R.C.P. 12(b)(6). The district court granted Triple Canopy's motion and dismissed Counts I and II of the Government's amended complaint and all counts of Badr's complaint. 950 F. Supp. 2d 888. The district court found that Count I of the Government's amended complaint failed to state a claim for the knowing presentation of a false claim because the Government failed to allege that Triple Canopy's claims for payment misstated the number of guards or the price of the services requested (which the district court characterized as failing to plead an "objectively false statement"). The district court dismissed Count II of the Government's amended complaint on the grounds that the Government had failed to plead an "objectively false statement" and that the Government failed to allege that

Government personnel ever reviewed the falsified scorecards placed in the guards' personnel files. The district court dismissed Badr's allegations of false claims at Al Asad on the grounds that he lacked standing to pursue these allegations once the Government intervened, and the court also dismissed the remaining counts of Badr's complaint (those alleging false claims at the other bases) on the grounds that they failed to plead the alleged fraud with specificity. Both the Government and Badr appealed.

The Fourth Circuit's Decision. On appeal, the Fourth Circuit reversed the district court's dismissal of Counts I and II of the Government's amended complaint, and affirmed its dismissal of Counts II-V of Badr's complaint. The court also reversed the district court's dismissal of Badr's allegations regarding Al Asad.

Count I: Regarding Count I, the Fourth Circuit noted that to state a claim for the knowing presentation of a false claim in violation of § 3729(a)(1)(A), the plaintiff must allege four elements: (1) a false statement or fraudulent course of conduct; (2) made with the requisite scienter; (3) that is material; and (4) that results in a claim to the Government. Regarding the first element—a false statement—the Fourth Circuit acknowledged that Triple Canopy had not expressly stated that its guards complied with the marksmanship requirement when it billed the Government. However, the court stated that a complaint adequately pleads a false implied certification when it alleges that the contractor, with the requisite scienter, makes a request for payment under a contract and withholds information regarding its noncompliance with a material contractual requirement. The court found that the Government had sufficiently pled a false statement by asserting that Triple Canopy had billed the Government for guard services that it knew failed to comply with TO-11 marksmanship requirement and took steps to conceal that non-compliance from the Government.

Regarding materiality, the Fourth Circuit stated that to establish this element, the Government had to plead that the alleged false statement had "a natural tendency to influence, or be capable of influencing," the Government's decision to pay. 31 U.S.C. § 3729(b)(4). The court found that the Government had sufficiently pled materiality under this standard for two reasons. First, "common sense strongly suggests that the Government's decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight." Second, Triple Canopy's alleged actions to cover up the guards' failure to satisfy the marksmanship requirement "suggests its materiality." As the court bluntly put it, "[i]f Triple Canopy believed that the marksmanship requirement was immaterial to the Government's decision to pay, it is unlikely to orchestrate a scheme to falsify records on multiple occasions."

Regarding scienter, the Government alleged that Triple Canopy's managers had actual knowledge of the guards' failure to satisfy the marksmanship requirement and participated in the scheme to falsify records to prevent the Government from discovering that fact. The Fourth Circuit found these allegations sufficient to plead the relevant scienter for a knowing presentation of a false claim.

Based on this analysis, the Fourth Circuit found that the Government had sufficiently alleged that Triple Canopy's implied false certifications resulted in false claims to the Government.

Count II: Regarding Count II of the Government's amended complaint, the Fourth Circuit disagreed with the district court's finding that the falsified qualification records were not "material" to Triple Canopy's false claims because the Government had not alleged that those records were reviewed by the contracting officer's representative ("COR"). The Fourth Circuit found that the FCA "reaches government contractors who employ false records that are capable of influencing a decision, not simply those who create records that actually do influence the decision," and that the district court had therefore erred in focusing on the actual effect rather than the potential effect of the falsified records on the Government. The Fourth Circuit found that the Government had properly pled the materiality of the falsified qualification records to the alleged false claims because those records "complete the fraud" by "mak[ing] the invoices appear legitimate because, in the event the COR reviewed the guards' personnel files, the COR would conclude that Triple Canopy had complied with the marksmanship requirement." Thus, the false scorecards were "integral to the false statement and satisfy the materiality standards."

The Fourth Circuit dismissed Counts II-V of Badr's complaint for failure to plead fraud with specificity as required by F.R.C.P. 9(b). However, the Fourth Circuit reversed the dismissal of Count I of Badr's complaint (alleging that Triple Canopy submitted false claims for guard services at Al Asad) because it found that Badr did not lose standing to pursue that count merely because the Government had intervened with similar allegations.

The Significance of the Fourth Circuit's Decision.

1. Implied False Certifications

Prior to *Triple Canopy*, the Fourth Circuit had questioned the validity of implied certification claims and reserved ruling on their viability. See, e.g., *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 n.8 (4th Cir. 1999). However, in *Triple Canopy*, the court noted that the weight of authority since *Harrison* had shifted significantly in favor of implied certification claims. It cited *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 305-06 (3rd Cir. 2011), which collected cases finding implied certifications from the First, Second, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits, and it squarely agreed with these circuits that "contractual implied certification claims can be viable under the FCA in the appropriate circumstances." However, the Fourth Circuit's articulation of the "appropriate circumstances" for implying false certifications warrants close examination.

First, the Fourth Circuit rejected Triple Canopy's argument that implied representations can give rise to FCA liability only where the contract (or some other authority) expressly designates the condition in question as a condition of payment. The court noted that nothing in the FCA specifically requires such a rule. In rejecting the "express condition of payment" limitation urged by Triple Canopy, the Fourth Circuit allied itself with the D.C. Circuit's decision in *United States v. Science Applications Int'l Corp.* ("SAIC"), 626 F.3d 1257 (D.C. Cir.

2010), and rejected the reasoning of the Second Circuit in *Mikes v. Straus*, 274 F.3d 687 (2nd Cir. 2001).

Second, while agreeing with most circuits that implied certifications arise only in connection with preconditions to payment, the Fourth Circuit found that a precondition to payment was the same as a "material" condition, and that a "material" condition is one that has "a natural tendency to influence, or be capable of influencing," the Government's decision to pay. 31 U.S.C. § 3729(b)(4). In this regard, the Fourth Circuit again aligned itself with the D.C. Circuit's SAIC decision, in which the court similarly equated the preconditions for payment required to imply false certifications with "materiality" as defined in § 3729(b)(4).

Third, and most importantly, the Fourth Circuit articulated a test for implied certifications that appears not only to require non-compliance with a "material" contractual requirement, but also to require actual knowledge of such material non-compliance, as well as possibly falsifications and other actions to conceal the non-compliance from the Government. For example, the Fourth Circuit stated that "we hold that the Government pleads a false claim when it alleges that the contractor, with the requisite scienter, made a request for payment under a contract and withheld information about its noncompliance with material contractual requirements." Elsewhere, the Fourth Circuit referred even more expressly to Triple Canopy's alleged knowledge and falsifications as a basis for implying false certifications: "The complaint contains an abundance of allegations that Triple Canopy did not satisfy [the marksmanship] requirement and, instead, undertook a fraudulent scheme that included falsifying records to obscure its failure. The Government's complaint also properly alleges that Triple Canopy's supervisors had actual knowledge of the Ugandan guards' failure to satisfy the marksmanship requirement and ordered the scorecards' falsification." Based upon these allegations, "we readily conclude that the Government has sufficiently alleged a false claim for purposes of Rule 12(b)(6) and Rule 9(b)."

Unlike many other courts, the Fourth Circuit did not focus its implied certification analysis solely on the FCA's falsity element, and then proceed to consider the other elements of FCA liability. Rather, the court considered other FCA elements—the materiality of the marksmanship requirement and the Triple Canopy supervisors alleged actual knowledge and deliberate concealment of the guards' non-compliance with this requirement—in concluding that Triple Canopy's claims were false. In essence, the Fourth Circuit telescoped the traditional, element-by-element approach pursued by many courts into a single, over-arching inquiry.

The test articulated by the Fourth Circuit leaves several questions unanswered. Would the court have found an implied false certification if the Government had not alleged actual knowledge on the part of the Triple Canopy supervisors, but only that they acted in reckless disregard or deliberate ignorance of the Ugandan guards' compliance with the marksmanship requirements? What if no qualification records had been falsified—would the Fourth Circuit still have found an implied false certification? And would the Fourth Circuit have found an implied false certification if the Government had not intervened?

The answer to these and other questions raised by the Fourth Circuit's decision may lie in the concern that it expressed for maintaining the distinction between ordinary breaches of contract, which are remedied through well-established contractual dispute resolution mechanisms, and implied false certifications, which are remedied through multiple damages and penalties under the FCA. The Fourth Circuit noted that it had previously declined to find an implied false certification because such a finding could "shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under" the FCA. *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008). The Fourth Circuit also previously held that "an FCA relator cannot base a fraud claim on nothing more than his own interpretation of an imprecise contractual provision," *Wilson*, 525 F.3d at 378, and that the purposes of the FCA were not served by imposing liability on "honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights, particularly when the party invoking the FCA is an uninjured third party." *Owens v. First Kuwaiti General Trading & Contracting Co.*, 612 F.3d 724, 734 (4th Cir. 2010). The court cited each of these decisions (and others) in *Triple Canopy* for the proposition that the implied certification doctrine "is prone to abuse" by parties seeking "to turn the violation of minor contractual provisions into an FCA action."

Notwithstanding these concerns, the Fourth Circuit noted "several key distinctions" between the alleged facts in *Triple Canopy* and those that it had previously regarded as "garden-variety" breaches of contract. First, "this case does not involve uninjured third parties making claims against their former employers or contracts under which the Government does not express dissatisfaction." To the contrary, the Government "has clearly expressed its displeasure with Triple Canopy's actions by prosecuting this action." (Query whether this suggests the court would apply a higher standard to implied certification claims asserted solely by relators.) Second, the court stated that "this is not a case involving subjective interpretations of vague contractual language." Instead, the marksmanship requirement is a "specific, objective, requirement that Triple Canopy's guards did not meet."

But the Fourth Circuit was not content to rely solely on contract specificity or the Government's satisfaction with the contractor's performance to distinguish between garden variety breaches of contract and false claims. The court repeatedly referred to the materiality of the guards' non-compliance with the marksmanship requirement, Triple Canopy's alleged knowledge of that non-compliance, and Triple Canopy's alleged falsification of documents as consistent with an implied false certification rather than an ordinary breach of contract. In particular, the court made clear its view that the "strong medicine" of the FCA "is needed, where as here, a contractor allegedly engages in a year-long fraudulent scheme that includes falsifying records in personnel files for guards serving as a primary security force on a United States airbase in Iraq." The court also stated that "the best manner for continuing to ensure that plaintiffs cannot shoehorn a breach of contract claim into an FCA claim is strict enforcement of the Act's materiality and scienter requirements." These statements confirm the role that the FCA's materiality and scienter requirements played in leading the Fourth

Circuit to conclude that the facts alleged in *Triple Canopy* went beyond a garden-variety contract dispute.

2. Materiality

The Fourth Circuit noted that to establish materiality, the Government must allege that the false statement had "a natural tendency to influence, or be capable of influencing, the Government's decision to pay." It further noted that while express contractual language may constitute dispositive evidence of materiality, materiality may be established in other ways, "such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue."

The court, however, looked neither to the terms of the contract nor to the testimony of the contracting parties in determining that compliance with the marksmanship requirement was material. Instead, the court cited common sense, which it said "strongly suggests that the Government's decision to pay a contractor for providing base security in an active combat zone would be influenced by knowledge that the guards could not, for lack of a better term, shoot straight." The court also cited Triple Canopy's actions to cover up the guards' failure to satisfy the marksmanship requirement as "suggesting" the materiality of that requirement. In other words, the Fourth Circuit based its finding regarding the sufficiency of the Government's materiality allegation on its knowledge and falsification allegations.

The court's reasoning leaves open the question of whether it would have found the non-compliance with the marksmanship requirement to be material absent allegations of knowledge and falsification of records. Such a determination would have to rely on the basis of common sense alone. Elsewhere in its decision, the Fourth Circuit noted that the materiality element "operates to protect contractors from onerous and unforeseen FCA liability as the result of noncompliance with any of potentially hundreds of legal requirements in contracts, because payment requests by a contractor who has violated minor contractual provisions that are merely ancillary to the parties' bargain do not give rise to FCA liability." The court also noted that "not every part of a contract can be assumed, as a matter of law, to provide a condition of payment." Given these statements, the court might be unwilling to find an allegation of materiality to be sufficient on the basis of "common sense" alone.

3. Knowledge

Possibly the most significant feature of the Fourth Circuit's decision is its interpretation of the "knowing" (scienter) element of the FCA as requiring actual knowledge, reckless disregard, or deliberate ignorance of materiality as well as falsity. The court stated unequivocally (albeit in a footnote) that "[b]ecause the FCA violations must be 'knowing,' the Government must establish that both the contractor and the Government understood that the violation of a particular contractual provision would foreclose payment." (Emphasis added.) The practical effect of this requirement, the court noted, would be that the Government might have a difficult time proving its case without a contractual provision expressly conditioning payment on compliance with the violated provision. These statements underscore the importance that the court gave to the Government's allegations of Triple Canopy's actual knowledge and intentional falsifications, and leave unclear

whether the Fourth Circuit would similarly imply false certifications absent such allegations.

The Fourth Circuit is not the first court to state that the FCA's knowledge element requires knowledge that the alleged non-conformance was material to payment under the contract—the D.C. Circuit's SAIC decision includes similar language. However, the Fourth Circuit appears to be the only circuit that requires the Government or relator to allege (and prove) that *both* the con-

tractor and the Government understood that the contract requirement alleged to have been violated was a precondition to payment (*i.e.*, "material") for FCA liability to arise. Furthermore, the fact that the Fourth Circuit and the D.C. Circuit have both included materiality in the FCA's scienter requirement may provide defendants with a persuasive argument against FCA liability even in implied false certification cases.