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INTRODUCTION

Confederate batteries opened up on Fort Sumter in April of 1861, inaugurating the bloodiest conflict in American history.[1] President Abraham Lincoln's war effort, nursing wounds from defeats at Fredericksburg in 1862 and Chancellorsville in 1863, sorely needed more men and supplies.[2] Propaganda campaigns and conscription efforts filled gaps in the depleted ranks of Lincoln's army, helping it swell into the largest mobilization of troops in the world.[3] Reliable supplies were, however, harder to come by; while Union soldiers fell to Confederate bullets and bayonets on the battlefield, army commissaries and quartermasters fell victims to fraud.[4] A lack of

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[1] PBS, *Timeline: Significant Civil War Battles*, AM. EXPERIENCE, http://www.pbs.org/wgbh/americanexperience/features/timeline/death/ (last visited July 13, 2016).

[2] *Id.*

[3] MANFRED F. BOEMEKE ET AL., ANTICIPATING TOTAL WAR: THE GERMAN AND AMERICAN EXPERIENCES, 1871–1914, at 33 (1999) ("[By] April 1865 . . . the United States . . . commanded the largest army in the world.").

[4] Brief for National Whistleblower Center as Amici Curiae Supporting Respondents, at 9 n.22, Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016) (No. 15-7) [hereinafter Brief

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meaningful government oversight had created an environment rife with profiteering.[5] During the first years of the war, the government unwittingly purchased 1,000 horses so sick with every known equine disease that they were entirely useless;[6] in another instance, the government paid a contractor for 411 horses of which only 76 were found fit for service (with the remainder being either blind, undersized, ringboned, or dead upon arrival).[7] The government also bought artillery shells filled with sawdust rather than gunpowder,[8] flimsy shoes that lasted for only twenty days,[9] "rotten" blankets,[10] "worthless" overcoats,[11] and "muskets not [even] worth shooting."[12] To stop these abuses, Congress appointed a special committee, called the Select Committee on Government Contracts, to investigate the extent of the fraudulent contracting;[13] the committee solicited testimony from military personnel, experts, and others that highlighted the disturbing magnitude of the problem.[14] In response, the Union government promulgated the False Claims Act ("FCA") in March of 1863.[15] Following the conclusion of the war, and the rapid decline of

for National Whistleblower Center] (citing REGÍS DE TORBRIAND, FOUR YEARS WITH THE ARMY OF THE POTOMAC 63 (George K. Dauchy trans., Ticknor and Company (1889) (1886))).

[5] Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1996 (2016) (quoting United States v. McNinch, 356 U.S. 595, 599 (1958)).

[6] Brief for National Whistleblower Center, *supra* note 4, at 11 (citing CONG. GLOBE, 37th Cong., 2d Sess. 298 (1862) (statement of Sen. Dawes)).

[7] *Id.* at 10–11 (citing H.R. REP. NO. 2-37, at 98–99 (1861)).

[8] *Id.* at 11–12 (citing CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863) (statement of Sen. Howard)).

[9] *Id.* at 10 (citing TROBRIAND, *supra* note 4, at 136).

[10] *Id.* at 11 (citing H.R. REP. NO. 2-37, at 120–21 (1861)).

[11] *Id.* at 12 (citing Testimony of Wm. T. Duvall, H.R. REP. NO. 49-37, at 136–40 (1863)).

[12] *Id.* at 9 (citing CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS, VOL. I, 305 (1939)).

[13] CONG. GLOBE, 37th Cong., 1st Sess. 23 (1861) (resolution of Rep. Van Wyck) ("[A] committee of five members [shall] be appointed by the Speaker to ascertain and report what contracts have been made by any of the departments for provisions, supplies, and transportation; for materials, and services, or for any articles furnished for the use of government . . . .").

[14] *See* Brief for National Whistleblower Center, *supra* note 4, at 10 (citing United States v. McNinch, 356 U.S. 595, 599 (1958)); *see also* Mark Greenbaum, *The Civil War's War on Fraud*, N.Y. TIMES: OPINIONATOR (Mar. 7, 2013, 12:22 PM), http://opinionator.blogs.nytimes.com/2013/03/07/the-civil-wars-war-on-fraud/?_r=0 ("[The Select Committee] ultimately issu[ed] over 3,000 pages of findings.").

[15] Robert T. Rhoad et al., *A Gathering Storm: The New False Claims Act Amendments and Their Impact on Healthcare Fraud Enforcement*, THE HEALTH LAWYER, Aug. 2009, at 14, 15 ("Congress enacted the federal FCA in 1863 to combat abuse of federally funded programs in the Civil War reconstruction era.

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government contracting needs, the FCA was left to gather dust in a forgotten corner of federal law until the late twentieth century.[16] In the 1980s, the FCA surged back to prominence to address abuses in the defense contracting industry and, once again, it became the government's weapon of choice to combat fraud.[17]

Since its Civil War origins, the FCA has undergone substantial changes. Congress, in recognition of the FCA's increasing importance with the growth of the modern regulatory state, expanded the purview of the FCA in both 1986 and 2009, much to the chagrin of government contractors.[18] The 2009 amendment, in particular, was a clear demonstration of congressional intent to expand the scope of the FCA by overriding federal judicial precedent that attempted to limit it.[19] Congress's goal in amending the FCA, thus, was not just to "enact a broad remedial statute" but rather to "preserve the traditional boundaries of fraud," as well.[20]

The FCA operates as a powerful tool to combat fraud that, otherwise left unchecked, might imperil the federal government's finances. The FCA allows either the Attorney General or a *qui tam* whistleblower (known in the FCA context as a relator) to bring an action on behalf of the United States against persons or entities committing certain types of fraud against the government.[21] The FCA, codified at 31 U.S.C. § 3729, holds that any individual who "knowingly" presents or knowingly conspires to "present[], or cause[] to be presented, a false or fraudulent claim for payment or approval" or "makes, uses, or causes to be made or used, a false record or statement material to a false . . . claim" is liable under the FCA, which imposes damages up to $11,000 per violation in addition to treble the amount of the

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In essence, the FCA prohibits the submission of false claims for payment where federal funds are involved.").

[16] *Id.* (citing JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS §§ 1.01–1.04 (3d ed. 2006)).

[17] *Id.*

[18] *See* Rhoad et al., *supra* note 15, at 15.

[19] *Id.* at 16; *see also* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662 (2008).

[20] Christopher L. Martin, Jr., Comment, *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 CALIF. L. REV. 227, 261 (2013).

[21] "Qui tam" means "for the government as well as the plaintiff," *Qui Tam*, LAW DICTIONARY, http://dictionary.law.com/default.aspx?selected=1709 (last visited Jan. 8, 2016). Or, more literally, it means "*qui tam pro domino rege quam pro se ipso*, or who pursues this action on our Lord the King's behalf as well as his own." Rhoad et al., *supra* note 15, at n.13 (citing Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000)) (internal quotations omitted).

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government's damages.[22] This can result in cases where the damages could total a staggering $2 billion.[23] The FCA, as a tool of fraud deterrence and of compliance enforcement, has had the most significant effect on the healthcare industry.[24] By way of illustration, between 1986 and 2009, two-thirds of the $22 billion recovered by the federal government ($14.3 billion) came from recoveries in the healthcare industry.[25] Since 2009, however, differing interpretations of the Fraud Enforcement and Recovery Act ("FERA"),[26] the passage of the Patient Protection and Affordable Care Act ("ACA"), and the Supreme Court's unanimous decision in *Universal Health Services, Inc. v. United States* ex rel. *Escobar* have all expanded the scope of the FCA, leading new industries to find themselves increasingly in the crosshairs of expanded procedural theories of liability.[27]

At an operative level, the FCA posits that both "factually false" and "legally false" claims are actionable; "factually false" claims include goods or services either incorrectly described or not provided at all,[28] and "legally false" claims are false based on statements, promises, or other certifications of compliance.[29] While various circuits have held that the FCA reaches factually false conduct, legal falsity (with the Supreme Court's recent endorsement) could gain traction as an equally important theory for prosecuting fraud.[30] This expanded theory of liability may continue to

[22] 31 U.S.C. § 3729(a)(1)(A)–(B) (2012).

[23] *GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report (last visited Feb. 27, 2017); *see also* Michael Holt & Gregory Klass, *Implied Certification Under the False Claims Act*, 41 PUB. CONT. L.J. 1, 2 (2011) (citing United States *ex rel.* Tyson v. Amerigroup Ill., Inc., 488 F. Supp. 2d 719, 742 (N.D. Ill. 2007)); *cf. The False Claims Act: A Primer*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf (last visited July 13, 2016).

[24] Brian McCarthy, Note, *Whistleblowers, Tort Fountains, and Line Drawing: Determining the Scope of Liability Under the False Claims Act*, 19 WIDENER L. REV. 437, 437–38 (2013).

[25] Rhoad et al., *supra* note 15, at 16 (citing U.S. DEP'T OF JUSTICE: CIV. DIV., FRAUD STATISTICS-OVERVIEW (Nov. 5, 2008)).

[26] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 386, 123 Stat. 1617.

[27] McCarthy, *supra* note 24, at 438 (citing Susan A. Mitchell et al., Implied Certification Liability Under the False Claims Act, in 11-4 Briefing Papers (2d Series) 1 (2011)).

[28] Robert Fabrikant & Glenn E. Solomon, *Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry*, 51 ALA. L. REV. 105, 111 (1999).

[29] Martin, *supra* note 20, at 230.

[30] Kristine J. Dunne et al., *False Claims Act: Recent Amendments and Their Impact on Higher Education*, 8 NACUANOTES (2008), http://counsel.cua.edu/fedlaw/NACUANote4-16-10.cfm ("[T]he 2009

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evolve as the industries that the FCA regulates continue to evolve, as well.[31] One such industry falling under this broad purview is higher education.

This Note will address whether or not educational institutions in the for-profit sector should be held liable under the FCA for entering into a Program Participant Agreement ("PPA") with the government, in good faith, only to thereafter commit fraud. This Note contends that the modern higher education environment provides an appropriate context in which courts may permissibly disregard any distinction between conditions of participation and conditions of payment for purposes of imposing FCA liability. It further posits that the Supreme Court's *Escobar* decision, though an important landmark toward a broader enforcement tool, did not go far enough to deter fraud in higher education. Part I will describe the background of the FCA, the rationale for the development of the "legally false" theory of liability, and the differences between the express and implied types of certification. It will also discuss judicial interpretation of legal falsity, with emphasis on the Supreme Court's decision in *Escobar*. Part II will address conditions of participation and conditions of payment and why the difference may remain significant in the fraud context. Part III will explain the structure of for-profit educational institutions, their role as government contractors, and the nature of the circuit split regarding the receipt of Higher Education Act ("HEA") Title IV funds and FCA liability. Part IV will discuss policy implications of this "implied certification of post-formation performance"[32] theory and why the educational setting is the appropriate venue in which to hold government contractors liable for fraud on an expansive sub-theory of implied false certification.

PART I

Any civil claim seeking relief must cogently articulate the nature of the grievance in accordance with the Federal Rules of Civil Procedure.[33] To establish a prima facie case of an FCA violation, a plaintiff is held to a heightened pleading

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Amendments to the FCA have created a more robust tool for whistleblowers and the government alike to disincentivize fraudulent actors."); *see generally* Martin, *supra* note 20; Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2004 (2016).

[31] *See* Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994).

[32] Holt & Klass, *supra* note 23, at 14.

[33] *See* Conley v. Gibson, 355 U.S. 41 (1957) (holding that claimant must provide a short, plain statement showing that she is entitled to relief); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Fed. R. Civ. P. 8.

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standard.[34] This standard requires plaintiffs to establish the "who, what, when, where, and how of the alleged fraud."[35] The FCA's role as a fraud-prevention statute allows relators—usually private individuals with knowledge of fraudulent practices committed by a government contractor—to bring an action on behalf of the government.[36] A relator must allege that a defendant presented false or fraudulent claims[37] for payment to an entity of the U.S. government, did so "knowing"[38] that the practice was illegal, and that the claim was material to the government's decision to issue payment.[39] Having successfully navigated this statutory minefield, a relator's allegations may still be dismissed for failure to state a claim.[40] Further complicating matters for an FCA plaintiff is the fact that the law is largely the product of judicial development and, as such, is in a constant state of flux.[41]

A brief survey of the FCA's legislative and judicial history, nevertheless, reveals a decided preference for a strong antifraud instrument. In 1968, the Supreme

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[34] United States *ex rel.* Rockey v. Ear Inst. of Chi., 92 F. Supp. 3d 804, 813 (N.D. Ill. 2015) (quoting United States *ex rel.* Gross v. AIDS Research Alliance-Chicago, 415 F.3d 601, 604 (7th Cir. 2005)) (holding that because "[t]he FCA is an anti-fraud statute . . . claims under it are subject to the heightened pleading requirements of Rule 9(b)" (internal quotations omitted)).

[35] United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 266 (5th Cir. 2010) (internal quotations omitted) (citing United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997)).

[36] 31 U.S.C. § 3730(b) (2012).

[37] 31 U.S.C. § 3729(b)(2)(A) (2012) ("[The term claim] means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property . . . .").

[38] § 3729(b)(1)(A)(i)–(iii) ("['Knowing' and 'knowingly' means that a person, with respect to information] (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information . . . .").

[39] § 3729(b)(4) ("[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."); *see also* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002–04 (2016) (discussing the "demanding" materiality requirement).

[40] *Steury*, 625 F.3d at 268 ("Not every breach of a federal contract is an FCA problem."); *see also Escobar*, 136 S. Ct. at 1994 (requiring a "demanding" materiality standard and making it more difficult for relators to plead FCA violations).

[41] ROBERT FABRIKANT ET AL., HEALTH CARE FRAUD: ENFORCEMENT AND COMPLIANCE loc. § 4.01(1) (2015) (ebook) ("[M]uch of the law on the FCA, historically and currently, is judge-made . . . . [Furthermore, the 1986 and FERA amendment of 2009] dramatically changed the FCA and rendered much of the judicial precedent on the FCA out of date, inapplicable, or of questionable guidance [which leaves] significant issues left unresolved by the [FCA] statute . . . .").

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Court broadened the scope of the FCA in ruling that its application extended to "all fraudulent attempts" that might cause the government to pay claims issued by contractors.[42] In 1986, Congress amended the FCA[43] both by creating a broader array of financial incentives to bring claims and by establishing stronger economic disincentives for violating FCA mandates.[44] In 2009, Congress passed FERA, again broadening the scope of the FCA.[45] This legislation removed portions of the FCA that had previously served to limit the application of the act from operating as a "blunt instrument to enforce compliance."[46] Notably, Congress' promulgation of FERA came one year after the Supreme Court's *Allison Engine* decision, wherein the Court narrowly construed provisions of the FCA by requiring an explicit element of intent;[47] this strict reading made it more difficult for relators to prove liability.[48] The subsequent legislative abrogation by the FERA amendments rendered most of the pre-2009 judicial guidance of questionable further utility.[49] In the Supreme Court's October 2015 term, the Justices granted certiorari and heard oral argument regarding whether a counseling center, providing medications and other services to patients without appropriately credentialed staff, could be held liable on a theory of

[42] United States v. Neifert-White Co., 390 U.S. 228, 233 (1968) ("[T]he False Claims Act should not be given the narrow reading that respondent urges. This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.").

[43] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986) (current version at 31 U.S.C. § 3729 (2012)).

[44] Rhoad et al., *supra* note 15, at 16; *cf.* Martin, *supra* note 20, at 229 ("As of June 2012, the government has recovered more than $33 billion in False Claims Act settlements and judgments since Congress overhauled the Act in 1986."); United States *ex rel.* Mikes v. Straus, 274 F.3d 687, 692 (2d Cir. 2001) ("In 1986 the Act was substantially amended to combat fraud in the fields of defense and health care.").

[45] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 386, 123 Stat. 1617.

[46] *Mikes*, 274 F.3d at 699; Rhoad et al., *supra* note 15, at 14 ("By amending the Act, Congress removed two key provisions, which prevented it from operating as a boundless all-purpose antifraud statute." (internal quotations omitted)).

[47] *See* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 671 (2008).

[48] *Cf.* Stuart M. Gerson et al., Allison Engine's *Positive Effects Upon False Claims Act Litigation in the Healthcare Industry*, HEALTH CARE & LIFE SCIENCES CLIENT ALERT 1 (2008), http://www.ebglaw.com/content/uploads/2014/06/23350_Allison-Engine-Positive-Effects.pdf.

[49] FABRIKANT ET AL., *supra* note 41.

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implied false certification.[50] In an eight to zero decision, the Court held that implied false certification was a valid theory of liability under the FCA.[51]

The FCA imposes liability for fraudulent claims submitted under one of two categories: factually false and legally false.[52] As mentioned previously, factually false claims are misrepresentations of goods or services provided, whereas legally false claims involve false certifications of compliance with terms of a statute or regulation where compliance is a precondition to payment.[53] Legally false claims are, again, subdivided into two principal categories: express false certifications and implied false certifications.[54] The latter, implied false certifications, can be further subdivided into two additional categories: "implied certification of no pre-formation fraud in the inducement and implied certification of post-formation compliance with contract terms, statutes[,] or regulations."[55]

Express false certifications, which are beyond the scope of this Note, occur when a government contractor explicitly and fraudulently certifies compliance with rules, statutes, or regulations governing the financial relationship between the parties.[56] Implied false certifications are broader than express false certifications because liability may be imposed when a claim is submitted to the government for payment without disclosing violations of conditions on which continuing eligibility to receive payment is predicated—essentially attaching liability to knowing silence.[57] The more nuanced variations of implied false certifications, pre-formation fraud, and post-formation fraud will be taken up in greater detail in Parts III and IV, *infra*.

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[50] *See generally* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016).

[51] *Id.* at 2001.

[52] United States *ex rel.* Sobek v. Educ. Mgmt., LLC, Civil Action No. 10-131, 2012 U.S. Dist. LEXIS 188243, at *44 (W.D. Pa. Oct. 22, 2012).

[53] *Id.* at 44–45.

[54] *Id.*

[55] Holt & Klass, *supra* note 23, at 17.

[56] United States *ex rel.* Wilkins v. United Health Grp., 659 F.3d 295, 305 (3d Cir. 2011).

[57] *Id.* ("There is a more expansive version of the express false certification theory called implied false certification . . . . [this] theory of liability is premised on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment." (internal quotations omitted)).

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The first court to recognize the existence of legal falsity, for purposes of the FCA, was the U.S. Court of Federal Claims in 1994.[58] In this case, the Army Corps of Engineers retained Ab-Tech Construction, Inc. to construct an automated data processing facility.[59] A grand jury investigation into Ab-Tech's business affairs found that the president of the company had engaged in the fraudulent submission of progress payment vouchers; the Court of Federal Claims thereafter determined that, in submitting these vouchers, Ab-Tech impliedly certified ongoing compliance with the terms of the contract.[60] Citing *Neifert-White*, the court held that Ab-Tech's withholding of information regarding its noncompliance while continuing to submit invoices for reimbursement was "the essence of a false claim."[61] Since *Ab-Tech*, other courts have approached the theory of legal falsity expressing varying degrees of acceptance.[62]

The controversy over the scope of FCA liability, under a theory of legal falsity, had continued to divide the circuit courts even two decades after *Ab-Tech*, requiring the Supreme Court to step in to resolve the conflict.[63] In *Universal Health Services, Inc. v. United States* ex rel. *Escobar*, the Supreme Court considered whether a healthcare entity, whose improperly licensed providers caused the death of a teenage girl, could be held liable under the FCA.[64] Universal Health Services submitted claims for payment to Medicaid, which contained boilerplate language certifying compliance with practitioner licensing requirements.[65] The services listed on the claims (e.g., counseling sessions and prescribing medications) were, in fact, provided, but they were not done in conformity with the implicit terms of the

[58] *Id.* at 305; Martin, *supra* note 20, at 230.

[59] Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 430 (1994), *aff'd mem.*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision).

[60] *Id.* at 431, 434.

[61] *Id.* at 433–34.

[62] *See Wilkins*, 659 F.3d at 306 ("[T]he Second, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits have recognized that there can be implied false certification liability under the FCA." (citations omitted)); Martin, *supra* note 20, at 231–32 ("[F]ederal courts of appeals have adopted remarkably inconsistent views of the implied certification theory. The Fourth, Fifth, Seventh, and Eighth Circuits have not formally adopted the theory and recognize only factually false claims and express false certifications." (footnote omitted)).

[63] *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1998 (2016); *Wilkins*, 659 F.3d at 306.

[64] *Escobar*, 136 S. Ct. at 1998.

[65] *Id.* at 1997.

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contract.[66] The falsity in the claims, therefore, was not express, it was implied. In the absence of a clear statutory definition, the Court turned to the common law origin of the word "fraud" to determine whether Congress intended the FCA to capture a wide range of duplicitous contracting practices.[67] The Court ruled in the affirmative, contending that, under the common law, omissions were treated as a type of fraud; the Court further determined that neither the FCA nor the common law "tether[ed]" liability for fraud to violations of conditions of payment.[68] But the Court's rejection of this talismanic liability label did not totally destroy the distinction between conditions of payment and conditions of participation.[69] In the end, the Court found the implied false certification theory valid, at least "in some circumstances."[70] It outlined a two-part, conjunctive test: first, the claim submitted by the contractor must articulate "specific representations about the goods or services provided" and, second, must fail to mention its noncompliance with governmental requirements, the nondisclosure of which transforms the submitted claim into a "half-truth."[71]

Initial reactions to *Escobar* point out that the Court's affirmation of legal falsity is far from a ringing endorsement of the implied false certification theory.[72] Whatever the case, it is still too early to assess industry fallout. One thing does, however, remain clear: while courts readily recognized express false certification as a tenable theory under the FCA prior to *Escobar*, adoption of implied false

[66] *Id.* at 1998.

[67] *Id.* at 1999 (quoting Sekhar v. United States, 133 S. Ct. 2720, 2724 (2013)).

[68] *Id.* at 2001.

[69] *See id.* at 2003 ("[W]hen evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant . . . .").

[70] *Id.* at 1999.

[71] *Id.*

[72] *See, e.g.*, Adrianna Reilly, *Attys React to High Court's FCA Liability Ruling*, LAW360 (June 16, 2016, 8:54 PM), http://www.law360.com/articles/807775/attys-react-to-high-court-s-fca-liability-ruling ("[M]ost observers expected the Supreme Court to allow some form of the [implied false certification] theory to survive. The loss for the government stems from the fact that the court [*sic*] has imposed 'rigorous' limitations on the use of the implied certification theory and expressly rejected the far more lenient standard advocated by the Justice Department . . . . So, yes, the . . . theory lives on, but its reach has been sharply limited."); *see also* William Sage, *Common Law And Common Sense: The Supreme Court Redresses Patient Harm Under The False Claims Act*, HEALTH AFF. BLOG (June 22, 2016), http://healthaffairs.org/blog/2016/06/22/common-law-and-common-sense-the-supreme-court-redresses-patient-harm-under-the-false-claims-act/ ("Unanimous Supreme Court decisions are often intellectually unsatisfying because they tend to rely on narrow grounds and sidestep important underlying questions . . . . [The Court's ruling] instructs lower courts to focus on substance over form . . . .").

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certification as a theory of liability was, historically, less well received.[73] And the Court's lukewarm approbation for the theory may do little to erode decades of circuit division.[74] Since the advent of the Pandora's Box ruling in *Ab-Tech*, courts, commentators, and the American Bar Association, among others, have lobbied against painting with too broad of a brush in the healthcare context.[75] This practice will be addressed in greater detail in Parts III and IV, *infra*. There is, however, a silver lining for these dissenters: while the *Escobar* Court may have green-lighted a broader theory of liability, the Court seems to have done so on the narrowest grounds;[76] it retained the distinction (albeit a diluted version) between conditions of participation and conditions of payment in addition to retaining a "rigorous" materiality standard for proof of fraud.[77] The opponents of the theory had worried that adopting implied false certification would lead to the imposition of liability for violations of relatively minor conditions of participation in addition to conditions of

[73] *See* United States *ex rel.* Wilkins v. United Health Grp., 659 F.3d 295, 306 (3d Cir. 2011).

[74] Some client advisories, issued by law firms in the immediate aftermath of the Court's ruling, indicate that while the Court officially recognized the implied false certification theory of liability, it did so on "the narrowest interpretation." *See, e.g.*, *Summary and Significance of the Supreme Court's Decision in Escobar*, AKIN GUMP STRAUSS HAUER & FELD LLP 2 (June 20, 2016), https://www.akingump.com/images/content/5/5/v2/55444/Litigation-Alert-Summary-and-Significance-of-Supreme-Court-Esc.pdf [hereinafter *Summary and Significance*]. In addition, the Court's "focus on 'specific representations,' along with its 'rigorous' and 'demanding' approach to materiality, may provide FCA defendants new arguments to defeat unmeritorious implied certification claims." Kirk Ogrosky et al., UHS v. U.S. *ex rel.* Escobar: *Supreme Court Refines "Implied Certification" Theory of False Claims Act Liability*, ARNOLD & PORTER ADVISORY 5 (June 17, 2016), http://www.arnoldporter.com/en/perspectives/publications/2016/06/uhs-v--us-ex-rel-escobar.

[75] *See Wilkins*, 659 F.3d at 307 ("[T]he implied certification theory of liability should not be applied expansively, particularly when advanced on the basis of FCA allegations arising from the Government's payment of claims under federally funded health care programs."); *see also* Susan C. Levy et al., *The Implied Certification Theory: When Should the False Claims Act Reach Statements Never Spoken or Communicated, but Only Implied?*, 38 PUB. CONT. L.J. 131, 142 (2008) ("*Mikes* serves as a warning to relators—especially in the Medicare context . . . —not to read the implied certification theory expansively and out of context."); Katherine A. Lauer et al., *Violations of Payment/Participation Conditions as Predicates for False Claims*, A.B.A.: SEC. HEALTH LAW LITIG. (2011), http://apps.americanbar.org/litigation/committees/criminal/email/winter2012/winter2012-0402-violations-conditions-payment-participation-predicates-false-claims.html ("Expanding the reach of the FCA by conflating conditions of payment with requirements that are actually conditions of participation is neither consistent with established cased law nor good public policy.").

[76] *Summary and Significance*, *supra* note 74.

[77] Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2003–04, 2004 n.6 (2016).

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payment,[78] a discussion of which is taken up in Part II, *infra*. Because the FCA is largely judge-made,[79] the Supreme Court's decision in *Escobar* will hardly be the last word on the matter.[80] The legacy of the FCA, from here forward, is for the lower courts to mold.

One industry that would benefit from a more expansive view of the FCA is higher education. The split between the Seventh and Ninth Circuits (*Sanford-Brown* and *Hendow*, respectively)[81] is illustrative of the larger debate over the propriety of adopting an expanded theory of implied false certification in the higher education context. To understand why higher education is, in the opinion of this author, a more appropriate realm for meting out liability under a broader theory of implied false certification than the type the Court endorsed in *Escobar*, it is necessary to review conditions of participation and conditions of payment in the FCA context.

PART II

One of the bedrock principles of the FCA is restitution.[82] The FCA operates by recouping monies wrongly paid to noncompliant government contractors and imposes treble damages as an additional measure of deterrence against future fraud.[83] Before the Supreme Court's June 2016 ruling, the alleged fraud was only actionable if it had occurred with respect to a condition of payment, rather than a condition of

[78] *See id.* at 2003 ("Materiality . . . cannot be found where noncompliance is minor or insubstantial."); *see generally* Lauer et al., *supra* note 75 (explaining the distinction between conditions of payment and participation); *see also* Robert S. Salcido, *When a Violation of a Rule or Regulation Becomes and FCA Violation: Understanding the Distinction between Conditions of Payment and Conditions of Participation*, THE SALCIDO REPORT 1, 1–2 (2015), https://www.akingump.com/images/content/3/8/v2/38183/When-a-Violation-of-a-Rule-or-Regulation-Becomes-an-FCA-Violatio.pdf.

[79] Fabrikant et al., *supra* note 41.

[80] *See* Ogrosky et al., *supra* note 74 ("[T]he Court's ruling does not provide a bright-line rule on implied certification. Instead, lower courts will have to develop a context-dependent materiality standard . . . .").

[81] *Compare* United States v. Sanford-Brown, Ltd., 788 F.3d 696 (7th Cir. 2015), *with* United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166 (9th Cir. 2006).

[82] *See* United States *ex rel.* Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001) ("[T]he Act is restitutionary and aimed at retrieving ill-begotten funds . . . ."). *But see Escobar*, 136 S. Ct. at 1996 ("Congress also has increased the [FCA]'s civil penalties so that liability is essentially punitive in nature." (internal quotations omitted)) (quoting Vermont Agency of Nat'l Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 784 (2000)).

[83] 31 U.S.C. § 3729 (2012).

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participation.[84] In this way, the ultimate result of a case hinged on whether the reviewing court would treat the violated provision in question as a condition of participation or a condition of payment.[85] The Court soundly rejected this silver bullet approach for predicating liability.[86] But, importantly, the Court did not entirely dismiss the distinction altogether.[87] This Part broadly surveys what differences there are (if any) between the two concepts.

Katherine Lauer and her colleagues in the American Bar Association's Health Law Litigation section offer a workable distinction between conditions of participation and conditions of payment: where a healthcare institution is entitled to continue receiving payments from the federal government, notwithstanding a bona fide violation of a Medicare or Medicaid provision, that provision is likely only a condition of participation.[88] The Centers for Medicare and Medicaid Services ("Medicare"), furthermore, explain in their Program Integrity Manual that conditions of participation are different from conditions of payment.[89] Put simply, if the government has a range of administrative remedies by which to address the alleged violation, then the provision is likely a condition of participation.[90] As such,

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[84] *See* United States *ex rel.* Wilkins v. United Health Grp., 659 F.3d 295, 309 (3d Cir. 2011) ("[T]o plead a claim upon which relief could be granted under a false certification theory, either express or implied, a plaintiff must show that compliance with the regulation which the defendant allegedly violated was a condition of payment from the Government.") (citing Rodriguez v. Our Lady of Lourdes Med. Ctr., 552 F.3d 297, 304 (3d Cir. 2008)).

[85] Lauer et al., *supra* note 75.

[86] *Escobar*, 136 S. Ct. at 2001 ("We conclude that the [FCA] does not impose this limit on liability . . . . Nor does the common-law meaning of fraud tether liability to violating an express condition of payment.").

[87] *Id.* at 2003 ("In sum, when evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment *is relevant*, but not automatically dispositive." (emphasis added)).

[88] *See id.*; *see also Mikes*, 274 F.3d at 697 ("Accordingly, while the Act is intended to reach all types of fraud without qualification that might result in financial loss to the Government, it does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions." (citing United States v. Neifert-White Co., 390 U.S. 228, 232 (1968) (internal quotations omitted))).

[89] CTRS FOR MEDICARE AND MEDICAID SERVS., MEDICARE PROGRAM INTEGRITY MANUAL 4 (2014), https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/pim83c03.pdf ("Medicare rules that do not affect Medicare payment[s] . . . include violations of conditions of participation.").

[90] *See* Salcido, *supra* note 78, at 7.

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conditions of payment were widely held to be the only conditions actionable under the FCA before *Escobar*.[91]

In deciding whether the submission of an annual cost report to Medicare constituted a violation of a condition of payment or condition of participation under an implied false certification theory, the Third Circuit's *Conner v. Salina Regional Health Center* decision relied on the "detailed administrative mechanism" established by the government;[92] the court held that because this mechanism was in place, the allegedly violated provision was a condition of participation.[93] Illustrative of other courts ruling on this issue, the *Conner* court noted that an adequate remedial system established by Medicare could address mere regulatory violations that did not rise to the level of fraud.[94] Thus, the court reasoned, it would make no sense to transform every condition of participation violation (for which there already existed a built-in administrative remedy) into a condition of payment violation that could be actionable under the FCA.[95]

Although the *Conner* court referred to the relationship between conditions of participation and payment as representing a "significant distinction,"[96] decisions from the District of Columbia Circuit,[97] District of Massachusetts,[98] and Eleventh Circuit[99] call into question whether or not this distinction actually exists.[100] These

[91] *See id.* at 5 (noting that this understanding of the FCA is confirmed by "the statutory purpose to protect the federal treasury"). *But see* United States *ex rel.* Lisitza v. Johnson & Johnson, 765 F. Supp. 2d 112, 128 (D. Mass. 2011) (holding that "some regulations or statutes may be so integral to the government's payment decision as to make any divide between conditions of participation and conditions of payment a distinction without a difference"); *see also* Lauer et al., *supra* note 75 ("[The] *Lisitza* court's suggestion . . . that there is no distinction between conditions of participation and conditions of payment . . . could prove problematic in future FCA actions.").

[92] United States *ex rel.* Connor v. Salina Reg'l Health Ctr., 543 F.3d 1211, 1221 (10th Cir. 2008).

[93] *Id.*

[94] *Id.*

[95] *Id.* ("There is thus no basis in either law or logic to adopt an express false certification theory that turns every violation of a Medicare regulation into the subject of an FCA qui tam suit.").

[96] *Id.* at 1220.

[97] *See* United States v. Sci. Apps. Int'l Corp., 626 F.3d 1257 (D.C. Cir. 2010).

[98] *See* United States *ex rel.* Lisitza v. Johnson & Johnson, 765 F. Supp. 2d 112 (D. Mass. 2011).

[99] *See* McNutt *ex rel.* United States v. Haleyville Med. Supplies, Inc., 423 F.3d 1256 (11th Cir. 2005).

[100] Thomas S. Crane & Brian P. Dunphy, *Will the Supreme Court Weigh In? Implied Certification Theory Under the False Claims Act*, MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO, P.C.: HEALTH L. & POL'Y MATTERS (Oct. 17, 2011), https://www.mintz.com/newsletter/2011/Advisories/1428-1011-NAT-HCED/

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decisions represent a trend (disturbing for some)[101] that could herald the transformation of conditions of participation into conditions of payment; commentators and courts fear that this could precipitate the usurpation of administrative agencies by federal courts as the premier arbiters of regulatory and contractual compliance.[102] While this dystopian scenario—where all, or most, conditions of participation suddenly become conditions of payment—is contrary to the majoritarian view, it is not wholly improbable, especially given the appropriate legislative nudge.[103] Medicare's implementation of "Value-Based Purchasing," which ties payment to quality of care standards, may blur the former division between conditions of payment and conditions of participation.[104] Though perhaps relevant only in the healthcare context, the government's willingness to deemphasize

web.htm (articulating why the alleged violation need not be a violation of a precondition for payment to be actionable under the FCA, effectively blurring the distinction between conditions of payment and conditions of participation).

[101] Two cases from the Middle District of Tennessee, though subsequently overruled, also highlighted a preference to equate conditions of participation with conditions of payment. *See* United States *ex. rel.* Williams v. Renal Care Group, No. 3:09-00738, 2010 U.S. Dist. LEXIS 28753 (M.D. Tenn. Mar. 22, 2010), *rev'd in part*, *aff'd in part*, 696 F.3d 518 (6th Cir. 2012); United States v. MedQuest Assocs., No. 3:06-01169, 2011 U.S. Dist. LEXIS 126569 (M.D. Tenn. Oct. 21, 2011), *rev'd*, 711 F.3d 707 (6th Cir. 2013).

[102] *See* United States *ex rel.* Parikh v. Citizens Med. Ctr., 977 F. Supp. 2d 654, 677 (S.D. Tex. 2013) ("Accepting Relators' argument would allow FCA liability to attach any time a condition of participation is violated . . . and could drastically expand the role of the courts in policing regulations in an area traditionally governed by administrative agencies."), *aff'd*, 762 F.3d 461 (5th Cir. 2014).

[103] *See generally* John T. Brennan, Jr. & Michael W. Paddock, *Limitations on the Use of the False Claims Act to Enforce Quality of Care Standards*, 2 J. HEALTH & LIFE SCI. L. 37, 70 (2008), https://www.crowell.com/documents/Use-of-the-False-Claims-Act-to-Enforce-Quality-of-Care-Standards.pdf (although noting that "[p]olicy reasons . . . call into question the appropriateness of employing the False Claims Act for policing quality care[,]" the authors recognize that "[t]he analysis set forth above is of course not static, and the current disconnect between quality-based standards (COPs or otherwise) [which currently maintain the rigid dichotomy between conditions of participation and conditions of payment] and the government's decision to pay a claim may become connected—and sooner rather than later. The federal government continues to focus on improving the quality of the nation's healthcare services; both Congress and CMS have examined the plausibility of implementing a pay-for-performance or value-based purchasing reimbursement methodology . . . [recently] Congress specifically directed CMS to develop value-based purchasing of hospital services by implementing quality indicators and instituting payment bonuses and penalties for adherence and noncompliance, respectively[.]"); *see also* United States *ex rel.* Lisitza v. Johnson & Johnson, 765 F. Supp. 2d 112 (D. Mass. 2011) (implying that there is no distinction between conditions of participation and conditions of payment).

[104] *Hospital Value-Based Purchasing*, CMS.GOV, https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/hospital-value-based-purchasing/index.html?redirect=/Hospital-Value-Based-Purchasing/ (last updated Oct. 30, 2015, 2:33 PM).

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the distinction between conditions of participation and payment, along with *Escobar*'s timely precept that labels, alone, are irrelevant,[105] could signal a larger change that courts may adopt in subsequent FCA analyses.[106] In assessing the possible ripple effects of this altered FCA inquiry, this Note now turns to the implications of the FCA in the context of higher education.

PART III

In 2016–2017, the average four-year in-state tuition across the United States was $9,650 for public schools, $16,000 for for-profit schools, and $33,480 for private schools—this represented an average increase of 2.4% from the 2015–2016 school year's tuitions and fees.[107] Combine these higher tuition rates with increased college enrollment, to the tune of 20.2 million students in the fall of 2015 (an increase in enrollment of 4.9 million students from fall 2000) and it is clear to see the important role that higher education plays in our economy.[108] Many students who are unable to afford the sticker price of tuition and associated fees may apply for federal aid through loans, grants, or federal work-study; some 70% of students receive grants to help them pay for college.[109] These programs are authorized reimbursement programs established by the federal government through Title IV of the HEA.[110] For

[105] Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1994 (2016) ("What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision.").

[106] The *Mikes* court deferred to Congress and Medicare to resolve its FCA-related institutional competence concerns, discussed in Part IV, *infra*; Medicare's willingness to blend the two previously discrete concepts (conditions of participation and conditions of payment), combined with Congressional desire to expand the FCA (manifested in the 2009 FERA amendments) and the Supreme Court's most recent stance warrants revisiting the reasoning and conclusion of *Mikes*.

[107] TRENDS IN COLLEGE PRICING 2016, COLLEGEBOARD 9 (2016), https://trends.collegeboard.org/sites/default/files/2016-trends-college-pricing-web_0.pdf.

[108] *Table 105.20. Enrollment in elementary, secondary, and degree-granting postsecondary institutions, by level and control of institution, enrollment level, and attendance status and sex of students: Selected years, fall 1990 through fall 2024*, NATIONAL CENTER FOR EDUCATION STATISTICS: DIGEST OF EDUCATION STATISTICS, http://nces.ed.gov/programs/digest/d14/tables/dt14_105.20.asp?current=yes (last updated Mar. 2015); *see* Julie Davis Bell, *Getting What You Pay For: Higher Education and Economic Development*, NCSL, http://www.wiche.edu/info/gwypf/bell_economicDevelopment.pdf (last visited Mar. 11, 2016).

[109] TRENDS IN COLLEGE PRICING 2016, *supra* note 107.

[110] 20 U.S.C. § 1070 (2012); *see What Are Title IV Programs?*, U.S. DEP'T OF EDUC.: FEDERAL STUDENT AID, http://federalstudentaid.ed.gov/site/front2back/programs/programs/fb_03_01_0030.htm (last visited Nov. 1, 2016).

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institutions of higher learning to participate in these programs, they must sign a PPA, which states, in relevant part:

> An institution may participate in any Title IV, HEA program . . . only if the institution enters into a written [PPA] with the Secretary . . . . A [PPA] 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 [PPA].[111]

Through federal aid programs, students apply for financial assistance from the federal government and use the money to pay the costs of tuition for the duration of their enrollment; under this scheme, for-profit institutions that have signed a PPA can receive up to 90% of gross tuition from federal sources alone.[112]

For-profit colleges,[113] colloquially known as "career colleges," have been around for over 100 years.[114] These institutions were originally designed to meet increasing demand for specialized technical and vocational needs in particular labor markets;[115] the for-profit business model advocated fast-tracking a degree-seeking individual to ensure prompt graduation with the skills essential for immediate job placement.[116] In fact, many students in the past decade were promised that exact

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[111] 34 C.F.R. § 668.14(a)(1) (2015) (emphasis added).

[112] *See* United States *ex rel.* Miller v. Weston Educ., Inc., 784 F.3d 1198, 1202 (8th Cir. 2015); 34 C.F.R. § 668.14(b)(16) ("[T]he institution will derive at least 10 percent of its revenues for each fiscal year from sources other than Title IV, HEA program funds . . . or be subject to sanctions.").

[113] While any institution of higher learning could commit the type of fraud actionable under a theory of post-formation implied false certification, recent cases seem to focus on the fraud and abuse committed by for-profit schools. For the sake of brevity, this Note does not take up a discussion of the differences between for-profit colleges, public/private colleges, and community colleges, but assumes that the analysis would be similar—to wit, any institution of higher education that violates provisions of a PPA could be prosecuted under the theory of post-formation implied false certification.

[114] David Deming et al., *For Profit Colleges*, 23 FUTURE OF CHILDREN 137, 138 (2013), https://dash.harvard.edu/bitstream/handle/1/12553738/11434354.pdf?sequence=1.

[115] David J. Deming et al., *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSP. 139, 139 (2012), http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.26.1.139 ("Today's for-profit postsecondary schools were preceded a century ago by a group of proprietary schools that were also responding to an explosion in demand for technical, vocational, and applied subjects.").

[116] *Id.*

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thing—jobs.[117] But, fast-forward to January 2016: prosecution for fraud forced Corinthian Colleges, one of the largest for-profit institutions, to declare bankruptcy and shut down all campuses while 7,500 former students of Corinthian and other for-profits signed petitions urging the federal government to forgive the more than $164 million in loans that they were duped into taking.[118] A 2008–2009 investigation by the Senate Committee on Health, Education, Labor, and Pensions revealed that for-profit colleges raked in $32 billion despite the fact that more than half of the students enrolled during that same time did not have a job.[119]

In an environment replete with such potential for fraud, the Ninth Circuit found that it was appropriate to impose FCA liability on a for-profit institution based on a theory of express false certification.[120] In *United States* ex rel. *Hendow v. University of Phoenix*, relators were former enrollment counselors who alleged that the University engaged in fraud by knowingly violating the incentive compensation ban, which the PPA with the Department of Education expressly forbade.[121] Though the court did not adopt or reject the theory of post-formation implied false

[117] Patricia Cohen, *For-Profit Colleges Accused of Fraud Still Receive U.S. Funds*, N.Y. TIMES, Oct. 12, 2015, at A1, http://www.nytimes.com/2015/10/13/business/for-profit-colleges-accused-of-fraud-still-receive-us-funds.html.

[118] Allie Bidwell, *For-Profit Corinthian Colleges Files for Chapter 11 Bankruptcy*, US NEWS & WORLD REP. (May 4, 2015, 6:02 PM), http://www.usnews.com/news/articles/2015/05/04/for-profit-corinthian-colleges-files-for-chapter-11-bankruptcy; Aimee Picchi, *Feeling Burned, For-Profit College Grads Want Loans Erased*, CBS: MONEYWATCH (Jan. 27, 2016, 12:38 PM), http://www.cbsnews.com/news/feeling-burned-for-profit-college-grads-want-loans-erased/.

[119] S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 112th CONG., EXECUTIVE SUMMARY 1, 1 (Comm. Print 2012), http://www.help.senate.gov/imo/media/for_profit_report/ExecutiveSummary.pdf; *see* S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUC.: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS (Comm. Print 2012), https://www.gpo.gov/fdsys/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf.

[120] United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166 (9th Cir. 2006).

[121] *Id.* at 1169.

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certification,[122] it did demonstrate willingness to consider the theory,[123] where other courts have outright rejected it.[124]

The Seventh Circuit squarely rejected the theory of post-formation implied false certification in *United States v. Sanford-Brown, Ltd.* almost a decade later.[125] In *Sanford-Brown*, the Seventh Circuit looked at the PPA and "panoply of statutory, regulatory, and contractual requirements" that the institution had agreed to abide by as preconditions to the receipt of federal funding.[126] The court rebuffed the notion that compliance with the PPA was both a condition of participation and a condition of payment.[127] The court thus affirmed the district court's grant of summary judgment in favor of the defendant and dismissed "all" allegations of FCA liability.[128] Because Sanford-Brown did not have a fraudulent mindset when it signed the PPA, the court reasoned, all subsequent claims for payment were not "poisoned

[122] *Id.* at 1172 n.1 ("Here, we need not address the viability of this theory, because it is beyond dispute that the University signed the written [PPA], thus making an express statement of compliance.").

[123] The *Hendow* court, over the objections of the defendant University, waved away concerns that the incentive compensation ban was a condition of participation rather than a condition of payment, saying "in this case, that is a distinction without a difference." *Id.* at 1176. The court also held that the University was liable under the FCA under a legally false theory—express false certification. *Id.* at 1172 n.1. In so holding, the *Hendow* court did two things: it imposed post-formation liability for claims that were legally false, *id.* at 1175 (which belongs to the same sub-species of claims as implied false certifications), and also demonstrated willingness to treat conditions of participation and conditions of payment equally in the education context, which is an essential step (and one that has caused some of the greatest friction), *see, e.g.*, United States *ex rel.* Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001), toward adopting the theory of post-formation implied false certification.

[124] The Seventh Circuit attempted to seize upon five carelessly drafted words contained in the *Hendow* court's introductory remarks—"in order to become eligible," *Hendow*, 461 F.3d at 1169—to rest the laurels of its no post-formation fraud argument. United States v. Sanford-Brown, Ltd., 788 F.3d 696, 710 (7th Cir. 2015). The Seventh Circuit was satisfied that this phrase, uttered once in a 5,000 word opinion, was enough to justify its finding that post-formation implied false certification is not a tenable theory of FCA liability in the education context. The fallacy of this position is self-evident; the *Hendow* court never again mentioned the fact that relators alleged the existence of fraud in the inducement and, even if the relators did so allege, the *Hendow* court's ultimate holding (that FCA liability can attach under a theory of post-formation express false certification) illustrates that this allegation would have been immaterial to the decision, regardless.

[125] *Sanford-Brown*, 788 F.3d at 710, *vacated*, United States *ex rel.* Nelson v. Sanford-Brown, 136 S. Ct. 2506 (2016).

[126] *Id.* at 701.

[127] *Id.* at 710.

[128] *Id.* at 709.

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by the institution's underlying bad faith."[129] This rationale, in essence, draws an artificial temporal line that amounts to a "distinction without a difference."[130] Importantly, *United States* ex rel. *Main. v. Oakland City University*, which the *Sanford-Brown* court cited with approbation, held that the FCA "requires a *causal* rather than a *temporal* connection between fraud and payment."[131] At bottom, the *Sanford-Brown* court maintains that a fraudulent mindset when signing a PPA is actionable under the FCA,[132] but an institution's decision to commit fraud after good-faith entry into a PPA is not actionable under the FCA theory of post-formation implied false certification. *Sanford-Brown*, therefore, stands for the proposition that:

> [P]romises of future performance do not become "false" due to subsequent non-compliance. . . . "[a] university that accepts federal funds that are contingent on following a regulation, which it then violates, has broken a contract." This distinction between fraud at the outset and breach of contract after entry into a PPA is significant . . . .[133]

Whether false claims submitted after signing a PPA are punishable under the FCA is not an issue that can be resolved by dismissively categorizing such claims as mere breaches of contract, *pace* the Seventh Circuit. The *Main* and *Sanford-Brown* courts, nevertheless, end their inquiry at this stage, maintaining that the answer is "straightforward."[134] But the inquiry is not so binary. Because legal falsity, and, more specifically, implied false certification, enjoys both legislative and judicial sanction,[135] public policy seems to militate against narrowly construing it in the

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[129] *Id.*

[130] United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1176 (9th Cir. 2006).

[131] United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005) (citing United States *ex rel.* Lamers v. Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999)) (emphasis added).

[132] Based on a theory of pre-formation implied false certification.

[133] *Sanford-Brown*, 788 F.3d at 710 (quoting *Main*, 426 F.3d at 917). The *Hendow* court agreed that breaches of contract did not give rise to FCA liability. *Hendow*, 461 F.3d at 1175.

[134] *Main*, 426 F.3d at 916.

[135] *See* United States *ex rel.* Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001) ("Foundational support for the implied false certification theory may be found in Congress' expressly stated purpose that the Act include at least some kinds of legally false claims . . . and in the Supreme Court's admonition that the Act intends to reach all forms of fraud that might cause financial loss to the government." (citing S. REP. NO. 99-345, at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274)); *see also* United States v. Neifert-White Co., 390 U.S. 228, 232 (1968); Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989,

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higher education context[136] where recent abuses have been both flagrant and frequent.[137] The *Main* and *Sanford-Brown* courts, therefore, seem to be on the wrong side of both logic and policy.[138]

PART IV

It has been over twenty years since Congress condemned the rampant fraud and abuse in federal aid programs and urged for greater oversight to protect students.[139] In the same time frame, the amount of student loans has increased ten-fold.[140] With more loans, more students are saddled with ever-greater amounts of debt, to the extent that student debt now accounts for more of the national debt than any other singular category of creditor debt in the United States (more than mortgages, motor vehicle loans, and credit cards, to name a few).[141] Aggregate student debt, according

1999 (2016) ("We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability.").

[136] The Supreme Court did not expressly outline the industry applicability of their holding in *Escobar*, but previous courts' reluctance to apply FCA liability theories equally across various, distinct industries would seem to indicate that the Supreme Court's restraint in this respect was intentional. The Court's decision ostensibly applies to the healthcare context where the submitted claim form is expressly false on its face (see *Summary and Significance*, *supra* note 74), but beyond this realm, its guidance would seem to lose some of its prescriptive potency.

[137] *See, e.g.*, Deming et al., *supra* note 114, at 140–41 ("Students leave for-profit colleges with higher levels of debt than students from other types of institutions and are more likely to default on their student loans . . . . Students who attended for-profit colleges are more likely to be unemployed and have lower earnings once they leave school than those in community colleges and other nonselective institutions."); *see also* Bidwell, *supra* note 118; Cohen, *supra* note 117; Picchi, *supra* note 118.

[138] *Sanford-Brown*, after all, was vacated and remanded following *Escobar*'s rejection of the Seventh Circuit's approach. *Sanford-Brown*, 788 F.3d at 710, *vacated*, United States *ex rel.* Nelson v. Sanford-Brown, 136 S. Ct. 2506 (2016).

[139] PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, ABUSES IN FEDERAL STUDENT AID PROGRAMS, S. REP. NO. 102-58, at 2, 37 (1991), http://files.eric.ed.gov/fulltext/ED332631.pdf ("The Department of Education must develop ways to assist those students who continue to be victimized by fraud and abuse within the GSLP. Because the Department's oversight systems have failed, students who have not received the education promised have been left responsible for loans that they cannot repay and, therefore, on which they all too often default.").

[140] Jeffrey Sparshott, *Congratulations, Class of 2015. You're the Most Indebted Ever (For Now)*, WALL ST. J.: REAL TIME ECONOMICS (May 8, 2015, 7:59 AM), http://blogs.wsj.com/economics/2015/05/08/congratulations-class-of-2015-youre-the-most-indebted-ever-for-now/.

[141] Josh Mitchell, *The Student-Loan Problem Is Even Worse Than Official Figures Indicate*, WALL ST. J.: REAL TIME ECONOMICS (Apr. 14, 2015, 2:04 PM), http://blogs.wsj.com/economics/2015/04/14/the-student-loan-problem-is-even-worse-than-official-figures-indicate/ ("Delinquencies on student debt are far higher than those for other forms of consumer credit, including credit cards, mortgages and auto

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to the Federal Reserve's calculations, had totaled $1.27 trillion by the end of March 2015.[142] The uncontrolled growth of student debt seriously impairs students' subsequent financial endeavors "such as purchasing homes, starting families, investing in small businesses, or retiring from the workforce."[143] Beyond this, increasingly higher delinquency rates among students[144] (which economists identify as being at least partially responsible for the 2008–2009 financial crash) suggest a strong causal mechanism for an overall "macroeconomic drag" on the national economy.[145] This has the inevitable domino effect of disincentivizing later investments for former students like home ownership or business startups.[146] Student debt, in this way, is like a cancer: because nothing has been able to stem its unregulated growth, its continued proliferation could cause systemic problems affecting not just indebted college graduates and dropouts, but the nation as a whole.[147] From a public policy standpoint, therefore, the importance of prosecuting fraud to protect these students cannot be overstated.[148]

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loans."); *Federal Reserve Statistical Release Consumer Credit*, BOARD GOVERNORS FED. RES. (Oct. 7, 2016, 3:00 PM), http://www.federalreserve.gov/releases/g19/current/g19.pdf.

[142] Jesse Bricker et al., *How Much Student Debt is Out There?*, BOARD GOVERNORS FED. RES.: FEDS NOTES (Aug. 7, 2015), http://www.federalreserve.gov/econresdata/notes/feds-notes/2015/how-much-student-debt-is-out-there-20150807.html.

[143] *Id.*

[144] *See* Meta Brown & Sydnee Caldwell, *Young Student Loan Borrowers Retreat from Housing and Auto Markets*, LIBERTY STREET ECONS. (Apr. 17, 2013, 7:00 AM), http://libertystreeteconomics.newyorkfed.org/2013/04/young-student-loan-borrowers-retreat-from-housing-and-auto-markets.html#.VuC3GsfWusM.

[145] Josh Freedman, *Student Loans Are A Drag On The Economy And Society*, FORBES: INVESTING (Feb. 11, 2014, 9:00 AM), http://www.forbes.com/sites/joshfreedman/2014/02/11/student-loans-are-a-big-drag-on-the-economy-and-society/#37fa8fac5504.

[146] David L. Eisler & Scott Garrison, *Addressing College Student Loan Debt*, 75 C&RL NEWS 374, 375 (2014), http://crln.acrl.org/content/75/7/374.full.pdf+html.

[147] *See* Sam Frizell, *Student Loans Are Ruining Your Life. Now They're Ruining the Economy, Too*, TIME: SAVING AND SPENDING (Feb. 26, 2014), http://time.com/10577/student-loans-are-ruining-your-life-now-theyre-ruining-the-economy-too/ ("Consumer purchasing is the primary driver of the U.S. economy . . . . '[T]he associations definitely suggest that growing student debt is a drag on consumption,' says [Wilbert] van der Klaauw [an economist with the Federal Reserve Bank of New York]."); Brown & Caldwell, *supra* note 144.

[148] *But see* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2002 (2016) ("[P]olicy arguments cannot supersede the clear statutory text.") (citing Kloeckner v. Solis, 568 U.S. __, __–__ n.4 (2012) (slip op., at 13–14 n.4)). Here, unlike the circumstances before the Court in *Escobar*, public policy militates in favor of broadening the FCA rather than limiting it. This is an important

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It is the opinion of this author that, despite the existing administrative infrastructure, the judiciary is an appropriate supplemental enforcement mechanism in the higher education context.[149] The FCA should be used by courts to ferret out and punish "all fraudulent attempts[,]" regardless of how the breaches are categorized.[150] The Supreme Court, therefore, should have resolved the circuit split by embracing a broader version of the implied false certification theory in *Escobar*. Far from rising to the level of an "extraordinarily expansive view of liability[,]"[151] the Court could have required a less restrictive showing of materiality[152] and could have abolished the distinction between conditions of payment and participation altogether; these approaches would have construed the FCA's provisions liberally and thereby effectuated congressional intent.[153]

The *Mikes* court, often cited as the seminal case on the theory of implied certification,[154] cautioned against reading the theory "out of context."[155] Though the court is quite reticent on precisely what context(s) is/are appropriate for the application of the implied false certification theory, it does offer that at least one context is less appropriate: healthcare.[156] The healthcare context is believed to be an inappropriate realm for broadened FCA liability because, in part, "Medicare regulations are among the most completely impenetrable texts within human

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difference because the Court already sanctioned broadening the scope of the FCA with a resounding eight to zero decision.

[149] United States *ex rel.* Sobek v. Educ. Mgmt., L.L.C., No. 10-131, 2013 U.S. Dist. LEXIS 76354, at *12–13 (W.D. Pa. May 31, 2013) ("The existence of an administrative enforcement mechanism does not preclude the possibility of an FCA claim [as] the government may select from a variety of remedies to combat fraud.") (citing United States *ex rel.* Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5, 688 F.3d 410, 414–15 (8th Cir. 2012)).

[150] *See supra* note 42 and accompanying text.

[151] *Escobar*, 136 S. Ct. 1989 at 2004.

[152] Though this is perhaps not contemplative of judicial economy, it aligns with the Court's endorsement of thorough factual inquiry over considerations of judicial economy in the FCA context. *Id.* at 2003–04 (supporting a fact intensive materiality inquiry by courts).

[153] *See infra* note 184.

[154] United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1171 (9th Cir. 2006); Holt & Klass, *supra* note 23, at 21–22; Martin, *supra* note 20, at 232–33; Lauer et al., *supra* note 75; Salcido, *supra* note 78, at 3.

[155] United States *ex rel.* Mikes v. Straus, 274 F.3d 687, 699 (2d Cir. 2001).

[156] *Id.* ("The *Ab-Tech* rationale, for example, does not fit comfortably in the health care context because the False Claims Act was not designed for use as a blunt instrument to enforce compliance with all *medical regulations* . . . ." (emphasis added)).

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experience"[157] where even the most diligent healthcare entity could become ensnared by an arcane condition of participation and thereby be on the hook for $11,000 per violation, plus triple the amount of the government's losses.[158] This situation would result in the inevitable federalization of medical malpractice, which, as the court notes, would contravene considerations of federalism.[159] Broadening FCA liability in the healthcare context, furthermore, is not contemplative of judicial economy,[160] would be detrimental for healthcare providers,[161] and would be generally contrary to public policy.[162] The *Mikes* court also invoked an institutional competence argument in justifying its refusal to hold Pulmonary and Critical Care Associates liable for uncalibrated spirometers under a theory of implied false certification.[163] By claiming that courts are an improper venue to adjudicate whether violations of some Medicare standards trigger FCA liability, the *Mikes* court invited Congress or the relevant administrative agency (in that case, Medicare) to act if there was disagreement over the court's interpretation.[164] In 2009, Congress did act—it promulgated FERA and expanded the FCA by requiring a materiality element.[165] Besides potentially

[157] Salcido, *supra* note 78, at 1–2 (citing United States v. Medica-Rents Co., 285 F. Supp. 2d 742, 770 (N.D. Tex. 2003)).

[158] U.S. DEP'T OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER, 1 (2011), https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.

[159] *Mikes*, 274 F.3d at 700.

[160] *Id.* (highlighting the fact that creating broader liability provisions exposes healthcare providers to FCA claims for relatively innocuous violations—for example, using a rubber-stamped signature in place of a hand-written signature); *see also* Lauer et al., *supra* note 75.

[161] Fabrikant & Solomon, *supra* note 28, at 114 (regarding "the principle that men must turn square corners when they deal with the government[: t]he square corners rule applies fully in the context of the FCA. *In the context of the heavily regulated health care field*, however, the application of the FCA to compliance certifications threatens to create so many corners for health care providers that the corners turn into circles." (emphasis added) (footnotes omitted) (internal quotations omitted) (quoting Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947))).

[162] Intuition, alone, indicates that hospitals should not be answerable to FCA violations on mere regulatory snafus: given that hospitals tend to care for the elderly, the disadvantaged, and the chronically ill, imposing hefty federal fines for lesser violations is plainly contrary to the public policy of promoting the social good that these institutions carry out. Although institutions of higher education, like for-profit schools, do serve the financially disadvantaged, their work is qualitatively different from that of healthcare providers.

[163] *Mikes*, 274 F.3d at 700.

[164] *Id.*

[165] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 386, 123 Stat. 1617.

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changing the canonical opinion in *Mikes*,[166] this legislative alteration to the FCA cast a wider net to prosecute fraud.[167]

Escobar, the most recent chapter in the ongoing saga of the evolving FCA, went further by sanctioning implied false certification.[168] But, because the issue before the Court was a violation of a Medicaid requirement, the Court was limited to circumstances arising in the healthcare context.[169] As such, the Court did not reach the propriety of an implied false certification of post-formation performance theory to prosecute for-profit institutions abusing federal aid programs. Even still, the Court's decision did not go far enough: preventing and punishing fraud, through a robust liability theory, is imperative in industries contracting with the government for economic, social justice, and public policy reasons.[170] The Court's endorsement of implied false certification, though an important step toward creating broader applicability for the FCA, is little more than a "pyrrhic" victory for achieving broader liability coverage.[171] In the higher education realm, the Court's ruling does not entirely foreclose the viability of the post-formation implied false certification theory, though its two-part test[172] does impose significant limitations on the theory.[173] It appears that these limitations will impermissibly shift the balance of power in FCA lawsuits by disadvantaging relators and students while giving significant leverage to educational institutions. In the interest of reining in abuses in the for-profit education sector, circuits interpreting the Court's recent guidance should broadly interpret *Escobar*'s normative directive.

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[166] *Mikes*, 274 F.3d at 697 ("We need not and do not address whether the Act contains a separate materiality requirement.").

[167] *Cf.* Rhoad et al., *supra* note 15.

[168] United Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1999 (2016).

[169] *Id.* at 2001. Even limited to this context, it is this author's contention that the holding is still too narrow.

[170] From a public policy standpoint, this may increase burdens on courts as more relators are able to survive motions to dismiss and summary judgment in the pleading stage; the Court, however, rejected contentions from Universal Health Services that requiring a fact-intensive evidentiary standard would impose too great a burden on courts. *Escobar*, 136 S. Ct. at 2004 n.6. From a social justice standpoint, an expanded implied false certification theory of liability under the FCA could be effective in protecting students in the higher education context where they are often in positions of unequal bargaining power.

[171] Reilly, *supra* note 72 ("The court's [*sic*] significant limitations on when [the implied false certification] theory can apply and the significant bolstering of the materiality requirement foreclose the government's most expansive use of the theory . . . .").

[172] *See* discussion *supra* Part I.

[173] *See Escobar*, 136 S. Ct. at 2001; *see also supra* notes 72, 74 and accompanying text.

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Much like Medicare's decision to link quality of care to payment decisions in the Value-Based Purchasing initiative, taxpayer investment in student aid should also be linked to the quality of education.[174] Doing so would liberally construe the *Escobar* holding by further diminishing the artificial distinction between conditions of participation and conditions of payment,[175] thereby effectuating legislative and judicial intent by broadening the scope of the FCA.[176] Rising student debt, high rates of delinquency, and the predatory behavior of for-profit institutions,[177] all increasingly larger problems in this country, provide a sound policy backdrop for urging that courts in the higher education context adopt a more expansive notion of implied false certification liability than the type embraced in *Escobar*.

CONCLUSION

In July of 1863, Matthew Brady captured the aftermath at the Battle of Gettysburg: iconic bloated corpses littering the blood-soaked ground like rag dolls shredded by the ravages of war. The battle marked the high tide of the Confederacy from which Robert E. Lee's army would never recover. Thanks to the bravery of officers like Joshua Lawrence Chamberlain, the tactical prescience of field commanders like George Meade, and the strong fraud deterrent effects of the FCA, the Union army survived the three-day battle and, ultimately, the war. In President Abraham Lincoln's eyes, the price-gouging contractors who occasioned the birth of the FCA were "worse than traitors in arms."[178] They were, in his words, "men who pretend loyalty to the flag, feast and fatten on the misfortune of the Nation while patriotic blood is crimsoning the plains of the South and their countrymen are

[174] Deming et al., *supra* note 114, at 137 ("In principle, taxpayer investment in student aid should be accompanied by scrutiny concerning whether students complete their course of study and subsequently earn enough to justify the investment and pay back their student loans.").

[175] Although the Supreme Court retained some semblance of distinction between the two concepts, see *Escobar*, 136 S. Ct. at 2003, Justice Thomas' opinion for the unanimous Court did intimate the lack of colorable distinction between the two: "[if] undisclosed violations of expressly designated conditions of payment [were sufficient to find liability, then] . . . [t]he government might respond by designating every legal requirement an express condition of payment." *Id.* at 2002. Though perhaps hyperbole, the Court points out that such caprice in designating a provision as payment or participation casts doubt onto whether there is, truly, or whether there should be a distinction between the two at all.

[176] *Escobar*, 136 S. Ct. at 1999; United States v. Neifert-White Co., 390 U.S. 228, 232 (1968); S. REP. NO. 99-345, at 9 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

[177] Deming et al., *supra* note 114, at 139–40.

[178] 89 CONG. REC. 10847 (1943) (quoting President Lincoln).

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mouldering in the dust."[179] Although the Civil War ended over 150 years ago, "Lincoln's Law" remains as relevant and important as ever.

It is time to combat the fraud of noncompliant for-profit institutions in the higher education setting.[180] The FCA, which has become an ever more important instrument for the federal government to prosecute fraud and regulate contracting practices in the private sector,[181] could be utilized more effectively by the judiciary. Federal courts should liberally invoke the sub-theories legal falsity, namely post-formation implied false certification, and hold for-profit institutions accountable to both their students and the public. Tying the receipt of federal monies to compliance with quality of education standards, as expressed in congressional committee reports, would abolish any meaningful difference between conditions of participation and payment in the higher education context, which would further open the door for courts to prosecute fraud under the broad theory of post-formation implied false certification.[182] This change would mirror Medicare's Value-Based Purchasing initiative,[183] effectuate congressional intent,[184] and, ultimately, protect students by encouraging prosecution of noncompliant for-profit colleges under the FCA.

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[179] *Id.*

[180] *See* discussion *supra* Part III.

[181] *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014*, DEP'T OF JUST. OFF. OF PUB. AFF.: JUSTICE NEWS (Nov. 20, 2014), https://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014 ("This is the first time the department has exceeded $5 billion in cases under the False Claims Act . . . . 'In the past three years, we have achieved the three largest annual recoveries ever recorded under the statute.'").

[182] *See* United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166 (9th Cir. 2006).

[183] *See Hospital Value-Based Purchasing*, *supra* note 104.

[184] S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 112TH CONG., EXECUTIVE SUMMARY 1, 10 (Comm. Print 2012), http://www.help.senate.gov/imo/media/for_profit_report/ExecutiveSummary.pdf ("[In light of abuses, the Committee recommended] [tying] access to Federal financial aid to meeting minimum student outcome thresholds . . . [as well as c]reat[ing] meaningful protections for students . . . [and e]nforc[ing] minimum standards for student services that include tutoring, remediation, financial aid, and career counseling and job placement . . . .").

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