

## District Court Decision Joins Ranks of FCA Cases Confirming Escobar's Materiality Standard

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On June 8, 2018, the US District Court for the Eastern District of Virginia granted in part a motion for summary judgment filed by a government contractor in an implied false certification case under the False Claims Act (FCA), holding that the relator failed to satisfy the Supreme Court's materiality standard put forth in the historic *Escobar* case.

The defendant, Triple Canopy, is a government contractor that provides security services to government agencies overseas. As a result of its overseas services, Triple Canopy was the target of at least two *qui tam* complaints alleging FCA violations under an implied certification theory. As we [previously reported](#), on May 16, 2017, after a years-long battle, the Fourth Circuit upheld FCA allegations against Triple Canopy, finding that that specific complaint met *Escobar*'s materiality standard (in part due to Triple Canopy's attempts to conceal its wrongdoing and the government's decision not to renew Triple Canopy's contract once learning of the deficiencies).

The claims in this FCA complaint arose from a different government contract to provide security services at the US Embassy in Baghdad. While employed at Triple Canopy in 2015, the relator Bachert raised concerns about one employee's routine weapons inspections and records related to those inspections, alleging they were falsified. An internal investigation and a State Department investigation did not substantiate all of Bachert's claims, but Triple Canopy nevertheless cooperated in the investigation and took corrective actions in response to the allegations. The State Department did not withhold any payment or seek any repayment in connection with the relator's allegations.

The relator then filed this *qui tam* action under the FCA on April 22, 2016, in which the government declined to intervene. The relator asserted that Triple Canopy was liable under the FCA because it submitted claims for payment to federal agencies without disclosing its alleged inspection irregularities and records issues. In moving for summary judgment, Triple Canopy argued that the relator had not demonstrated these alleged issues were material to its payment under the State Department contract. The court agreed with Triple Canopy, finding that it "strains credulity to believe that those inspection reports were a factor in the government's decision to make payment on the contract." The court then squarely addressed the materiality standard under *Escobar*, holding that the "alleged falsehoods at issue . . . are the kind of 'minor or insubstantial' noncompliance that *Escobar* advises are not material." The court went on to emphasize that the allegations were "insubstantial in relation to the overall size of the [contract]," pointing out that even if the allegations were true, the

records involved accounted for only 0.3 percent of the total labor invoice to the government. Finally, the court noted that the State Department had considered the allegations raised by the relator, found them to be immaterial, and continued payment under the contract, which it described as “important factor(s)” in assessing materiality under *Escobar* and as “uniformly recognized” by circuit courts post-*Escobar* to substantially increase the relator’s burden in establishing materiality.

This court’s decision joins the litany of other cases holding, based on *Escobar*, that the government’s actions after learning of alleged violations are critical to the materiality analysis and the relator’s burden in establishing materiality. It is distinct from the pack, however, in that it also considered the nature and value of the breach in proportion to the total value of the contract. This additional factor in the materiality analysis may prove helpful for future litigants.

The case is *United States ex rel. Bachert v. Triple Canopy, Inc.*, Case No. 1:16-cv-456, before the U.S. District Court for the Eastern District of Virginia.

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National Law Review, Volume VIII, Number 177

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