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FEATURE COMMENT: Right On The Bullseye? Fourth Circuit Takes Its Shot At Applying *Escobar*'s Materiality Standard After SCOTUS Sends Iraqi Security Guard Case Back For Further Consideration

U.S. ex rel. Badr v. Triple Canopy, Inc., 2017 WL 2115196 (4th Cir. May 16, 2017), aff'g in part, rev'g in part, 950 F. Supp. 2d 888 (E.D. Va. 2013)

When the *Triple Canopy* case was on appeal before the U.S. Court of Appeals for the Fourth Circuit for the first time in 2015, it seemed like the epitome of a case in which bad allegations could make for bad law. In 2015, courts were still wrestling with the viability of the implied certification theory under the False Claims Act. So a case involving Ugandan mercenaries with falsified marksmanship scorecards hired to protect U.S. and Iraqi facilities in Iraq was exactly the type of case that seemed likely to cement the Fourth Circuit as a favorable jurisdiction for FCA cases brought under the implied certification theory.

Recently, the Fourth Circuit ruled (again) on the case—this time taking into consideration the U.S. Supreme Court's decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016). Although the FCA defense bar hoped this might result in a different decision, the Fourth Circuit appears to be standing by its 2015 decision in which it held that the Government adequately stated a claim for relief under the FCA's implied certification theory.

So how did we get here? To recap, in 2009, Triple Canopy Inc. was hired by the Government to provide security services for an airbase in Iraq. The contract required Triple Canopy's guards to qualify under specified firearm standards for marksmanship. When the hired guards could not demonstrate such firearm proficiency, a Triple Canopy supervisor allegedly directed the creation of false qualifying marksmanship scorecards for these guards, as well as additional guards hired. The scorecards were allegedly signed, sometimes post-dated, and placed in the guards' personnel files.

Omar Badr, a Triple Canopy medic who had been ordered to prepare some of the false scorecards, filed a qui tam action under the FCA, and the Government intervened in the case. The Government and Badr alleged violations of the FCA under the implied certification theory. Under this theory, the Government and Badr argued that Triple Canopy violated the FCA by merely submitting a request for payment.

In their views, it was irrelevant that Triple Canopy *never explicitly certified* compliance with the contract's marksmanship requirement on its invoices, and that Triple Canopy never made any certification of any kind on the Government's Material Inspection and Receiving Report (form DD-250).

In January 2015, the Fourth Circuit, relying on the troubling allegations in this case, unsurprisingly reversed the district court's dismissal of the Government's claim, finding that a false claim is adequately pleaded if the party knowingly makes a claim for Government payment and withholds information about its noncompliance with material contractual requirements. *U.S. v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015); 57 GC ¶ 24. The Fourth Circuit reasoned, "If Triple Canopy believed that the marksmanship requirement was immaterial to the Government's decision to pay, it was unlikely to orchestrate a scheme to falsify records on multiple occasions."

The Fourth Circuit also rejected the argument that because the Government never reviewed the records, it could not have relied on the scorecards. A false record could influence the Government's payment decision "even if the Government ultimately does not review the record," the Fourth Circuit said.

About one year after the Fourth Circuit's decision, and while a petition for certiorari in the *Triple Canopy* case was pending at the Supreme Court, the Supreme Court issued its landmark decision in *Escobar*. *Escobar* confirmed that the implied certification theory is a viable theory of liability under the FCA. Rhoad, McLaughlin, Crawford and Hill, Feature Comment, "Frankenstein's Monster Is (Still) Alive: Supreme Court Recognizes Validity Of Implied Certification Theory," 58 GC ¶ 219.

Escobar described the FCA's "rigorous" materiality standard and the types of facts that would be relevant to a district court's determination of whether a particular certification was material to a Government payment decision. The specific and oft-cited rule from *Escobar* is that to establish liability under the implied certification theory, a relator or the Government must show that a defendant's claim for Government payment makes specific representations about the goods and services provided, and the defendant's failure to disclose noncompliance with material contractual or other legal requirements makes those representations misleading.

The Supreme Court in *Escobar* stressed that the materiality requirement is "demanding," and that noncompliance with contractual or other legal terms must have materially affected the Government's payment decision. The Court noted that materiality is not necessarily satisfied even if a party violates an express condition of payment or the Government could have declined to pay the claim had it known of a party's violation of a legal requirement. The Court also identified some facts that are relevant to materiality, e.g., whether the Government "regularly pays a particular type of claim in full despite actual knowledge" of violations, indicating that the materiality standard is a fact-specific one.

With the *Escobar* decision on the books, the Supreme Court sent the *Triple Canopy* case back to the Fourth Circuit for further consideration in light of that decision. *Triple Canopy, Inc. v. U.S. ex rel. Badr*, 136 S. Ct. 2504 (granting petition for certiorari, vacating judgment, and remanding to the Fourth Circuit for further consideration in light of *Escobar*).

In its recent decision, the Fourth Circuit found that Triple Canopy's requests for payment constituted the types of "half-truths" identified in *Escobar*. "[A]lthough Triple Canopy knew its 'guards' had failed to meet a responsibility in the contract, it nonetheless requested payment each month from the Government for those 'guards.' " Slip op. at 8. Just as the Supreme Court reasoned in *Escobar*, the Fourth Circuit found that "anyone reviewing Triple Canopy's invoices 'would probably—but wrongly—conclude that [Triple Canopy] had complied with core [contract] requirements." Id.

In regard to materiality, the Fourth Circuit noted that "nothing in [*Escobar*] undermines our earlier conclusion that Triple Canopy's falsity was material. In fact, far from undermining our conclusion, [*Escobar*] compels it." Slip op. at 9. The Fourth Circuit cited a hypothetical provided in the *Escobar* decision:

> If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has "actual knowledge." Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information" even if the Government did not spell this out.

Slip op. at 9–10 (citing *Escobar*, 136 S. Ct. at 2001–02). "Guns that do not shoot," the Fourth Circuit explained, "are as material to the Government's decision to pay as guards that cannot shoot straight." Slip op. at 10.

The Fourth Circuit also noted that the Government's decision not to renew its contract with Triple Canopy and its decision to "immediately intervene[]" in Badr's qui tam suit constituted "evidence that Triple Canopy's falsehood affected the Government's decision to pay." Slip op. at 10.

The Fourth Circuit's decision is not surprising, but it is important for several reasons.

First, the case marks yet another post-*Escobar* departure from the rule against correlating the Government's intervention decision with the merits of the underlying case. Historically, courts have said things like "[t]here is no reason to presume that a decision by the Justice Department not to assume control of the suit is a commentary on the merits," *U.S. ex rel. Chandler v. Cook Cnty.*, 277 F.3d 969, 974 n.5 (7th Cir. 2002); 44 GC ¶ 45; 45 GC ¶ 114, and "a decision not to intervene may not necessarily be an admission by the United States that it has suffered no injury in fact, but rather the result of a cost benefit analysis." *U.S. ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455 (5th Cir. 2005).

But in *Triple Canopy*, the Fourth Circuit found the Government's decision to "immediately intervene[]" following its decision not to renew Triple Canopy's contract as "evidence that Triple Canopy's falsehood affected the Government's decision to pay." *Triple Canopy*, slip op. at 10.

The Fourth Circuit's finding in this regard came just two weeks after the Third Circuit applied similar reasoning in *U.S. ex rel. Petratos v. Genentech, Inc.*, 2017 WL 1541919 (3d Cir. May 1, 2017). In *Petratos*, the Third Circuit, in finding that Government knowledge precluded a finding of materiality, noted that "the Department of Justice has taken no action against Genentech and declined to intervene in this suit." In light of these holdings, it seems that courts are warming up to the notion that the Government's intervention decision may be considered in the context of a materiality analysis. Although the defense bar might initially welcome this development, it may result in DOJ intervening in more cases for the purpose of preserving potential recoveries.

Second, to the extent the Fourth Circuit characterizes its 2015 decision as taking "a narrower view of materiality" than the Supreme Court did in *Escobar*, the decision suggests that *Triple Canopy* is *not* going to limit the implied certification theory's outer bounds. This should be troubling for anyone who does business with the Government because it suggests that novel theories of liability—to quote Lloyd Christmas—have a chance.

Third, *Triple Canopy* can be placed in the category of cases in which a contractual violation goes to the "essence of the bargain." A run-of-the-mill breach of contract is not the type of breach that goes to the "essence of the bargain," and therefore does not give rise to FCA liability. Accordingly, *Triple Canopy* might be distinguishable from future cases because of its bad factual allegations. Perhaps future courts that face this same question will look closely at the facts of the alleged conduct of Triple Canopy and properly limit the application of this decision to similar factual circumstances.

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