FEDERAL FUNDING AND FRAUD: THE FALSE CLAIMS ACT IN HIGHER EDUCATION AFTER *MAIN V. OAKLAND CITY UNIVERSITY*

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I. INTRODUCTION

The False Claims Act[1] (FCA) is a federal statute that aims to "combat fraud against the federal government."[2] The FCA imposes civil liability on any person, or entity, that makes a false or fraudulent claim to the government for payment.[3] In order to increase the likelihood of reports of fraudulent claims, it allows private individuals, known as "relators," to sue on behalf of the government and receive a portion of the damages.[4]

The FCA has a long history, but relators generally did not sue institutions of higher education under its provisions until fairly recently. Because many colleges and universities make claims to the federal government for student aid, these institutions are theoretically liable under the FCA if any of the requests for student aid are fraudulent. Only some colleges and universities are amenable to such qui tam actions: state colleges and universities, and, in some cases, community colleges are immune from liability under the FCA because of the Eleventh Amendment.[5] In an FCA higher education case, an individual with knowledge that a non-state university or college made fraudulent requests for federal student aid can sue the institution on behalf of the government. If the relator is successful in proving that federal student aid was obtained

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1. 31 U.S.C. §§ 3729–3733 (2006).

2. Virginia C. Theis, Note, *Government Employees as* Qui Tam *Plaintiffs: Subverting the Purposes of the False Claims Act*, 28 Pub. Cont. L.J. 225, 225 (1999).

3. 31 U.S.C. § 3729.

4. 31 U.S.C. § 3730(b), (d).

5. *See* discussion *infra* Part II.B.

fraudulently, he is entitled to share in the award that the institution must pay the government.

At first, courts were unreceptive to claims made against colleges and universities under the FCA, often granting defendants' motions to dismiss for failure to state a claim. Courts generally focused on the requirement of a *claim* for payment, insisting that the request for money be on the same document as the falsity.[6] Then in 2003, Judge Easterbrook of the Seventh Circuit Court of Appeals broke new ground, ruling in *Main v. Oakland City University*[7] that an FCA suit against a private university could proceed to the merits.[8] He reasoned that if a falsity led to a payment that the government should not have made, then the definition of "claim" should not depend on how many documents were involved.[9] Other courts have followed suit; one even expanded on the holding.[10] While the rulings may seem a logical and fair application of the law, some higher education lawyers fear that the Seventh Circuit opened a floodgate of litigation and that colleges and universities will face high litigation expenses and possible damage awards for inadvertent errors on the numerous applications for federal aid they must fill out annually.[11]

These fears are unfounded, as the False Claims Act acts to punish only those who have intentionally perpetrated financial fraud on the government. Part I of this note will discuss the background of the FCA and explain the types of federal student aid that institutions of higher education receive. Part II will discuss the developing case law of the application of the FCA to institutions of higher education: Pre-*Main*, the *Main* holding, and Post-*Main*. Part III will argue that *Main*'s holding was limited and did not open a floodgate for litigation, and attorneys who fear otherwise are wrong.

II. BACKGROUND

A. History

The False Claims Act was passed during the Civil War at the insistence of President Abraham Lincoln.[12] During that war, private contractors profited from fraudulent sales to the government.[13] These contractors sold things like useless rifles, rancid food, and unseaworthy ships that they re-

6. *See* cases cited *infra* notes 50, 68.
7. 426 F.3d 914 (7th Cir. 2005).
8. *See* discussion *infra* Part III.B.
9. *Id.* at 916.
10. *See* discussion *infra* Part III.C.
11. *See* discussion *infra* Part IV.
12. James W. Adams, Jr., *Proof of Violation Under the False Claims Act*, *in* 78 AM. JUR. 3D *Proof of Facts* 357, § 3 (2004).
13. *Id.*

painted and delivered to the Navy as newly built.[14]

From the beginning, the FCA's "qui tam" provisions were crucial to its enforcement. These provisions allow a private individual to sue, on behalf of the government, an entity placing fraudulent claims for payment.[15] A qui tam action, representing the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," means "who as well for the king as for himself sues in this matter."[16] Qui tam actions trace their origin to thirteenth-century England, where individuals sued on behalf of themselves and the government in order to gain access to the reportedly more just royal courts.[17] Qui tam actions allow individuals who successfully sue on behalf of the government to keep a portion of the award granted.[18] When the FCA was enacted in 1863, federal and state governments had codified numerous other qui tam actions.[19]

The 1863 Act provided both criminal and civil penalties for persons submitting a false claim.[20] Civilly, persons found to have fraudulently billed the government were fined double the amount of damages the United States sustained because of the fraud, and were required to pay a $2,000 civil penalty for each false claim.[21] The individual who successfully tried the suit on behalf of the government (the "relator") received 50% of all damages recovered.[22]

Congress amended the FCA in 1943.[23] Two major changes substantially decreased the motivation for individuals to file suit. First, relators could no longer bring an action based on evidence or information that the government knew about at the time of filing.[24] It did not matter whether the government intended to pursue the claim or whether the individual was the original source of the information.[25] Second, the relator's percentage of damages received decreased to 25% if the government did not help in the litigation, and 10% if it did.[26]

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14. *Id.*
15. 31 U.S.C. § 3730(b) (2006).
16. BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).
17. Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83–85 (1972).
18. *Id.* at 85.
19. Adams, *supra* note 12, § 3; *see, e.g.*, Act of Mar. 3, 1845, ch. 43, § 17, 5 Stat. 732, 738 (regarding postage); Act of June 30, 1834, ch. 161, § 27, 4 Stat. 729, 733–34 (regarding trade with Indians).
20. False Claims Act, ch. 67, §3, 12 Stat. 696, 698 (1863) (current version at 31 U.S.C. §§ 3729–3733 (2006)).
21. *Id.* § 3, 5.
22. *Id.* § 6.
23. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608.
24. *Id.*
25. *See id.*
26. *Id.*

Congress, recognizing the extent of the amendments' impact and the need for greater private enforcement of the FCA, amended it again in 1986.[27] Congress eliminated the 1943 provision forbidding suits where the government is aware of the fraud at the time of filing, but only if the relator is an "original source" of the allegations and has direct and independent knowledge of the fraudulent activity.[28] The amendments also increase the civil fine for each fraudulent claim from $2,000 to a range of $5,000 to $10,000.[29] Finally, Congress increased relators' financial motivations to file suit. Guilty parties must pay treble damages—rather than double damages—for actual loss to the government, and the relator's share increased to 25–30% if the government does not participate in the litigation, and 15–25% if it does.[30]

B. The FCA in Suits Against Colleges and Universities

State colleges and universities are exempt from FCA liability under the Eleventh Amendment, which ordinarily prevents private citizens from suing non-consenting states or state agencies for money damages in federal court.[31] Congress may abrogate this immunity for a particular cause of action if it uses unequivocal statutory language to do so, and if it predicates its action upon an appropriate constitutional provision.[32] The Supreme Court ruled in 2000 that the FCA does not use such language, and therefore states and state agencies (including state colleges and universities) are immune from qui tam suits under the FCA.[33] State colleges and universities are deemed arms of the state because a judgment against one of them would have the same practical consequences to the state treasury as a judgment against the state.[34] Private colleges and universities receive no such immunity. Similarly, independent political subdivisions, such as

27. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified at 31 U.S.C. §§ 3729–3733 (2006)).

28. *Id.*

29. *Id.*

30. *Id.* The 1986 amendments also: (1) define the level of mens rea needed to be liable for submitting a false claim to include submitting claims with deliberate ignorance or reckless disregard as to the truth of the information contained on the claim; (2) require the government or qui tam relator to adduce proof of the submission of a false claim by a preponderance of evidence instead of higher standards that had been imposed by courts; (3) enlarge the time within which a false claims act case may be bought; (4) mandate that the defendant pay a successful qui tam relator's attorney's fees; and (5) protect relators from retaliation by their employers. *Id.*

31. Bd. of Trs. v. Garrett, 531 U.S. 356, 363 & n.34 (2001).

32. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996).

33. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 782–88 (2000).

34. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123 (1984); United States *ex rel.* Diop v. Wayne County Cmty. Coll. Dist., 242 F. Supp. 2d 497, 526 (E.D. Mich. 2003).

cities or counties, are not protected by the Eleventh Amendment against FCA-based claims.[35]

Community colleges present more interesting questions of immunity, because it is unclear whether they should be treated as arms of the state—because they often receive substantial amounts of money from the state—or as agents of the city or county that runs them. The Supreme Court has not reached the issue of the conditions under which a community college can receive sovereign immunity through the Eleventh Amendment. There are, however, two lower court cases dealing with the sovereign immunity of community colleges in FCA cases.

In both of these cases, the courts decided that when a verdict against the community college would significantly affect the state treasury, the college is immune from liability under the Eleventh Amendment. In *Hadley v. North Arkansas Community Technical College*,[36] the Eighth Circuit concluded that because the community college received nearly 75% of its revenue from state appropriations, it was an agency of the state.[37] The court therefore granted the community college sovereign immunity from an individual's FCA claims against it.[38]

A federal district court in *Diop v. Wayne County Community College* found a much smaller percentage—around 35%—sufficient to invoke state agency status protection against FCA claims.[39] The court explained that courts must examine the college and its "powers and characteristics . . . to determine whether suit is in reality against the State. Courts typically look at the degree of local autonomy and control and most importantly, whether the funds to pay any award will be derived from the State treasury."[40] Because this area has not been litigated frequently, nor addressed by the Supreme Court, it remains to be seen what nexus between community colleges and the state treasury is required before the college receives Eleventh Amendment protection from FCA suits.

C. Federal Funding of Higher Education

There are a number of ways in which the federal government subsidizes higher education. The primary means of such support is federal student financial aid, which is authorized by the Higher Education Act of 1965 (HEA).[41] Title IV of the Higher Education Act of 1965[42] contains many

35. Cook County v. United States *ex rel.* Chandler, 538 U.S. 119, 125–34 (2003).
36. 76 F.3d 1437 (8th Cir. 1996).
37. *Id.* at 1440.
38. *Id.*
39. *Diop*, 242 F. Supp. 2d at 527. The court also held that the fact that the college was created by the State and subject to operational rules legislated by the State weighed in favor of sovereign immunity for the college. *Id.* at 527–28.
40. *Id.* at 527.
41. Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections

programs, including the Federal Pell Grants,[43] the William D. Ford Federal Direct Loan Program,[44] the Federal Family Education Loan Program,[45] and the Federal Perkins Loan Program.[46]

Federal Pell Grants are considered the foundation of federal financial aid; other federal and state forms of aid add to this basis.[47] The grants do not have to be paid back, and the government awards them only to undergraduate students.[48] The Federal Perkins Loans program provides low-interest (5%) loans to both undergraduate and graduate students with exceptional financial need.[49] Those students who do not qualify for the Perkins loans may qualify for loans under the Family Federal Education Loan Program (FFELP) or the William D. Ford Federal Direct Loan Program.[50] The titles of these federal loans are the same under both programs: students receive "Federal Stafford Loans," and parents of the students receive "Federal PLUS Loans."[51] The Stafford Loans include both subsidized loans, where the government pays the interest while the student is in school, and unsubsidized loans, where the student will eventually be responsible for the interest payment.[52]

Federal regulations prescribe the rules and procedures that determine whether an educational institution qualifies for funding under Title IV.[53] In order to participate in the Title IV programs, colleges and universities must sign a "Program Participation Agreement" (PPA) with the Secretary of Education.[54] This agreement requires that the applying institution make a

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of 20 U.S.C. (2006)).

42. 20 U.S.C. §§ 1070–1099 (2006).

43. *Id.* §§ 1087a–1087j.

44. *Id.* §§ 1071–1087.

45. *Id.* §§ 1087aa–1087ii.

46. *Id.* §§ 1087aa–1087ii.

47. United States, Department of Education, Federal Student Aid: Federal Pell Grant, http://www.studentaid.ed.gov/PORTALSWebApp/students/english/PellGrants.jsp (last visited Apr. 20, 2009).

48. *Id.*

49. United States, Department of Education, Federal Student Aid: Campus-Based Aid, http://www.studentaid.ed.gov/PORTALSWebApp/students/english/campusaid.jsp (last visited Apr. 20, 2009).

50. United States, Department of Education, Federal Student Aid: Stafford Loans (FFELs and Direct Loans), http://studentaid.ed.gov/PORTALSWebApp/students/english/studentloans.jsp (last visited Apr. 20, 2009) [hereinafter Stafford Loans Website].

51. Because the FFELP is funded by private lending institutions, and only guaranteed by the government, courts quickly dismiss the portion of FCA lawsuits referring to fraud based on it, and it will therefore generally be excluded from the discussion. *See also infra* note 76.

52. Stafford Loans Website, *supra* note 50.

53. Institutional Eligibility Under the Higher Education Act of 1965, as Amended, 34 C.F.R. pt. 600 (2008).

54. 34 C.F.R. § 668.14 (2008).

number of promises, most of which are beyond the scope of this paper. Two of the regulations are relevant here. First, colleges and universities must be accredited to qualify for funding.[55] This is important because a recent case has held that falsifying accreditation information may be the same thing as falsifying a claim for money to the government.[56] Second, the HEA prohibits participating institutions from "provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities."[57] This prohibition is presumably based on the belief that only students who actually desire to be in school should get federal funding—the government does not want to spend taxpayer dollars to enrich colleges and universities that enroll anybody, regardless of talent or desire.

Once an institution has been deemed qualified to receive federal student financial aid, the individual student requests Title IV funding through a Free Application for Federal Student Aid (FAFSA). When the student is approved, the federal government writes a check to the college or university in which the qualified student is enrolled. Because a large number of students are able to attend college only with the help of federal money, it is crucial to institutions that are struggling to keep up enrollment that they be eligible for Title IV programs. Because it is in private colleges' and universities' financial interest to do what they can to qualify for federal funding, the incentive develops to be less-than-honest when requesting federal financial aid. The FCA claims relating to higher education stem from falsities made on institutions' PPA agreements, which they must have signed in order for students to submit a FAFSA. The

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> An institution may participate in any Title IV, HEA program, other than the LEAP and NEISP programs, only if the institution enters into a written program participation agreement with the Secretary, on a form approved by the Secretary. A program participation agreement conditions the initial and continued participation of an eligible institution in any Title IV, HEA program upon compliance with the provisions of this part, the individual program regulations, and any additional conditions specified in the program participation agreement that the Secretary requires the institution to meet.

Id. § 668.14(a)(1).

55. Accreditation is a somewhat complicated process in the United States, as it is not run through the government. The HEA requires the Secretary of Education to publish a list of nationally recognized accreditation agencies that he/she considers to be a "reliable authority" as to the quality of education or training provided by the institution. 34 C.F.R. § 600.2. These agencies use different procedures to determine whether institutions meet their criteria for accreditation. U.S. Department of Education, Financial Aid for Postsecondary Students: Accreditation in the United States, http://www.ed.gov/admins/finaid/accred/accreditation_pg2.html (last visited Apr. 20, 2009).

56. United States v. Chapman Univ., No. SACV 04-1256JVSRCX, 2006 WL 1562231, at *3–4 (C.D. Cal. May 23, 2006); *see* discussion *infra* Part III.C.

57. 20 U.S.C. § 1094(a)(20) (2006).

conflicting case law that has developed turns on whether falsities made on forms other than the FAFSA can be the basis for fraud under the FCA.[58]

III. DEVELOPING CASE LAW

Prior to 2003, most cases filed under the FCA involve health care claims, or claims relating to military expenses.[59] Beginning in 2003, however, cases of relators suing colleges and universities for fraud in requesting federal student financial aid became more common.[60] At first, these relators were unsuccessful, as courts refused to hold that institutions committed fraud under the FCA if the FAFSA itself did not contain a falsity.[61] Then in 2005 Judge Easterbrook held in *Main* that fraud in the PPA is punishable under the FCA.[62] Since *Main*, courts have followed Judge Easterbrook's logic, holding colleges and universities responsible for the information they provide the government when requesting financial aid.[63]

A. Initial Reception of Higher Education False Claims Act Suits

1. *United States* ex rel. *Graves v. ITT Educational Services*[64]

At first, courts were unreceptive to lawsuits brought against institutions of higher education by relators under the FCA. In *United States* ex rel. *Graves v. ITT Educational Services*, a federal district court in Texas refused to hold the institution liable under the FCA.[65] ITT's technical colleges participated in student financial aid programs under Title IV.[66] Under these programs, the federal government insured educational loans and made direct grants to the students enrolled at ITT.[67]

58. The case opinions discussed in this article do not refer to the FAFSA by name. Instead, they refer generally to documents requesting federal student aid. However, this article will refer to the FAFSA in place of generic descriptions of requests for federal student aid.

59. *See* W. Jay De Veccio, *Qui Tam Actions: Some Practical Considerations*, HEALTH CARE LAW AND LITIGIGATION: ALI-ABA COURSE OF STUDY, Oct. 2000, at 529; *see, e.g.*, United States *ex rel.* Quinn v. Omnicare, 382 F.3d 432 (3d Cir. 2004) (qui tam action alleging false claims submitted by Medicare-providing pharmacies), United States *ex rel.* Butler v. Hughes Helicopters, Inc., 71 F.3d 321 (9th Cir. 1995) (qui tam action alleging false claims submitted by a defense contractor).

60. This is an observation by the author. The main cases discussed in this Note were decided within a period of 3–4 years.

61. *See* discussion *infra* Part III.A.

62. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914 (7th Cir. 2005).

63. *See* discussion *infra* Part III.C.

64. 284 F. Supp. 2d 487 (S.D. Tex. 2003).

65. *Id.* at 489.

66. *Id.*

67. *Id.*

Dan Graves and Susan Newman were admissions and recruitment representatives at an ITT Tech branch in California.[68] ITT certified in its Program Participation Agreement that it would follow all the applicable federal regulations, including an agreement not to pay admissions personnel on a commission-basis.[69] Graves and Newman, the relators, alleged that from 1993 until the filing of the case, "all of ITT Tech's campuses paid its admissions [and] recruitment representatives under an 'incentive salary structure'" in violation of federal statute.[70] The relators claimed that ITT made "claims for payment" to the federal government to receive funds under Title IV and that those claims required a valid PPA.[71] The relators did not allege that ITT filed applications[72] that were in themselves false, but instead alleged that the institution made a fraudulent "claim" by receiving Title IV funds despite knowing it was violating the PPA.[73]

This line of reasoning is often referred to as the "false certification" theory of FCA violations; it was first adopted by the Fifth Circuit in *United States* ex rel. *Thompson v. Columbia/HCA Healthcare Corporation*.[74] The theory allows relators to prove a false claim if the defendant falsely certified compliance with a federal statute, regulation, or contractual term that was a prerequisite to obtaining a government benefit.[75] The theory developed through the common law and is based on the idea that there is more than one way to tell a lie—lying that a college or university is doing something required to receive funds is equally as false as lying about household income or other items on an application for funding.

The *Graves* court, however, rejected the relator's argument, granting ITT's motion to dismiss for failure to state a claim upon which relief may be granted.[76] The court held that ITT was not liable under the FCA, because the FAFSA was not fraudulent nor based on a "false

68. *Id.* at 490.

69. *Id.* at 491.

70. *Id.* at 490.

71. *Id.* at 490–91. These funds included FFLEP loans, Pell Grants, and Federal Direct Student Loans. *Id.*

72. *See* discussion *supra* note 58.

73. *Graves*, 284 F. Supp. 2d at 491.

74. 125 F.3d 899 (5th Cir. 1997).

75. *Id.* at 902. "A theory of 'legally false' certification differs from 'factually false' certification, which involves an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *Graves,* 284 F. Supp. 2d at 496–97. For a detailed description of the elements under the false certification theory, see *infra* notes 139–151 and accompanying text.

76. *Graves,* 284 F. Supp. 2d at 489. The court quickly dismissed any claims that were based on money paid out under FFELP, because under FFELP the government is not making a payment at all, but instead is guarantying a loan made by a private lender. *Id.* at 496. The rest of the case focuses on payments made to ITT under the Federal Pell Grant program.

certification."[77] The court distinguished between "generally certifying compliance with applicable regulations and statutes governing participation in a program," and "certifying compliance with a particular requirement that is a prerequisite to receiving or retaining payment under that program."[78] The court, after a discussion of precedent across multiple circuits, including the Second, Fifth, and Ninth Circuits, determined that "the appropriate inquiry is whether the defendants' certification of compliance with the regulation at issue was a condition to payment."[79] It reasoned that the PPA merely contained a "general statement of adherence to all regulations or statutes governing participation in a program through which federal funds [were] received,"[80] and that it was insufficient as a basis of FCA liability.[81]

2. *United States* ex rel. *Gay v. Lincoln Technical Institute, Inc.*[82]

Another federal district court in Texas issued a similar ruling six months later in *United States* ex rel. *Gay v. Lincoln Technical Institute, Inc.*[83] *Gay*'s factual circumstances were almost identical to those in *Graves*. The relators were previously admissions personnel, who alleged that Lincoln Tech violated the FCA by certifying compliance with federal regulations in order to receive Title IV funds while knowingly violating the regulation prohibiting commission-based recruiting salaries.[84]

The *Gay* court ruled in favor of Lincoln Tech by granting its 12(b)(6) motion to dismiss for failure to state a claim.[85] The court ruled that the relators failed to allege a number of crucial requirements. First, the relators did not allege a cognizable "claim" under the FCA because it did not describe any specific request or demand made by Lincoln Tech for money, but instead provided only "a generic description of Lincoln's program procedures in HEA student loan programs."[86] The court held that there could be no actionable fraud under the FCA since the relators did not offer

77. *Graves*, 284 F. Supp. 2d. at 507–08.

78. *Id.* at 501.

79. *Id.*

80. *Id.*

81. *Id.*

82. No. Civ.A. 301CV505K, 2003 WL 22474586 (N.D. Tex. Sept. 3, 2003).

83. *Id.*

84. *Id.* at *1. The chain-of-payment was clearer in this case: Lincoln Tech executed PPAs with the Department of Education then submitted "assertion letters to its compliance auditor stating that the school complied with the requirements of participation in HEA student loan programs, including incentive compensation prohibitions." *Id.* The court's opinion did not specify whether the Department of Education received these assertion letters attached to the auditor's reports or whether the information from the letters was re-stated in the reports.

85. *Id.*

86. *Id.* at *2.

any evidence that any information on the FAFSAs[87] was false or contained false statements.[88]

Additionally, even if the relators alleged a "claim," they did not allege facts sufficient to prove fraud under the false certification theory.[89] The court held that the relators failed to meet the two elements of the false certification theory: (1) that the defendant made a knowingly false certification of compliance with a statute; and (2) that the certification was a prerequisite to payment.[90] Apparently, the record lacked detailed allegations of the University's knowledge of its false certification, so the first element was not met.[91] The *Gay* court considered the lack of the first element a moot point, however, because there was no proof that the certification was a condition of payment.[92] The court thus needed a very specific statement from the federal government conditioning payment of a particular fund to a certification that the program has been, and will continue to be, in compliance with the particular regulation prohibiting commission-based recruiting.[93]

B. A Shift in Case Law: *United States* ex rel. *Main v. Oakland City University*

In October of 2005, Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit delivered a surprising ruling in *United States* ex rel. *Main v. Oakland City University*.[94] The facts in *Main* are similar to both *Graves* and *Gay*. Jeffrey Main worked for Oakland City University, first as a recruiter, and later as the University's Director of Admissions.[95] He claimed that he was paid on a contingent basis; when he found out that this arrangement was against federal law, he filed suit.[96] The district court, ruling the same way as the courts in *Graves* and *Gay*, dismissed the case on the pleadings.[97]

87. *See supra* note 58.

88. *Gay*, 2003 WL 22474586, at *2. The court quickly dismissed any claims that were based on money paid out under FFELP. *Id.* at *2; *see supra* note 51.

89. *Gay*, 2003 WL 22474586, at *4.

90. *Id.* at *3–*4.

91. *Id.* at *4.

92. *Id.*

93. The court also quickly dismissed the relators' claims of fraud in the inducement and the "reverse false claim" under § 3729(a)(7) of the FCA. *Id.* at *4–*5.

94. 426 F.3d 914 (7th Cir. 2005).

95. *Id.* at 916.

96. *Id.*

97. *Id.* The district court ruled that:

> [E]ven wilful falsehoods in phase-one applications do not violate the Act, because the phase-one application requests a declaration of eligibility rather than an immediate payment from the Treasury. The phase-two application for grants, loans, and scholarships are covered by the Act . . . but are not false,

The court of appeals reversed.[98] Judge Easterbrook ruled that because the False Claims Act covers anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government,"[99] the process by which Oakland City University obtained federal funds was covered under the Act.[100] Judge Easterbrook introduced new terminology to explain his interpretation of the statute. He reasoned,

> The University "uses" its phase-one application (and the resulting certification of eligibility) when it makes (or "causes" a student to make or use) a phase-two application for payment. No more is required under the statute. The phase-two application is itself false because it represents that the student is enrolled in an eligible institution, which isn't true. (Likely the student does not know this, however, so the phase-two application is not fraudulent.) The statute requires a causal rather than a temporal connection between fraud and payment. If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.[101]

Oakland City University argued that this broader approach would make any institution liable under the FCA if it broke a promise that it had made to the government in its PPA. The court rejected the University's argument by differentiating between a breach of promise and fraud.[102] A simple breach of promise is a broken contract, which is not actionable under the FCA.[103] Fraud requires a false representation such as a promise to do something that one has no intention of doing.[104] Colleges and universities are not liable for simply "tripping up on a regulatory complexity," but they are liable for knowingly making a promise on their PPA that they do not intend to keep.[105] The court allowed the relator to reach the merits of the case, because it found that he had sufficiently alleged a false claim within the meaning of the statute.[106]

> because they do not repeat the assurance that the University abides by the rule against paying contingent fees to recruiters.

Id.

98. *Id.* at 915.
99. 31 U.S.C. § 3729(a)(2) (2006).
100. *Main*, 426 F.3d at 916.
101. *Id.* (citation omitted).
102. *Id.* at 917.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* The Supreme Court denied certiorari in April of 2006, leaving the decision intact in Illinois, Indiana, and Wisconsin. Oakland City Univ. v. United States *ex rel.* Main, 547 U.S. 1071 (2006).

The University further argued that a violation of the incentive compensation ban usually does not result in a financial loss to the United States, because the student presumably would have enrolled in a different, eligible school, and received Title IV funding anyway.[107] The court rejected this argument as well, pointing out that the statute provides for penalties even if actual loss is hard to quantify.[108]

The federal government declined to intervene, but filed an amicus curiae brief on behalf of the relators, arguing that:

> [N]umerous courts have held that knowing violations of statutory or regulatory requirements are actionable under the FCA where a person's eligibility for government funds is conditioned on compliance with those requirements. In such circmstances [sic], courts have reasoned that a request for payment constitutes an "implied certification" of compliance with all program requirements, and that such a claim is therefore "false" when the prerequisites for obtaining the benefit have not been satisfied.[109]

C. Post-*Main*: Colleges and Universities Held to a Higher Standard

Three related cases after *Main* have been decided in congruence with the Seventh Circuit precedent. Two courts have explicitly adopted Judge Easterbrook's logic, and one possibly expanded the scope of his ruling.

1. *United States v. Chapman University*[110]

The first case, *United States v. Chapman University*, was brought by three Chapman University professors.[111] This case differs factually from the three previously discussed cases because the relators in this case based their FCA claim on false statements made to an accreditation agency, rather than directly to the federal government.[112]

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107. *Main*, 426 F.3d at 917.

108. *Id.*

109. Brief for the United States as Amicus Curiae Supporting Appellant at 19, *Main*, 426 F.3d 914 (No. 05-2016).

110. No. SACV 04-1256JVSRCX, 2006 WL 1562231 (C.D. Cal. May 23, 2006).

111. *Id.* at *11.

112. *Id.* at *2. The U.S. Justice Department did not join in the lawsuit against Chapman. It did, however, file a brief with the court supporting the relators' legal argument and opposing Chapman's request to dismiss the suit.

> The university's argument "that 'no FCA claim can be maintained based on the standards of [a] private accreditation authority'" sweeps "too broadly," the government brief notes. "Numerous courts have held that where the United States makes compliance with certain requirements a condition of receiving a government benefit and a person submits a claim while not in compliance with such requirements, the claim violates the [False Claims Act] . . . . Nothing in this theory of liability requires that the substance of the federal requirement originate with the federal government, as long as the federal

Chapman University was accredited by the Western Association of Schools and Colleges (WASC).[113] The relators in the case alleged that Chapman University lied to WASC and consequently to the federal government about meeting accreditation standards regarding a minimum number of classroom hours taught.[114] Accreditation by an approved agency is required before an institution can receive financial aid under Title IV.[115] Chapman University signed the Program Participation Agreement and thereby confirmed that it was accredited by WASC.[116] Chapman University could not receive Title IV funds if it did not enter into a PPA with the government.[117] With this in mind, the relators alleged that certain officials at Chapman knew that the certification that each class was being taught for 45 hours was false.[118] Chapman University argued that none of the documents that the relators had identified constituted "false claims for payment or false certification of compliance with a condition of payment."[119] Chapman contended that the relators' claim should fail "because state and federal financial tuition assistance does not depend on complete compliance with the guidelines of an accreditation agency, such as WASC, but rather depends only on being accredited by an accreditation agency."[120] Chapman essentially argued that once they had been

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> government has adopted the requirement as its own, by statute, regulation, rule or contract."

Doug Lederman, *Ever-Expanding False Claims Act*, INSIDE HIGHER ED, May 26, 2006, http://www.insidehighered.com/news/2006/05/26/false (quoting a brief filed on behalf of the United States) (omission and alterations in original).

113. *Chapman Univ.*, 2006 WL 1562231, at *2. The Western Association of Schools and Colleges (WASC) is "one of six regional associations that accredit public and private schools, colleges, and universities in the United States. The Western region covers institutions in California and Hawaii, the territories of Guam, American Samoa, Federated States of Micronesia, Republic of Palau, Commonwealth of the Northern Marianas Islands, the Pacific Basin, and East Asia, and areas of the Pacific and East Asia where American/International schools or colleges may apply to it for service." Western Association of Schools and Colleges, http://www.wascweb.org/ (last visited Apr. 20, 2009).

114. The WASC handbook provided that each class should be taught for a minimum of 45 hours. *Chapman Univ.*, 2006 WL 1562231, at *2. The relators also alleged false certification in regards to having clinical supervision in the Marriage and Family Therapy program, which is a requirement for licensing in California, but is not important for the discussion here. Similarly, the relators made a claim under unfair competition, which will not be discussed here.

115. 34 C.F.R. § 600.2 (2008).

116. *Chapman Univ.*, 2006 WL 1562231, at *6.

117. 34 C.F.R. § 668.14 (2008).

118. *Chapman Univ.*, 2006 WL 1562231, at *1. The relators alternatively argued that even if the officials did not have actual knowledge that this certification was false, they "acted with deliberate indifference and/or reckless disregard as to the truth or falsity of the claim." *Id.*

119. *Id.* at *2.

120. *Id.*

accredited, the promises that it had made to gain accreditation had no legal implications, and further that the only way to be liable under the FCA was to lie in the actual requests for federal aid.

The court rejected Chapman's arguments and ruled that the relators' complaint was sufficient to withstand a motion to dismiss.[121] The court found that *Main* was analogous and provided a "persuasive analytic framework" to analyze the case.[122] In *Main*, the signing of the PPA (the "application to establish the institution's eligibility") constituted "phase one" of the fraud, and the submission of the FAFSAs[123] constituted "phase two."[124] In *Chapman University*, the submission of documents for accreditation by WASC constituted "phase-one" of the fraud.[125] The submission of the PPA *and* the FAFSAs constituted "phase two."[126] The court in *Chapman* shifted the signing of the PPA from being the entire "phase-one" of the fraud, to being merely a part of "phase-two." The court agreed with the relators that but for the alleged false statements contained in "phase-one," the government would not have granted Chapman certain loans and grants, and that no more was required under the FCA.[127]

Chapman University tried to differentiate its case from *Main* by arguing that the fundamental difference was that its infraction was of an accreditation requirement, rather than of a statute.[128] The court rejected this argument, ruling that the question of whether or not the WASC standards have the force and effect of a statute was immaterial.[129] Chapman also contended that the pleadings were insufficient because the PPA did not require an affirmative certification of compliance with WASC accreditation requirements, the relators had not alleged when classroom instruction hour violations occurred, and the relators had not alleged how many times those violations occurred.[130] The court ruled that the complaint satisfied the pleading requirements for fraud by identifying "the who, Chapman, when, the past ten years, and what, PPAs."[131] The court further held that a specific outlay of money by the government need not be identified; the allegation that the PPA affirmed accreditation and that Chapman had requested federal loans based on the PPA was sufficient.[132]

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121. *Id.* at *7.
122. *Id.* at *2.
123. *See supra* note 58.
124. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005).
125. *Chapman Univ.*, 2006 WL 1562231, at *3.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at *6.
131. *Id.* at *7.
132. *Id.* The court did strike a portion of the relators' pleading which used the

2. *United States* ex rel. *Hendow v. University of Phoenix*[133]

The case against the University of Phoenix was factually similar to *Graves*, *Gay*, and *Main*. In *United States* ex rel. *Hendow v. University of Phoenix*, the relators alleged that the University knowingly made false promises to comply with the incentive compensation ban to become eligible for Title IV funding.[134] The relators in *Hendow* alleged more outrageous behavior than had the relators in the previous cases. In *Graves*, *Gay*, and *Main*, the relators alleged that the admissions and recruiting personnel were at times receiving compensation based in part on how many students they were able to recruit. There were never any alleged schemes or elaborate plans to take money from the government. The University of Phoenix, on the other hand, purportedly had a complex compensation scheme based on sheer numbers, fake documents to provide to the government to hide such a scheme, and oral statements from the head of enrollment about how the school was intentionally deceiving the federal government.[135] After the previous, more subtle fraud cases were allowed

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phrase "including, but not limited to." Because the relators had alleged fraud, it needed to be pleaded with sufficient particularity. The court ruled that if this portion was struck, then the pleadings would be sufficient. *Id.* at *5.

133. 461 F.3d 1166 (9th Cir. 2006).

134. *Id.* at 1169.

135. *Id.*

> First, relators allege[d] that the University, with full knowledge, flagrantly violate[d] the incentive compensation ban. They claim[ed] that the University "compensates enrollment counselors . . . based directly upon enrollment activities," ranking counselors according to their number of enrollments and giving the highest-ranking counselors not only higher salaries but also benefits, incentives, and gifts. Relators allege[d] that the University also "urges enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to attend the university," thus encouraging counselors to enroll students based on numbers alone. Relator Albertson, in particular, allege[d] that she was given a specific target number of students to recruit, and that upon reaching that benchmark her salary increased by more than $50,000. Relator Hendow specifically allege[d] that she won trips and home electronics as a result of enrolling large numbers of students.
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> Second, relators allege[d] considerable fraud on the part of the University to mask its violation of the incentive compensation ban. They claim[ed] that the University's head of enrollment openly brag[ged] that "[i]t's all about the numbers. It will always be about the numbers. But we need to show the Department of Education what they want to see." To deceive the DOE, relators allege[d], the University create[d] two separate employment files for its enrollment counselors—one "real" file containing performance reviews based on improper quantitative factors, and one "fake" file containing performance reviews based on legitimate qualitative factors. The fake file is what the DOE allegedly sees. Relators further allege[d] a series of University policy changes deliberately designed to obscure the fact that enrollment counselors are compensated on a per-student basis, such as altering pay scales to make it less obvious that they are adjusted based on the number of students

to proceed to the merits, this case seemed an obvious vehicle to keep the proverbial FCA ball rolling.

And indeed, it was. After a federal district court granted the University of Phoenix's motion to dismiss, the Ninth Circuit reversed.[136] The *Hendow* court held that claims that are actionable under the FCA should not be limited to those where the payment itself is facially false or fraudulent; "[r]ather, the False Claims Act is 'intended to reach all types of fraud, without qualification, that might result in financial loss to the [g]overnment.'"[137] The court pointed to *United States* ex rel. *Hopper v. Anton*'s[138] discussion of the elements that constitute a successful "false certification" in a FCA suit, articulating four elements necessary for a successful claim.[139] First, there must be a false claim: some falsity must be alleged.[140] Second, scienter is a vital requirement: the false claim must be "false when made,"[141] and "it must be an intentional, palpable lie."[142] Third, "the false statement or course of conduct must be material to the government's decision to pay out money."[143] In other words, the certification must have been a "prerequisite to obtaining a government benefit,"[144] or "the government funding must be 'conditioned' upon certifications of compliance."[145] The court explained that the multiple ways of restating the materiality requirement pointed to the simple question of whether the certification, statement, or course of action was "relevant to the government's decision to confer a benefit."[146] The fourth element requires a claim made to the government for payment.[147]

The court elaborated on the third element, explaining that the lower court and the University of Phoenix had misinterpreted the circuit court's use of the word "certification" in several previous cases.[148] It ruled that the word "certification" holds no "paramount and talismanic significance" and

enrolled.

Id. Relators also alleged false claims made by the University, requesting funding under both the Pell Grant Program and guarantees under the FFELP. *Id.* at 1169–70.

136. *Id.* at 1168.

137. *Id.* at 1170 (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)).

138. 91 F.3d 1261, 1266 (9th Cir. 1996).

139. *Hendow*, 461 F.3d at 1171–73. The court also articulated the elements for a "promissory fraud" FCA claim, *id.* at 1173–74, but since the relators met the elements of the first claim, discussion of promissory fraud is unnecessary here.

140. *Id.* at 1171.

141. *Id.* at 1172 (quoting *Hopper*, 91 F.3d at 1267).

142. *Id.* (quoting *Hopper*, 91 F.3d at 1267).

143. *Id.*

144. *Id.* (quoting *Hopper*, 91 F.3d at 1266).

145. *Id.* (quoting *Hopper*, 91 F.3d at 1267).

146. *Id.* at 1173.

147. *Id.*

148. *Id.* at 1172.

should not be "used with technical precision, or as a term of art."[149] The court said the phrase "false certification" was merely a simpler way of saying "false statement of compliance with a government regulation that is a precursor to government funding."[150] Courts should not distinguish, the Ninth Circuit said, false certifications from false statements— it is the falsity of the utterance that is determinative.[151] The court emphasized the goal of the FCA—to recover funds fraudulently obtained—and minimized the importance of technicalities that had distracted other courts.

The court accordingly found that the relators in *Hendow* alleged facts against the University of Phoenix sufficient to withstand a motion to dismiss on the pleadings.[152] First, falsity was alleged, as the relators claimed that the University actually established and followed a policy of violating the incentive compensation ban with the intent to deceive the government.[153] Second, scienter was alleged, as the relators claimed that University staff openly bragged about perpetrating a fraud, and that there was a system in place to give the government "fake" documents when it was determining compliance.[154] Third, the relators alleged facts tending to show that the false statements made by the University were material to the government's decision to disburse money.[155] The court used both statutory language and language in the PPA itself to reject the University's argument that compliance with the incentive compensation ban was not a material element in the government's decision whether to disburse funds.[156] Fourth,

149. *Id.*

150. *Id.*

151. *See id.* ("So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.").

152. *Id.* at 1177–78.

153. *Id.* at 1174–75.

154. *Id.* at 1175.

155. *Id.* at 1175–77.

156. *Id.* The court's reasoning read:

> First, a federal statute states that in order to be eligible, an institution must:
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> > enter into a program participation agreement with the Secretary [of Education]. The agreement *shall condition* the initial and continuing eligibility of an institution to participate in a program *upon compliance* with the following requirements . . . [including the incentive compensation ban.]
>
> 20 U.S.C. § 1094(a) (2006) (emphasis added). Second, a federal regulation specifies:
>
> > An institution may participate in any Title IV, HEA program . . . *only if* the institution enters into a written program participation agreement with the Secretary . . . . A program participation agreement *conditions* the initial and continued participation of an eligible institution in any Title IV, HEA program *upon compliance* with the provisions of this part [such as the incentive compensation ban.]
>
> 34 C.F.R. § 668.14(a)(1) (2008) (emphasis added). Third and finally, the

the court found that the relators alleged that the University made a claim to the government for funding.[157] The court agreed with the Seventh Circuit that "it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork."[158] The court concluded that "whether the false statement or course of conduct causes the government to 'pay out money or to forfeit moneys due'" is the only significant question.[159]

IV. PREDICTIONS AND OVERREACTIONS

Some higher education scholars and lawyers expressed two major concerns when the Seventh Circuit handed down *Main*. They feared that the ruling opened a floodgate for future litigation against colleges and universities.[160] They also warned that such lawsuits would break down communication lines between federal agencies and the colleges and universities that depend on their advice.[161]

Critics of the *Main* ruling are concerned that there will be a drastic increase in the number of frivolous FCA suits against colleges and universities.[162] "'Lawyers who make a living out of suing universities can have a field day with this,' said Sheldon E. Steinbach, vice president and general counsel of the American Council on Education, the chief umbrella group for higher education."[163] Mark Pelesh, a higher education lawyer, argues that *Main* may make colleges and universities vulnerable to a whole

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program participation agreement itself states:

> The execution of this Agreement [which contains a reference to the incentive compensation ban] by the Institution and the Secretary is a *prerequisite* to the Institution's initial or continued participation in any Title IV, HEA program.

(emphasis added). All of the emphasized phrases in the above passages demonstrate that compliance with the incentive compensation ban is a necessary condition of continued eligibility and participation: compliance is a "prerequisite" to funding; funding shall occur "only if" the University complies; funding shall be "condition[ed] ... upon compliance." These are not ambiguous exhortations of an amorphous duty. The statute, regulation, and agreement here all explicitly condition participation and payment on compliance with, among other things, the precise requirement that relators allege that the University knowingly disregarded.

Id. at 1175–76 (alterations and omissions in original).

157. *Id.* at 1177.

158. *Id.* (quoting United State *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005)).

159. *Id.* (quoting Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999)).

160. *See* Lederman, *supra* note 112 (quoting Mark Pelesh).

161. Doug Lederman, *Inviting a Flurry of False Claims Cases*, INSIDE HIGHER ED, Oct. 24, 2005, http://insidehighered.com/news/2005/10/24/false.

162. *Id.*

163. *Id.*

new species of lawsuits: FCA qui tam actions alleging knowing violations of one of the myriad requirements in the HEA and implementing regulations.[164] Michael B. Goldstein, a lawyer in Dow Lohnes & Albertson's higher education practice in Washington, D.C., agrees with Pelesh. Goldstein argues that *Main* opened the doors for numerous lawsuits because PPAs require schools to "commit to obeying scores if not hundreds of rules and regulations, and the court's ruling [made] it possible for an individual to bring a lawsuit seeking triple damages for all financial aid deemed to have been received as a result of a breach of those rules."[165]

The numerous HEA regulations range from requiring the availability of employment and graduation statistics to forbidding the hiring of administrators who have a history of committing financial fraud against the government.[166] One of the key certifications that must be included in the PPA is certification that the institution "[h]as in operation a drug abuse prevention program that the institution has determined to be accessible to any officer, employee, or student at the institution."[167] Pelesh and others argue that colleges and universities will be subjected to lawsuits whenever they fail to follow any of these numerous regulations.[168] Pelesh contends that the danger of such litigation will be increased by the possibility of treble damages under the False Claims Act.[169] He believes that the lucrative amount of money that relators can win in a successful claim will increase the number of suits against colleges and universities.[170]

Additionally, critics of *Main* fear a breakdown in communication between federal agencies and colleges and universities. For example, in

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164. Mark L. Pelesh, *Tripping Up on the Paperwork*, INSIDE HIGHER ED, Nov. 4, 2005, http://insidehighered.com/views/2005/11/04/pelesh. "Mark L. Pelesh is executive vice president for legislative and regulatory affairs for Corinthian Colleges, Inc. He was formerly the head of the Education Law Group at Drinker Biddle & Reath in Washington, and specialized in the Higher Education Act and U.S. Department of Education regulation." *Id.*

165. Lederman, *supra* note 161. It is also interesting to consider the argument that there will be "enterprising counsel" that might even be more likely than the individuals with information needed to sue that will be encouraged to sue after *Main.* Pelesh, *supra* note 164.

166. 34 C.F.R. §§ 668.14(b)(10)(i), (18)(i) (2008).

167. 34 C.F.R. § 668.14(c)(1). Although there are no current lawsuits based on this PPA requirement, such a suit is possible, if not likely, because many schools receiving Title IV funding lack a drug abuse prevention program. Glen S. McGee, director of the Florida Higher Education Accountability Project, claims that a United States Department of Education official, "Ruth Tringo, privately acknowledged to him that most—if not all—of the hundreds of community colleges and universities that receive Title IV funding do not have a drug abuse prevention program in place." Posting of Glen S. McGee to http://insidehighered.com/news/2006/05/26/false (May 27, 2006, 21:20 EST)

168. Pelesh, *supra* note 164.

169. *Id.*

170. *Id.*

2002, the Deputy Secretary of Education, William D. Hansen, issued a memorandum (the Hansen memo) to the Office of Federal Student Aid.[171] The Hansen memo set forth the Education Department's policy for enforcing violations of the incentive compensation prohibition.[172] Hansen explained that violating the prohibition did not result in financial loss to the government, and so such violations would not preclude an institution from participating in Title IV programs.[173] The memo explained:

> After further analysis, I have concluded that the preferable approach is to view a violation of the incentive compensation prohibition as not resulting in monetary loss to the Department [of Education]. Improper recruiting does not render a recruited student ineligible to receive student aid funds for attendance at the institution on whose behalf the recruiting is conducted. Accordingly, the Department should treat a violation of the law as a compliance matter for which remedial or punitive sanctions should be considered.[174]

However, the Department of Justice filed a brief as amicus curiae in *Main*, contending that the allegations of the complaint, if true, demonstrated a right to recover under the False Claims Act.[175] Judge Easterbrook held that the amicus curiae brief represented the position of the government, and dismissed Hansen's letter as a "back-office memo."[176] Sheldon Steinbach questions this casual dismissal of the Hansen memo, and believes that the memo constitutes tangible guidance given by the Department of Education to colleges and universities to gauge whether they are in compliance with federal laws and rules.[177] Steinbach argues that *Main* undermined college and university attorneys' degree of confidence in the reliability of such guidance.[178] In his opinion, the case "dismantle[d] verbally the mechanism that the Department of Education uses to dispense advice, in a way that could be devastating."[179] Steinbach, like Goldstein, believes that lawyers for colleges and universities must "examine [the *Main*] decision closely to decide just how broad the implications were for higher education and how

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171. Memorandum from William D. Hansen, Deputy Sec'y, U.S. Dep't of Educ., to Terri Shaw, Chief Operating Officer, Fed. Student Aid (Oct. 30, 2002), *available at* http://www.apollolegal.com/hendowDocuments/Document_17.pdf.

172. *Id.*

173. *Id.*

174. *Id.*

175. Brief for the United States as Amicus Curiae in Support of Appellant at 1–3, United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914 (7th Cir. 2005) (No. 05-2016).

176. *Main*, 426 F.3d at 917.

177. Lederman, *supra* note 161. Sheldon Steinbach is the Vice President and general counsel of the American Council on Education. *Id.*

178. *Id.*

179. *Id.*

aggressively college associations would mobilize to challenge it."[180]

While it may be prudent for colleges and universities to examine the *Main* ruling and anticipate possible lawsuits, there is no need for college and university associations to mobilize and challenge the ruling. For a number of reasons, the fallout of the *Main* decision will be much less drastic than Steinbach and Goldstein suggest. First, state colleges and universities are immune from liability under the FCA,[181] eliminating a large number of possible lawsuits. It is true that community college liability or immunity is still in question at this point, but there is the chance that at least some such colleges could escape liability on Eleventh Amendment grounds, particularly if they receive a large percentage of funding from the state.[182]

Moreover, critics of the *Main-Chapman-Hendow* line of cases need to remember that it is only fraudulent behavior that makes institutions liable, not "[t]ripping up on a regulatory complexity."[183] Attorney Daniel Bartley, who represented the relators in the *Chapman* and *Hendow* cases, disagrees with those who argue that the new line of FCA cases allows institutions to be sued if they violated any of the hundreds of regulations that the government, or an accreditor, imposes on them. "This applies only where there is a material breach of a condition of payment, and it's flagrant," Bartley said.[184] "The only colleges that face trouble are those that are not obeying the law and the material accreditation standards that underlie their

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180. *Id.*

181. *See supra* notes 33–34 and accompanying text.

182. *See supra* notes 37–40 and accompanying text.

183. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005). The court in *Main* explained:

> To prevail in this suit [relator] must establish that the University not only knew . . . that contingent fees to recruiters are forbidden, but also planned to continue paying those fees while keeping the Department of Education in the dark. This distinction is commonplace in private law: failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud . . . . [I]f the university knew about the rule and told the Department that it would comply, while planning to do otherwise, it is exposed to penalties under the False Claims Act.

Id. The *Hendow* court adopted this approach, further elaborating:

> We, too, have held that for promissory fraud to be actionable under the False Claims Act, "the promise must be false when made." We have also noted that "[i]nnocent mistakes, mere negligent misrepresentations and differences in interpretations" are not sufficient for False Claims Act liability to attach. In short, therefore, under a promissory fraud theory, relator must allege a false or fraudulent course of conduct, made with scienter.

United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1174 (9th Cir. 2006) (quoting United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir. 1996)) (alteration in original).

184. Lederman, *supra* note 112.

getting loans and grants."[185] Critics of the recent change in the law are unable to point to any case where a college or university inadvertently, or even negligently, violated a Title IV regulation and were successfully sued under the False Claims Act. Every case discussed in this note involves alleged fraud, and there is no reason why fraud in the higher education context should not be punished as strictly or as consistently as other fraud perpetrated against the government.

V. CONCLUSION

The groundbreaking case of *United States* ex rel. *Main v. Oakland City University* marked a significant shift in the federal courts' willingness to hear the merits of suits alleging false claims made by private colleges and universities to the federal government for payments under Title IV. The *Chapman University* and *University of Phoenix* cases indicate that some other federal courts agree with the logic in *Main* and are no longer going to allow any private institution of higher education to fraudulently receive money from the government by hiding behind layers of paperwork.

Although some higher education lawyers fear the repercussions of the *Main* holding, there will unlikely be a large number of suits filed. Public colleges and universities are immune from FCA suits. More importantly, courts have been distinguishing between broken promises and intentional fraud, and it is reasonable to expect them to do so in the future. FCA liability will attach only when the institution knew it was lying to the government about its past behavior or current intentions in order to get federal money. The primary effect of *Main* was to hold private institutions of higher learning as accountable as other groups that get federal financial support.

185. *Id.*