

## Fourth Circuit Adopts “Implied Certification” Theory of False Claims Act Liability and Examines Materiality Under That Theory

On January 8, 2015, the United States Court of Appeals for the Fourth Circuit issued a significant opinion on the False Claims Act (“FCA”) in *United States ex rel. Badr v. Triple Canopy, Inc.*, No. 13-2101 (4th Cir. Jan. 8, 2015). In this case, private security company Triple Canopy, Inc. contracted with the government to provide security services at a U.S. military airbase, then falsified its employees’ marksmanship scorecards to cover up their failure to meet the required qualifications. Although the district court had dismissed the government’s claims, the Fourth Circuit reversed, and in so doing it adopted the “implied certification” theory of FCA liability and issued an important decision analyzing materiality as related to that theory.

### Facts and Procedural History

In June 2009, the government awarded Triple Canopy a contract to provide security services at Al Asad Airbase, the second-largest airbase in Iraq. The contract included a “marksmanship requirement,” which required Triple Canopy to ensure that all employees received initial training on carrying their weapon and that all employees passed a U.S. Army qualification course. Triple Canopy hired approximately 332 Ugandan guards to serve at Al Asad, but the guards’ supervisors soon learned that none were able to satisfy the qualifying score on the required marksmanship course. As a result, the supervisors generated false scorecards for the guards’ personnel files to cover up their deficiency. Over the course of the one-year contract, Triple Canopy submitted invoices and was paid about \$4.4 million for the Ugandan guards’ work at Al Asad. At the end of the year, the government declined to renew the contract with Triple Canopy, and the guards were thereafter dispatched to four other contract sites around Iraq.

Omar Badr was a Triple Canopy medic at Al Asad who was ordered by his supervisors to create false marksmanship scorecards. In March 2011, Badr initiated a *qui tam* suit with five FCA counts—one count related to Al Asad and four counts for the other contract sites where the guards were later dispatched. The government intervened in Badr’s claims specific to Al Asad and filed an amended complaint. Triple Canopy then moved to dismiss both complaints, which the district court granted. The district court concluded that the government had failed to state a valid claim under the FCA’s “false claims” section, 31 U.S.C. § 3729(a)(1)(A), because it had not alleged that Triple Canopy invoiced the government for an incorrect number of guards or billed for a fraudulent amount of money, and concluded that the government had failed to state a valid claim under the FCA’s “false records and statements” section, 31 U.S.C. § 3729(a)(1)(B), because it had failed to allege the relevant government officer had actually reviewed the false scorecards. The government and Badr thereafter appealed to the Fourth Circuit.

### The Fourth Circuit’s Opinion

Analyzing the government’s § 3729(a)(1)(A) count, the Fourth Circuit explained that other “courts have recognized that a claim for payment is false when it rests on a false representation of compliance with an applicable . . . contractual term,” and that such “false certifications” can be “either express or implied.” Abandoning its prior hesitation, the Fourth Circuit then explicitly adopted the implied certification theory of liability, holding that “the Government pleads a false claim when it alleges that the contractors, with the requisite scienter, made a request for payment under a contract and withheld information about its noncompliance with material contractual requirements.” As applied to this case, the Fourth Circuit concluded that the government had sufficiently pled a valid implied certification claim. With respect to materiality, “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.” The fact that Triple Canopy orchestrated a scheme to falsify the guards’ scorecards also suggested that the company itself believed the marksmanship requirement was material to the government’s decision to pay under the contract. This case differed from prior cases involving “garden-variety breaches of contract” because those cases involved “uninjured third parties,” whereas the government here had expressed its displeasure by intervening in the case, and because those cases involved subjective interpretations of vague contractual language, whereas the marksmanship requirement in this contract was a “specific, objective” provision that the Ugandan guards did not meet.

On the government’s § 3729(a)(1)(B) count, the district court had concluded that the false scorecards could not have been material because there was no allegation that the relevant government officer had actually reviewed them. The Fourth Circuit again disagreed, explaining that materiality turns on the “potential” effect of the false statement at the time it is made, not the actual effect of the false statement when discovered. The false scorecards in this case were therefore material because if the contracting officer had reviewed them, he would have concluded that Triple Canopy had complied with the marksmanship requirement and that the invoices were thus legitimate. Accordingly, the Fourth Circuit reversed the district court’s dismissal of the government’s amended complaint and remanded for further proceedings.

Despite reversing on those grounds, the Fourth Circuit affirmed the district court’s dismissal of Badr’s counts related to the four other contract sites where the guards were dispatched after Al Asad. The entirety of Badr’s allegations for those sites was that the Ugandan guards had been transferred there and that Triple Canopy was paid by the government under terms similar to those under the Al Asad contract. The Fourth Circuit agreed that such bare allegations do not satisfy Federal Rule of Civil Procedure 9(b)’s heightened pleading standards, which demand more than simply presuming Triple Canopy submitted false claims under those other contracts too.

## Significance of the Decision

Even though the Fourth Circuit adopted the implied certification theory of FCA liability, its opinion included a number of important points for any party contracting with the federal government. The court repeatedly emphasized that a mere breach of contract will not support a cognizable FCA claim, as “the purposes of the FCA [are] not served by imposing liability on honest disagreements, routine adjustments and corrections, and sincere and comparatively minor oversights” in the performance of a contract. Also, because the implied certification theory imposes liability when a defendant has not submitted an objectively false claim for payment and thus is “prone to abuse,” the court stressed 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.”

Despite the Fourth Circuit’s ruling on materiality in *Badr*, defendants should continue to press on this element when facing an FCA suit. Materiality was sufficiently pled in *Badr* because Triple Canopy’s false statement went to the core of the contract—“Distilled to its essence, the Government’s claim is that Triple Canopy, a security contractor with primary responsibility for ensuring the safety of servicemen and women stationed at an airbase in a combat zone, knowingly employed guards who were unable to use their weapons properly and presented claims to the Government for payment for those unqualified guards.” In future cases where the alleged false statement does not implicate the very basis of the contract itself, defendants will likely have more success on this element.

In addition, the importance of the Fourth Circuit affirming the dismissal of Badr’s counts on the other contract sites should not be overlooked. *Qui tam* relators often bring claims related to a number of

government contracts, as opposed to one contract standing alone. The Fourth Circuit's conclusion that Badr could not simply presume Triple Canopy's submission of false claims connected to the other contract sites demonstrates that courts will individually analyze every contract alleged in a complaint in order to ensure there are sufficient allegations to satisfy Rule 9(b) in each instance.

Ropes & Gray will continue to monitor developments in this area. If you have any questions or would like to discuss the foregoing or any related matter, please contact the Ropes & Gray attorney with whom you regularly work, or any other attorney in our [FCA practice](#).

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