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EXPERT ANALYSIS

Implied Certification in The Crosshairs: 7th Circuit Ruling Increases Likelihood Of Supreme Court Review Of False Claims Act Case

By Richard W. Arnholt, Esq., and Kaitlin E. Harvie, Esq.
Bass, Berry & Sims

Authors' preliminary note: As this article goes to press, the U.S. Supreme Court has granted certiorari in *Universal Health Services Inc. v. Escobar,* No. 15-7, *cert. granted* (U.S. Dec. 4, 2015), a case that presents nearly identical questions to those on petition for certiorari in the *Triple Canopy Inc. v. United States ex rel. Badr* case, discussed at length below. Both petitions address the validity and appropriate scope of the implied certification theory of liability under the False Claims Act, although the cases arise from distinct contexts — health care versus defense contracting — and from circuit courts with distinct approaches to the theory. While both cases were set for conference Dec. 4, 2015, the Supreme Court granted the petition in *Universal Health Services* but took no action with regard to *Triple Canopy*. Given the cases' similarity with regard to issues and the distinctions between the contexts and standards applied by lower courts, the pending decision on the *Triple Canopy* petition may provide useful insight into the way the issues ultimately will be framed in the court's analysis of implied certification.

Federal appeals courts have taken varied approaches when considering whether False Claims Act liability may be based on the theory that demands for payment include implied certifications that the contractor has complied with relevant statutory, regulatory and contractual requirements. As a result, there is an increased likelihood that the U.S. Supreme Court will address this issue next term.

In *United States v. Triple Canopy Inc.*, the 4th U.S. Circuit Court of Appeals adopted the implied-certification theory.[1] Looking far beyond the express terms of the underlying contract, the court relied on "common sense" and context to conclude that false-presentment claims had been adequately pleaded against the contractor — even though payment was not conditioned on the provision violated. On June 5 Triple Canopy filed a petition for a writ of certiorari to the Supreme Court.

At the other extreme — and just days after Triple Canopy filed its petition — the 7th Circuit issued a decision appearing to reject the theory in its entirety, in *United States v. Sanford-Brown Ltd.*[2] Given the distinct approaches taken by these two circuits, as well as the variations in application of the implied-certification theory by some of the other circuits, Supreme Court guidance would be welcomed.

SCATTERSHOT APPROACHES

The FCA imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." Under the theory of implied certification, the act of submitting a claim for payment implies compliance with governing statutes, regulations or

contract terms, such that a party may face liability for presenting a false claim for payment when it knowingly fails to comply with one of these requirements.

Most circuits have adopted some version of the theory. They have differed, however, as to their conclusions with respect to its proper scope. While several circuits have reserved judgment on the theory, before the *Sanford-Brown* decision no circuit had come close to rejecting it outright.

Express condition to payment

The 2nd Circuit and 3rd U.S. Circuit have taken a restrictive approach by holding that implied false certification applies only when the condition of payment is expressly stated in a statute, regulation or contract term.[3]

In United States v. Triple Canopy Inc., the 4th U.S. Circuit Court of Appeals adopted the implied-certification theory.

Material precondition to payment

Other federal appeals courts, including the 1st, 10th and District of Columbia circuits, have permitted a broader scope of liability by recognizing that claims may be false when a party impliedly represents or certifies compliance with a material precondition to payment.[4]

Under this approach, while an express designation in the applicable laws may establish a material precondition of payment, courts are willing to go beyond the explicit language to conduct a "fact-intensive inquiry and context-specific inquiry" regarding the regulatory scheme or contractual circumstances.[5]

As the District of Columbia Circuit explained: "The existence of express contractual language ... may well constitute dispositive evidence of materiality, but it is not ... a necessary condition. The plaintiff may establish materiality 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."[6]

Implied certification without appropriate scope

The 9th Circuit has recognized the implied-certification theory, but it has declined to determine whether the condition of payment must be expressly stated.[7]

Similarly, the 6th Circuit has adopted the implied-certification theory.[8] And in one case, the 6th Circuit upheld the dismissal of a complaint because the plaintiff failed to allege the defendant was "expressly required to comply with [the applicable] standards as a prerequisite to payment."[9] It has not, however, explicitly addressed the scope of the theory.[10]

Judgment reserved on implied certification

Finally, the 5th Circuit and 11th Circuits have explicitly reserved judgment on the viability of the implied-certification theory.[11]

THE TRIPLE CANOPY CASE

This year, in *United States v. Triple Canopy Inc.*, the 4th Circuit joined courts applying a broader standard to the implied-certification theory. It did so by holding a contractor may be liable for presenting a claim for payment while withholding information about its noncompliance with a material requirement, even if the requirement was not an express condition of payment.

Factual background

In June 2009, Triple Canopy was awarded Task Order 11, a one-year contract to provide security services at the Al Asad Airbase in Iraq. TO-11 included a "specific task description" that identified

20 "responsibilities" assumed by Triple Canopy. The final responsibility specified by TO-11 required Triple Canopy to ensure its guards achieved a marksmanship score sufficient to qualify on a U.S. Army qualification course. Nothing in TO-11, however, expressly conditioned payment on compliance with these responsibilities.

Over the course of the contract, Triple Canopy hired hundreds of guards from Uganda to provide the security services outlined in the contract. Shortly after the guards arrived, Triple Canopy supervisors allegedly learned that none of them could satisfy the marksmanship requirement. Nor could they "zero," or properly aim, their rifles.

Furthermore, Triple Canopy allegedly falsified the guards' scorecards on two occasions to indicate they had achieved the required marksmanship scores. During the course of the contract, Triple Canopy submitted 12 monthly invoices for the services of the Ugandan guards.[12]

The District Court decision

After a former Triple Canopy employee filed a qui tam complaint, the government intervened, asserting claims under both the false-presentment and false-records provisions of the FCA. With regard to the presentment claim, the government alleged Triple Canopy knowingly presented materially false or fraudulent claims "based upon the false representation that the guards they employed for TO 11 had met the requirements for employment under TO 11, including the requirement that they had qualified on a U.S. Army qualification course on their use of firearms when the truth was that they had not qualified."

On June 19, 2013, the District Court dismissed the FCA claims against Triple Canopy.[13] In addressing the implied-certification theory, it explained that the 4th Circuit had not adopted the theory. Even if it had, the court said, the government would be required to show Triple Canopy violated a precondition to payment. Consequently, the court "decline[d] to adopt the implied-certification theory and [found] that the government's allegations would in any event be insufficient to invoke this theory of liability" due to "the absence of a precondition for payment connected to the weapons qualifications certification forms."

The 4th Circuit decision

The 4th Circuit disagreed. On Jan. 8, it aligned itself with circuits taking a broader view of liability under the implied-certification theory. The 4th Circuit acknowledged that the theory could be abused to turn minor contractual or regulatory violations into FCA actions. However, it explained that "[t]he 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.'"

Consequently, the court held "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.'"

Applying these standards, the court first determined the complaint sufficiently alleged that Triple Canopy failed to satisfy TO-11's marksmanship requirement and the company's supervisors had actual knowledge of the failure. It also held the materiality element was sufficiently pleaded. Specifically, the court explained, "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 court also considered the factual circumstances, stating "[i]f 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."[14] Thus, the 4th Circuit looked

far beyond any express conditions in the underlying contract and relied on "common sense" and context to consider the materiality of the marksmanship requirement.

Triple Canopy's petition

Triple Canopy petitioned the Supreme Court for a writ of certiorari June 5, arguing that the 4th Circuit's "unbounded" approach to the implied-certification theory impermissibly expanded FCA liability.[15]

Triple Canopy also called on the court to "examine the underlying legitimacy of the implied-certification theory itself." It noted that while eight circuits had recognized some form of implied certification, five had not yet determined whether to adopt it. Notably, none had expressly rejected the theory.

7TH CIRCUIT SHOOTS DOWN IMPLIED CERTIFICATION

The 7th Circuit may have changed this, however, just days after Triple Canopy filed its petition. In *United States v. Sanford-Brown Ltd.*, the 7th Circuit rejected not only the relator's false-presentment claim based on implied-certification but arguably the implied-certification theory in its entirety.

The relator asserted a false-presentment claim based on Sanford-Brown College's alleged violation of certain regulations referenced in its program participation agreement with the U.S. Department of Education. Specifically, the agreement provided that Sanford-Brown would comply with program statutes and implementing regulations governing institutional eligibility for federal subsidies. The relator argued Sanford-Brown was liable for presenting false claims because it violated some of these regulations and compliance with the rules was a condition of payment — not just a condition of participation in the federal subsidies program.

In upholding the District Court's decision granting summary judgment for Sanford-Brown, "including its rejection of the theory of implied false certification," the 7th Circuit resolved the previously "unsettled" viability of the implied-certification theory within its jurisdiction by declining to endorse it.

Echoing circuits that have adopted a more restrictive approach to implied certification, the 7th Circuit explained said the FCA "is simply not the proper mechanism" for enforcing regulatory requirements. The court went even further, concluding, "Absent evidence of fraud before entry, non-performance after entry into an agreement for government subsidies does not impose liability under the FCA." Thus, the 7th Circuit upheld summary judgment for the college because the relator did not prove the institution's application to establish eligibility was fraudulent.

SANFORD-BROWN'S IMPACT

Under one interpretation of the *Sanford-Brown* decision, the court's conclusion "categorically reject[s] the implied-certification theory" — a reading acknowledged by the government in its opposition brief to Triple Canopy's petition.[16] Specifically, the 7th Circuit suggested that when a party enters into an agreement in good faith, and only subsequently becomes aware of its own noncompliance, the mere act of submitting a claim for payment while remaining silent as to the noncompliance cannot give rise to FCA liability.

As the government argued in its opposition to Triple Canopy's petition, however, "there is good reason to doubt [whether the 7th Circuit] intended its decision to sweep so broadly." Attempting to downplay the circuit split, the government argued the *Sanford-Brown* decision should be disregarded because it is factually dissimilar, such that the court's analysis "focused entirely on the specific statutory context in which the allegedly false claims were submitted."

Furthermore, the 7th Circuit did not definitively foreclose the possibility of liability under an implied-certification theory based on a violation of a condition of payment (compared with the conditions of eligibility or participation at issue in *Sanford-Brown*).

While there are several bases for interpreting the *Sanford-Brown* decision in a more limited manner, the ruling highlights the variation in approaches to implied certification among the circuits.

First, the decision provides strong precedent for rejecting the implied-certification theory outright. Even assuming the 7th Circuit left open the viability of implied certification in certain circumstances, the decision remains novel in that it suggests liability cannot arise based on a party's nonperformance after its good-faith entry into an agreement with the government.

This standard creates a potential schism among the circuits; as applied to the *Triple Canopy* facts, the contractor would not face liability because there is no allegation it initially assumed the TO-11 responsibilities with knowledge that the guards could not meet the marksmanship requirement.

CONCLUSION

With the *Triple Canopy* petition pending, the *Sanford-Brown* decision makes it more difficult to ignore the varied approaches taken by different circuits to the implied-certification theory. Perhaps more importantly, the *Sanford-Brown* decision "zeroes" the issues in the *Triple Canopy* case by forcing a meaningful review of the theory's viability — rather than presuming it is an appropriate application of the FCA — before proceeding to determine the theory's scope.

While the recent 4th Circuit and 7th Circuit decisions stretched the range of approaches to implied certification even further, the stark contrast between the decisions enhances the likelihood the Supreme Court will take up the *Triple Canopy* case — and provide much-needed clarity on the theory's viability and scope. WJ

NOTES

[1] *United States v. Triple Canopy Inc.*, 775 F.3d 628 (4th Cir. 2015),

[2] *United States v. Sanford-Brown Ltd.*, 788 F.3d 696 (7th Cir. 2015).

[3] *See Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Grp.*, 659 F.3d 295, 307 (3d Cir. 2011).

[4] *United States ex rel. Hutcheson v. Blackstone Med.*, 647 F.3d 377, 387-88, 392 (1st Cir. 2011); *United States ex rel. Lemmon v. Envirocare of Utah Inc.*, 614 F.3d 1163, 1169-70 (10th Cir. 2010); *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010); *Ab-Tech Constr. Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994), aff'd, 57 F.3d 1084 (Fed. Cir. 1995).

[5] *See New York v. Amgen Inc.*, 652 F.3d 103, 111 (1st Cir. 2011).

[6] *See Sci. Applications*, 626 F.3d at 1269; *see also Lemmon*, 614 F.3d at 1169-70 (materiality adequately pleaded in claim based on implied certification when plaintiff's relied on purpose of contract and plaintiff's statements).

[7] *See Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 n.3 (9th Cir. 2010).

[8] *See United States ex rel. Augustine v. Century Health Servs.*, 289 F.3d 409, 415 (6th Cir. 2002).

[9] *Chesborough v. VPA PC*, 655 F.3d 461, 468 (6th Cir. 2011).

[10] *See States v. Villaspring Health Care Ctr.*, No. CIV.A. 3:11-43-DCR, 2011 WL 6337455, at *6-8 (E.D. Ky. Dec. 19, 2011).

[11] *See United States ex rel. Gage v. Davis S.R. Aviation LLC*, No. 14-50704, 2015 WL 4237682, at *3 (5th Cir. July 14, 2015); *United States ex rel. Osheroff v. Humana Inc.*, 776 F.3d 805, 808 n.1 (11th Cir. 2015).

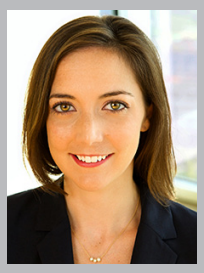
[12] *See generally* Complaint of the United States in Intervention, *United States ex rel. Badr v. Triple Canopy Inc.*, No. 1:11-cv-288, 2012 WL 5510874 (E.D. Va. Oct. 25, 2012).

[13] *United States ex rel. Badr v. Triple Canopy Inc.*, 950 F. Supp. 2d 888, 899-900 (E.D. Va. 2013).

[14] Under this reasoning, falsification of any records is, ipso facto, evidence that the contractor viewed compliance with the underlying requirement to be material to the government's decision to pay.

[15] Petition for Writ of Certiorari at 13-27, *Triple Canopy Inc. v. United States ex rel. Badr,* No. 14-1440, 2015 WL 3542745 (U.S. June 5, 2015).

[16] Brief for the United States in Opposition at 14-15, *Triple Canopy Inc. v. United States ex rel. Badr,* No. 14-1440, 2015 WL 5260470 (U.S. Sept. 8, 2015).



Richard Arnholt (L) is a partner in the Washington office of **Bass, Berry & Sims**, where he is a member of the firm's government contract group and serves as a co-chair of its procurement fraud task force. He can be reached at rarnholt@bassberry.com. **Kaitlin Harvie** (R) is an associate in the firm's Nashville, Tennessee, office. As a member of the compliance and government investigations team, she focuses her practice on procurement fraud, health care fraud and abuse matters. She can be reached at kharvie@bassberry.com.