Recent Developments in False Claims Act Litigation

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Introduction

During the past year, evolution of case law under the False Claims Act ("FCA") has accelerated. There have been new developments in critical areas of significance to government contractors. This paper explores four distinct areas of FCA caselaw of importance to companies that contract with the United States, or who otherwise participate in programs involving federal funds: (1) the public disclosure bar, which prevents claims based on information that is already in the public domain; (2) Federal Rule of Civil Procedure 9(b)'s particularity requirement, which sets the degree of specificity with which plaintiffs must plead their allegations; (3) the theory of implied certification, which was recently adopted by the Fourth Circuit in an expansive holding; and (4) the implications for FCA litigation of a recent D.C. Circuit case involving attorney-client protections for documents created as part of internal investigations.

I. Public Disclosure Bar

A. Implications of the 2010 Amendments to the False Claims Act's Public Disclosure Bar

As part of the 2010 Patient Protection and Affordable Care Act ("PPACA"), Congress amended the public disclosure bar to the False Claims Act ("the FCA"). The FCA provides two routes to recovery. First, the government may sue the recipient of government funds directly, or second, a relator may file a qui tam lawsuit on behalf of the government.[1] If the relator's action succeeds, he or she may receive between 15 and 30% of the proceeds of the action or settlement.[2] However, a relator is barred from recovery if the allegations underlying his claim were previously disclosed in a qualifying public event. The purpose of the public disclosure bar is to strike an appropriate balance between incentivizing whistleblowers and preventing parasitic *qui tam* lawsuits based on information already in the public domain.[3]

Because the courts have uniformly held that the 2010 amendments to the public disclosure bar do not apply retroactively, most cases in the past five years have involved applications of the 1986 public disclosure bar. As whistleblowers begin coming forward with allegations involving post-2010 conduct, the meaning of the 2010 amendments to the public disclosure bar will become increasingly important. This section discusses unresolved issues surrounding the 2010 public disclosure bar, including (1) whether it creates a jurisdictional limitation on the federal courts' ability to hear certain FCA cases; (2) the new definition of what constitutes a public disclosure; and (3) the revised scope of the "original source" exception to the public disclosure bar.

B. The Public Disclosure Bar as a Jurisdictional Strip or an Affirmative Defense?

The courts are split on whether the 2010 changes to the public disclosure bar strip federal courts of jurisdiction to hear qualifying FCA cases, although the weight of authority suggests they do not. This question is especially important to contractors because the public disclosure bar is one of the few tools through which defendants can obtain dismissal of a case. Under the 1986 amendments, the public disclosure bar was clearly jurisdictional: The FCA provided that "[n]o court shall have jurisdiction" when the underlying allegations were publicly disclosed. By contrast, the 2010 amendments provide that "the court shall dismiss an action" where the underlying allegations were publicly disclosed.

Both of the federal appellate courts to address the question have concluded that the 2010 amendments create an affirmative defense, not a jurisdictional limitation.[4] In *Osheroff*, the Eleventh Circuit gave three reasons why the courts should treat the 2010 amendments as creating an affirmative defense: First, the plain language of the new provision—"shall dismiss"—

commands that result.[5] Second, consistent with the presumption that Congress chooses its words deliberately, Congress' decision to remove the prior jurisdictional language suggested a corresponding intent to remove the jurisdictional limitation.[6] Third, the Eleventh Circuit also found it significant that "Congress did not remove similar jurisdictional language from surrounding provisions," such as §§ 3730(e)(1)–(2).[7] The Fourth Circuit's analysis also focused on the plain language of the section.

Conversely, some district courts have concluded that the 2010 amendments do not alter the jurisdictional nature of the public disclosure bar.[8] In *Beauchamp*, the relator alleged that defendant Academi Training Center, a security contractor providing services in Iraq, regularly submitted claims to the State Department that falsified the weapons qualification test scores for security personnel.[9] Examining the public disclosure bar, the Eastern District of Virginia gave two reasons why it remained jurisdictional: First, Congress's decision to remove the word "jurisdictional" was not dispositive because "Congress need incant magic words in order to speak clearly."[10] By using the term "shall dismiss," Congress preserved a threshold, i.e. jurisdictional, limitation on the scope of the statute.[11] Second, the Court noted that "the public disclosure bar has long been interpreted as jurisdictional and is contained in a subsection entitled 'certain actions barred.'"[12] The Eastern District of California relied heavily on the logic of *Beauchamp* in also finding the 2010 bar to be jurisdictional.[13]

Whether the public disclosure bar is a jurisdictional limitation or an affirmative defense may have significant practical effects for litigants. If the public disclosure bar is jurisdictional, then challenges would arise under Fed. R. Civ. P. 12(b)(1). If not, then challenges would arise under Rule 12(b)(6). Under Rule 12(b)(1), defendants may have more freedom to introduce affidavits and other extrinsic evidence to support their arguments. Although facial challenges to subject matter jurisdiction generally require the courts to accept as true all of the plaintiff's allegations, factual challenges to subject matter jurisdiction—such as the argument that a relator's claims are substantially similar to qualifying public disclosures—allow the courts to weigh extrinsic evidence in order to determine whether subject matter jurisdiction exists.[14] Second, subject matter jurisdiction is always at issue, meaning that a defendant's failure to initially claim that the allegedly fraudulent transactions were publicly disclosed may not constitute waiver of the public disclosure 'defense.'

By contrast, interpreting the 2010 amendments as creating an affirmative defense under Rule 12(b)(6) will probably increase the likelihood that plaintiffs' complaints withstand motions to dismiss. In deciding a defendant's Rule 12(b)(6) motion to dismiss, the courts rely almost exclusively on the plaintiff's complaint, viewing all non-conclusory allegations in the light most favorable to the plaintiff.[15] Consequently, defendants will probably have less flexibility under Rule 12(b)(6) to introduce extrinsic evidence in support of their public disclosure arguments. Additionally, the defendant's failure to a raise public disclosure defense in its response may constitute waiver.

C. What Constitutes a Public Disclosure?

The 2010 public disclosure bar appears to narrow the universe of sources that constitute public disclosures. With respect to prior litigation, the airing of a claim in state court proceedings no longer counts as a public disclosure; the 2010 amendments provide that public disclosure occurs only for claims alleged "in a *Federal* criminal, civil, or administrative hearing in which the Government or its agent is a party."[16] For example, the *Beauchamp* Court found that a previous FCA lawsuit alleging the same general facts—as a federal lawsuit filed by a relator on behalf of the United States—qualified as a public disclosure.[17] With respect to government investigations, the 2010 amendments also limit public disclosure to those allegations found in federal reports.[18] What constitutes a “federal report” for FCA purposes is uncertain: The public disclosure bar plainly extends to GAO reports, and the courts have also held that the report of an agency’s Inspector General may constitute a public disclosure,[19] but it is less certain whether a Defense Contract Audit Agency (DCAA) report, for example, would qualify as a public disclosure.

The 2010 amendments also preserve the public disclosure bar for claims aired in the “news media,” and the courts continue to grapple with the meaning of that term.[20] In particular, the courts have struggled to apply the news media bar to the Internet—an application that will likely become increasingly difficult as more information becomes available online. For example, the defendant medical clinic in *Osheroff* placed advertisements in the *Miami Herald* promising to provide eligible patients with free meals, free spa services, and free entertainment.[21] The medical clinic also made similar promises on its public website.[22] Noting that the term news media “has a broad sweep,” the Eleventh Circuit held that both the newspaper ads and the public website qualified as news media for the purpose of the public disclosure bar.[23]

Notably, the 2010 amendments may have resolved a longstanding circuit split over the application of the public disclosure bar. Under the 1986 version, the Fourth Circuit had interpreted the phrase "based upon" to bar only those claims that were “actually derived from” the allegations in the public domain.[24] By contrast, all the other circuits to address the question interpreted "based upon" to bar claims that were “substantially similar to” allegations already in the public domain,[25] a standard much more favorable to defendants than the Fourth Circuit’s interpretation.[26] Some courts have recently noted that the 2010 amendments appear to adopt the majority position.[27] As amended, the FCA provides that claims are barred where "substantially the same allegations or transactions" were publicly disclosed. Based upon this language, the

Northern District of Illinois recently held that "the 2010 amendment incorporated the [majority] standard."[28]

D. "Original Source" Exception

i. The *Trinity Industries* Decision

The Eastern District of Texas' decision in *United States ex rel. Harman v. Trinity Indus., Inc.*[29] is especially significant to contractors for two reasons: First, it is one of the few decisions to parse the differences between the 1986 and 2010 amendments, and second, it may signal a trend toward a more expansive view of who constitutes an original source.

In *Trinity Industries*, relator Joshua Harmon alleged that defendant Trinity Industries submitted fraudulent claims seeking reimbursement for the installation of guardrail end terminals along some state and federal highways.[30] To qualify for reimbursement, highway equipment installed anywhere on the National Highway System must first be approved by the Federal Highway Administration (FHWA). Trinity's ET-Plus guardrail system, as approved by the FHA in 2000, was designed to fold outward when struck by a vehicle, thereby minimizing the likelihood of injury to passengers in the vehicle.[31] Harmon alleged that Trinity substantially changed the end terminal design after the 2000 approval and did not resubmit the product for FHA approval.[32] Harman claimed the redesigned guardrails folded over, rather than away from, the vehicle upon impact.[33]

Harman obtained information about the alleged fraud from three sources. First, Harman learned some facts about Trinity's alleged fraud while the two parties were litigating a patent infringement claim related to the guardrail design.[34] Second, Harman claimed that he then inspected several guardrails, took measurements, and used his specialized background knowledge to compare the as-installed specifications with the as-approved specifications.[35] Third, Harman used a FOIA request to obtain a copy of Trinity's 2005 submission to the FHWA, in which Trinity allegedly failed to disclose that it made material changes to the guardrail design.[36] Concluding that Trinity had fraudulently submitted claims for reimbursement, Harman disclosed his conclusions to state highway officials, in court documents in the related lawsuit, and on a website he created.[37] Trinity argued that the basis of Harman's FCA claims was previously disclosed and that Harman did not qualify as an original source because he "compiled the information in [his] disclosures 'from public sources.'"[38]

The Court held that Harman qualified as an original source under both the 1986 and 2010 versions.[39] Under the 1986 public disclosure bar, an original source was someone who had "direct and independent knowledge of the information on which the allegations are based."[40] Applying this version, the Court concluded that Harman's knowledge was direct because "a significant portion of his claim stems from personally-gathered information."[41] Though some pieces of information were publicly disclosed in litigation and in the media, the Court explained that "it would be extreme to find that a relator's knowledge was not 'independent' because some fraction of the facts…are contained in public documents."[42] The Court also noted that Harman's knowledge qualified as independent because the falsity of Trinity's claims "was made plain only through his own efforts."[43] The Court suggested that, as a policy matter, Harman was the type of whistleblower whom Congress wanted to file a lawsuit: He gained knowledge of Trinity's false claims through his own "sweat of the brow" analysis, rather than through free-riding on the efforts expended by others.[44]

In its analysis, the Court parsed the differences between original sources under the 1986 and 2010 versions. It acknowledged that the 2010 amendment eliminated the "direct and independent knowledge" requirement.[45] The 2010 version now requires that original sources either (1) alert the government to the fraud scheme in advance of public disclosure, or (2) have independent knowledge that materially adds to the public disclosures.[46] The Court concluded that the 2010 amendment "appears only to have expanded the definition of 'original source.'"[47] If a party qualified as an original source under the 1986 version, then *a fortiori* that party would also qualify under the 2010 version.[48]

ii. Ninth Circuit Abrogates "Hand in the Public Disclosure" Requirement

Interpreting the 1986 amendments, the Ninth Circuit recently revisited the requirements for qualifying as an original source. In *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*[49] the Court abrogated an earlier decision holding that a whistleblower qualified as an original source only if he "had a hand in the public disclosure."[50] In *Hartpence*, the Ninth Circuit acknowledged that the "hand in the public disclosure" requirement had no basis in the statutory text and that the *Wang* Court had impermissibly grafted "a non-existent, extra-textual" requirement onto the FCA.[51] Although the "hand in the public disclosure" requirement was grounded in legislative history, the *Hartpence* Court concluded that the *Wang* Court erred in looking at the legislative history of an unambiguous statute.[52] The *Hartpence* Court concluded that "there are two, and only two, requirements in order for a whistleblower to be an 'original source'" under the 1986 amendments: (1) He must voluntarily inform the government of the facts underlying the complaint, and (2) he must have direct and independent knowledge of the facts underlying his complaint.[53] Ultimately, the *Hartpence* decision will make it easier for whistleblowers within the Ninth Circuit to qualify as original sources and thereby avoid dismissal under the public disclosure bar.

II. Particularity Requirement Under Fed. R. Civ. P. Rule 9(b)

The federal appellate courts also continue to grapple with the application of Rule 9(b)'s particularity requirement to FCA *qui tam* litigation. Where a plaintiff alleges fraud,[54] the rule requires him to "state *with particularity* the circumstances constituting fraud."[55] The courts appear split on the degree of particularity that is necessary to survive a defendant's motion to dismiss for failure to comply with Rule 9(b).

The D.C. Circuit recently held that the "precise details of individual claims are not, as a categorical rule, an indispensable requirement of a viable False Claims Act complaint."[56] Whether representative examples must be pleaded has long been an important issue for the relator's bar, and as a result, the softer position of the D.C. Circuit and other appellate courts may have significant implications for contractors. The relator in the AT&T case, Todd Heath, ran an auditing firm that dealt specifically with phone bills.[57] Based upon his review of customers' phone bills, Heath alleged that AT&T implemented a scheme to defraud the Universal Service Fund.[58] He claimed that AT&T failed to provide schools and libraries with the lowest price to which they were entitled, and that those organizations then submitted inflated claims for reimbursement to the Universal Service Fund.[59] Although AT&T did not submit the false claims directly, the FCA still applied because AT&T allegedly caused their submission.[60]

In its motion to dismiss, AT&T raised three particularity objections to Heath's complaint. First, the complaint failed to identify specific, affirmative misrepresentations to the U.S. government.[61] Second, it failed to identify the specific actors who made the false statements or misrepresentations.[62] Third, it failed to identify any "representative samples" of claims, which AT&T argued were necessary to put it on notice as to the allegations against it.[63] Addressing the issues in turn, the D.C. Circuit rejected AT&T's first argument because the complaint adequately alleged an "implied certification" theory.[64] Second, the Court held that the complaint did specifically identify the actor responsible for the false statements—AT&T itself.[65] Although the Court acknowledged that some relators might have to identify specific people who were responsible for false claims, in this case such a degree of specificity was not necessary because the complaint alleged a widespread, institutionalized scheme to defraud the government.[66] Third, and most significantly, the D.C. Circuit held that "Rule 9(b) does not inflexibly dictate adherence to a preordained checklist of 'must have' allegations.'"[67] The D.C. Circuit explained that the proper inquiry was whether the complaint alleged "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted," not whether the complaint alleged the precise details of individual claims.[68] The D.C. Circuit concluded that Heath's complaint alleged enough details—such as descriptions of inculpatory AT&T training and sales materials, and an audited phone bill confirming that AT&T was in fact engaged in the fraud scheme—to be considered reliable.[69]

Notably, there remains a circuit split over the degree of particularity required to survive a motion to dismiss for failure to comply with Rule 9(b). The D.C. Circuit joined the First, Third, Fifth, Seventh, Ninth, and Tenth Circuits in adopting a flexible, more relaxed pleading standard.[70] By contrast, the Fourth, Sixth, Eighth, and Eleventh Circuits tend to apply a more stringent particularity requirement, which favors defendants. However, even some of those circuits appear to be moving toward more relaxed standards. As noted above, the Eighth Circuit recently said that "a relator can satisfy Rule 9(b) without pleading representative examples of false claims if the relator can otherwise plead the particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."[71] The Eleventh Circuit also recently noted that "there is no per se rule that an FCA complaint must provide exact billing data or attach a representative sample claim."[72] In *Mastej*, the Eleventh Circuit found sufficient indicia of reliability where the relator learned about the defendant's false claims through her employment with the defendant.[73] Together, *Mastej* and *Thayer* suggest that some courts may overlook a relator's failure to specify the "who, what, when, and where" of the fraud claims if the relator is a corporate insider or someone else who presumably has good reason to know about the defendant's fraud.

III. Implied Certification

Generally, under the implied certification doctrine, a request for payment by a government contractor implicitly certifies compliance with all contractual and regulatory provisions that are conditions of payment. Therefore, a government contractor can face FCA liability simply by submitting a request for payment, if the contractor knows it has violated a condition of payment and does not disclose the violation. Implied certification has become widely accepted among the federal circuits over the last twenty years; however, questions remain about the criteria that distinguish conditions of payment from ordinary contractual or regulatory requirements.

This section discusses the current state of implied certification law, with a focus on the implications of a recent Fourth Circuit decision—*United States v. Triple Canopy*.[74] *Triple Canopy* is the first Fourth Circuit case to hold a government contractor liable under the theory of implied certification; additionally, the opinion based its finding of liability on a broad, open-ended definition of conditions of payment.[75] The dispute in *Triple Canopy* arose under a military contract; it remains to be seen whether the Fourth Circuit will apply the reasoning of *Triple Canopy* in other contexts, such as healthcare contracting.

A. Current Doctrine

The FCA imposes liability on government contractors who knowingly present a "false or fraudulent" claim for payment, or a "false record or statement" material to a false or fraudulent claim.[76] A "claim" is defined as "any request or demand, whether under a contract or otherwise, for money or property" made either to an "officer, employee, or agent of the United States" or to an intermediary who will pass on the financial liability to the United States.[77] Courts applying these provisions have distinguished between two different types of false claims.[78] "Factually false" claims are claims that inaccurately describe the goods or services a contractor provided.[79] For example, a health care provider who submits a claim for medical services that are different than the ones that were actually delivered, or for services that were never delivered, has submitted a factually false claim. "Legally false" claims are claims that falsely certify compliance with a statutory or contractual provision.[80] For example, if a statute states that the government will only pay claims for procedures that are medically necessary, and a health care provider submits a claim certifying that it has complied with the provision, but in fact some of the procedures it carried out were not medically necessary, the claim would be legally false.

The typical false certification of compliance is made expressly by the provider or contractor.[81] For example, if the government provides payment forms with boxes to check for compliance with particular statutory or contractual requirements, a contractor who checks the boxes expressly certifies compliance with those requirements. However, some cases have held contractors liable for implied, rather than express, false certifications of compliance.[82] Under the implied certification theory, a request for payment itself implicitly certifies compliance with all statutory and contractual provisions that are conditions of payment.[83] Courts distinguish conditions of payment from ordinary "breaches of contract" or deviations from "perfect compliance with all underlying statutes and regulations," where the government would still pay, "despite knowing that the contractor has failed to comply," and instead pursue other remedies.[84] The criteria for drawing this distinction are still being developed; however, the bottom line is that if a contractor has knowingly violated a requirement that would cause the government to withhold payment, and nevertheless submits a claim without disclosing the violation, the contractor is liable under the FCA.

The first case to hold a government contractor liable on the basis of an implied false certification was *Ab-Tech Construction, Inc. v. United States*,[85] decided a little over twenty years ago in the Court of Federal Claims. Since then, eight federal circuits—the First, Second, Third, Sixth, Ninth, Tenth, DC, and now Fourth—have accepted the implied certification theory.[86] No federal circuit has rejected it, but several have explicitly withheld a decision.[87]

As mentioned above, although implied certification has become widely accepted, the rules that govern whether particular statutory or contractual provisions will be considered conditions of payment, rather than ordinary performance requirements, are still developing. So far, cases in the federal courts of appeals have announced two different approaches. One is a narrow, express statement rule—"implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid."[88] Statutory language that "no payment may be made" without compliance is an example of a statement that would qualify.[89] The other is a broader, more open-ended approach—"express contractual language specifically linking compliance to eligibility for payment 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" from the parties about their understanding of the contract.[90]

In practice, the two approaches are not rivals; instead, courts have usually applied them in different types of cases. In cases arising under Medicare or Medicaid, courts have usually refused to find liability without an express statement that the requirement at issue was a condition of payment, rather than an ordinary regulatory requirement.[91] By contrast, in cases arising in other contexts, for example higher education programs or contracts to provide technical assistance to agencies, courts have been more willing to look at other sources of evidence, or to base findings of liability on weaker statutory language.[92]

Several courts have explained the pattern by distinguishing between "conditions of participation," which are "enforced through administrative mechanisms" that impose sanctions besides withholding payment, and "conditions of payment," which "if the government knew they were not being followed, might cause it to actually refuse payment."[93] Federal health care regulations are often paired with a "carefully crafted remedial process," administered by federal agencies, which imposes sanctions besides withholding payment and might be disrupted by FCA liability.[94] Therefore, courts have often inferred that these regulations are conditions of participation, rather than payment, absent an express statement to the contrary. In other contexts, where there is less risk of disrupting an alternative enforcement scheme, courts have been more willing to make an independent judgment about whether a contractual or regulatory provision is a condition of payment.[95]

B. *United States v. Triple Canopy*

Triple Canopy is the first case in the Fourth Circuit to hold a government contractor liable based on a false implied certification. The dispute arose under a military contract, in which the contractor—Triple Canopy—agreed to provide security services, including guards, for a military airbase in Iraq.[96] The contract listed twenty security responsibilities, among them ensuring that the guards at the base were able to pass a specified marksmanship test. The contract did not, however, "expressly condition[ ] payment on compliance."[97] Triple Canopy hired guards, discovered they were unable to pass the test, and nonetheless submitted a year of payment requests to the federal government.[98] It also created false records stating the guards had passed the test, although the records were never submitted to the government.[99]

On appeal from a motion to dismiss, the Fourth Circuit held 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."[100] Additionally, the opinion gave two reasons for finding that the marksmanship requirement was material (i.e. a condition of payment): (1) "common sense"—a requirement that guards in a war zone can "shoot straight" must have been a condition of payment; (2) Triple Canopy's cover-up attempt—if the violation was not a condition of payment, there would have been no reason to conceal it.[101]

This holding is consistent with cases in other circuits that have taken a broad, case-by-case approach, rather than a strict, express statement approach, in cases arising under contracts that are not connected to federal health care programs. However, it also raises several questions for federal contractors going forward. One is how broadly the case-by-case inquiry will sweep in future cases. How will future judges in the Fourth Circuit apply the "common sense" and "cover up" rationales, and what other factors will turn out to be relevant to the case-by-case definition of a condition of payment?

A second question is whether the Fourth Circuit will extend the reasoning of *Triple Canopy* to cases involving health care contracts, and other cases arising under federal programs with detailed administrative remedial schemes, or whether it will instead adopt an express statement rule in those cases, as many other circuits have done. A subsequent District Court opinion noted that "[n]othing in the Fourth Circuit's opinion indicates that the Court of Appeals intended a holding limited to the discrete facts presented therein…[the Court] set forth the elements of an implied certification claim generally."[102] However, the District Court case also arose under a military contract; it remains to be seen how courts in the Fourth Circuit will treat other types of cases. A third question is whether intervention from the Supreme Court in this case, or a future case, will settle some of the outstanding questions on implied certification. The contractor in *Triple Canopy* has filed a petition for a writ of certiorari with the Supreme Court, and the National Defense Industrial Association has submitted an amicus brief in support of the petition.

IV. Attorney-Client Privilege

Relators in FCA suits sometimes seek access to documents that contractors create in the course of internal compliance investigations. Rulings in a recent case in the DC Circuit—*United States ex. rel. Barko v. Halliburton Co.*[103]—concern the degree to which these documents are protected by attorney-client privilege.

Barko was originally filed in 2005 in DC District Court. The relator (Barko) alleged that Kellogg, Brown, & Root (KBR), a contractor and subsidiary of Halliburton, had inflated costs and accepted kickbacks while working on government contracts in Iraq. During discovery, Barko sought access to documents that KBR had produced in a prior internal investigation, carried out "pursuant to its Code of Business Conduct, which is overseen by the company's Law Department."[104] The District Court granted the request on the grounds that the documents were not protected by attorney-client privilege.[105] Attorney-client privilege only protects documents whose "primary purpose" is to provide legal advice, and the District Court held that documents only pass the "primary purpose" test if they "would not have been made 'but for' the fact that legal advice was sought."[106] The District Court concluded that KBR's internal investigations were "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice," so the documents were not protected.[107]

KBR subsequently filed a petition for a writ of mandamus; the DC Circuit Court of Appeals granted the petition and vacated the District Court's order.[108] In its ruling, the DC

Circuit held that the "but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis."[109] In stated that the "but-for" test, which only protects communications whose *sole* purpose was to provide legal advice, would "eradicate the attorney-client privilege for internal investigations," making businesses "less likely to disclose facts to their attorneys and to seek legal advice" and limiting valuable compliance efforts.[110] Instead, "[s]ensibly and properly applied, the [primary purpose] test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication."[111] Under this test, the DC Circuit held that "there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice," so the documents produced in the course of that investigation were covered by attorney-client privilege.[112]

However, this ruling was not the end of the matter. On remand, the District Court again granted a discovery request from the relator, this time on the basis of a different argument—that KBR's attorneys had placed the documents at issue in the litigation by allowing a witness to read them before deposition, asking questions about the contents, and using the answers in a motion for summary judgment.[113] KBR has again appealed the order; a decision is pending in the Court of Appeals.

Conclusion

The landscape of FCA caselaw has changed dramatically in the past few years and will continue to evolve in the near future. Each of the issues discussed above has important implications for entities involved in transactions with the U.S. Government. While it may not be clear what direction the courts will take in future cases, it is more important than ever for contractors to be mindful of compliance and to recognize that the FCA has become a primary enforcement tool for the government in connection with the performance of its contractors.

[1] 31 U.S.C. § 3730 (2010).
[2] *Id.*
[3] *See Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294–95 (2010).
[4] *See United States ex rel. Radcliffe v. Purdue Pharma, L.P.*, 737 F.3d 908 (4th Cir. 2013); *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805 (11th Cir. 2015).
[5] *Osheroff*, 776 F.3d at 810.
[6] *Id.*
[7] *Id.* at 811.
[8] *See, e.g.*, *United States ex rel. Beauchamp v. Academi Training Ctr., Inc.*, 933 F.Supp.2d 825 (E.D. Va. 2013); *United States ex rel. Hoggett v. Univ. of Phoenix*, No. 2:10-cv-02478-MCE-KJN, 2014 WL 3689764 (E.D. Cal. July 24, 2014); *United States ex rel. Adams v. Wells Fargo Bank Nat'l Ass'n*, No. 2:11-cv-00535-RCJ-PAL, 2013 WL 6506732 (D. Nev. Dec. 11, 2013).
[9] *Beauchamp*, 933 F.Supp.2d at 830. The relator also alleged a second, distinct fraud scheme: that Academi would submit claims that "listed contractors working in positions in which they did not actually work." *Id.*
[10] *Id*. (internal citations omitted).
[11] *See id.* at 839.
[12] *Id.*
[13] *See Hoggett*, No. 2:10-cv-02478-MCE-KJN, at *5.
[14] *United States ex rel. Moore v. Pennrose Props., LLC*, No. 3:11-cv-121, 2015 WL 1358034, at *3–*4 (S.D. Ohio Mar. 24, 2015).
[15] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[16] 31 U.S.C. § 3730(e)(4)(A)(i) (emphasis added).
[17] *See Beauchamp*, 933 F.Supp.2d at 842–43.
[18] *See id.* at (ii) ("The court shall dismiss an action… if substantially the same allegations… were publicly disclosed in a Congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation.") (emphasis added).
[19] *See, e.g.*, *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 520–21 (3d Cir. 2007) (interpreting 1986 version of the public disclosure bar).
[20] *Id.* at (iii).
[21] 776 F.3d at 808.
[22] *Id.*
[23] *Id.* (citing *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S.Ct. 1885, 1891 (2011)).
[24] *United States ex rel. Siller v. Becton Dickinson*, 21 F.3d 1339, 1347–48 (4th Cir. 1994).
[25] *See United States ex rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 386 (3d Cir. 1999) (collecting circuit cases that adopt the majority position).
[26] Then-Judge Alito, sitting on the Third Circuit, explained that the Fourth Circuit standard was "suspect because it would render the original source exception largely superfluous." *Mistick PBT*, 186 F.3d at 386. Moreover, the Fourth Circuit standard may have allowed some plaintiffs to evade the public disclosure bar by artfully pleading their claims to avoid the appearance that those claims were actually derived from public disclosures.
[27] *See, e.g.*, *United States ex rel. John v. Hastert*, No. 13-C-5014, 2015 WL 1006852 (N.D. Ill. Mar. 4, 2015).
[28] *John*, No. 13-C-5014, at *8.
[29] No. 2:12-CV-00089, 2014 WL 47258 (E.D. Tex. Jan. 6, 2014).
[30] *Trinity Indus.*, 2014 WL 47258, at *1.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at *4.
[35] *Id.*
[36] *Trinity Indus.*, 2014 WL 47258, at *4.
[37] *Id.*
[38] *Id.*
[39] *Id.* at *6.
[40] *Id.* at *5.
[41] *Id.*
[42] *Trinity Indus.*, 2014 WL 47258, at *5.

[43] *Id.* at *6.
[44] *Id.* at *5.
[45] *Id.* at *4.
[46] *Id.*
[47] *Id.*
[48] *Trinity Indus.*, 2014 WL 47258, at *4.
[49] No. 12-55396, 2015 WL 4080739 (9th Cir. July 7, 2015) (en banc).
[50] *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992).
[51] 2015 WL 4080739, at *6–*7.
[52] *Id.*
[53] 2015 WL 4080739, at *1.
[54] FCA litigation is considered fraud within the meaning of the rule.
[55] Fed. R. Civ. P. 9(b) (emphasis added).
[56] *United States ex rel. Heath v. AT&T Inc.*, No. 14-7094, 2015 WL 3852180, at *12 (D.C. Cir. June 23, 2015).
[57] *Id.* at *3.
[58] *Id.*
[59] *Id.*
[60] *Id.* at *7.
[61] *Id.* at *10.
[62] *Id.* at *11.
[63] *Id.*
[64] *Id.* at *10. *See infra* Section III (discussing recent developments in implied certification case law).
[65] *Id.* at *11.
[66] *Heath*, 2015 WL 3852180, at *11.
[67] *Id.* at *11 (quoting *Thayer v. Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (8th Cir. 2014)).
[68] *Id.* at *12 (quoting *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009)).
[69] *Id.* at *12.
[70] *See Heath* at *12 (collecting cases from circuits with relaxed particularity requirements).
[71] *Thayer*, 765 F.3d at 918 (internal quotations omitted).
[72] *United States ex rel. Mastej v. Heath Mgmt. Assocs.*, 591 Fed.App'x. 693, 704 (11th Cir. 2014).
[73] 591 Fed.App'x. at 704–05.
[74] 775 F.3d 628 (4th Cir. 2015).
[75] *Id* at 637–38.
[76] 31 U.S.C. § 3729(a)(1)(A)-(B).
[77] 31 U.S.C. § 3729(b)(2).
[78] *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008). The First Circuit has rejected this terminology, but in practice its decisions do not deviate from those of the other circuits. *See United States ex. rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377, 385–86 (1st Cir. 2011).
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *See, e.g., United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699–700 (2d Cir. 2001).
[83] Some courts describe this as the rule that a request for payment implicitly certifies "material" compliance with statutory and contractual provisions. *See, e.g. United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010). Despite the terminological variation, the rule is the same—implied certification is based on statutory or contractual violations that would cause the government to reconsider its decision to pay, if it knew about them.
[84] *Triple Canopy*, 775 F.3d at 635; *Conner*, 543 F.3d at 1219, 1220.
[85] 31 Fed. Cl. 429, 434 (Fed. Cl. 1994).
[86] *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, 647 F.3d 377 (1st Cir. 2011); *Mikes*, 274 F.3d at 699–700; *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 306 (3d Cir. 2011); *Triple Canopy*, 775 F.3d at 636–37; *United States ex rel. Augustine v. Century Health Servs.*, 289 F.3d 409, 414–15 (6th Cir. 2002); *Ebeid v. Lungwitz*, 616 F.3d 993, 997–98 (9th Cir. 2010); *Conner*, 543 F.3d at 1218; *United States v. SAIC*, 626 F.3d 1257, 1269 (D.C. Cir. 2010).

[87] *United States ex rel. Steury v. Cardinal Health Inc.*, 735 F.3d 202, 205–07 (5th Cir. 2013); *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 711–12 (7th Cir. 2014); *Osheroff*, 776 F.3d at 808 n. 1. A recent Seventh Circuit case described its holding as a rejection of the "so-called doctrine of implied false certification." *United States v. Sanford-Brown, Ltd.*, 2015 U.S. App. LEXIS 9508, *33 (7th Cir. 2015). However, a close reading of the case suggests that it did not reject implied certification liability altogether; instead, it rejected implied certification liability that is based on "conditions of participation (not conditions of payment)." *Id* at *35. As discussed below, this distinction is a common element of implied certification doctrine in other circuits.
[88] *Mikes*, 274 F.3d at 700; *accord Conner*, 543 F.3d at 1218–22.
[89] *Mikes*, 274 F.3d at 700.
[90] *SAIC*, 626 F.3d at 1269.
[91] *Mikes*, 274 F.3d at 699, 700 (a broad approach to implied certification liability "does not fit comfortably into the health care context"); *Conner*, 543 F.3d at 1218–22; *Wilkins*, 659 F.3d at 307, 309–10, 313 ("the implied certification theory of liability should not be applied expansively, particularly…under federally funded health care programs"); *United States ex rel. Hobbs v. Medquest Assocs.*, 711 F.3d 707, 717 (6th Cir. 2013).
[92] *SAIC*, 626 F.3d at 1269; *United States v. Univ. of Phoenix*, 461 F.3d 1166, 1176 (9th Cir. 2006).
[93] *Conner*, 543 F.3d at 1220; *Wilkins*, 659 F.3d at 309.
[94] *Conner*, 543 F.3d at 1221.
[95] *Univ. of Phoenix*, 461 F.3d at 1176; *SAIC*, 626 F.3d at 1269.
[96] *Triple Canopy*, 775 F.3d at 632.
[97] *Id*.
[98] *Id.* at 632–33. The government and the relator also made several other arguments unrelated to implied certification. *Triple Canopy*, 775 F.3d at 633.
[99] *Id*.
[100] *Triple Canopy* at 635 (internal quotation marks omitted).
[101] *Id* at 637–38.
[102] *Skinner v. Armet Armored Vehicles, Inc.*, 2015 U.S. Dist. LEXIS 15547 (W.D. Va. 2015).
[103] 37 F. Supp. 3d 1 (D.D.C. 2014).
[104] *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756 (D.C. Cir. 2014).
[105] *Barko*, 37 F. Supp. 3d at 6.
[106] *Id*. at 5 (internal quotation marks omitted).
[107] *Id*.
[108] *In re Kellogg Brown & Root, Inc.*, 756 F.3d at 756.
[109] *Id* at 759.
[110] *Id.*
[111] *Id* at 760.
[112] *Id*.
[113] *United States ex rel. Barko v. Halliburton Co.*, 2014 WL 6657103 (D.D.C. Nov. 20, 2014).