461 F.3d 1166 (2006)

UNITED STATES of America, ex rel. Mary HENDOW; Julie Albertson, Plaintiffs-Appellants,

v.

UNIVERSITY OF PHOENIX, Defendant-Appellee.

No. 04-16247.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted February 15, 2006.
Filed September 5, 2006.

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A. False Certification

Many different courts have held that a claim under the False Claims Act can be false where a party merely falsely certifies compliance with a statute or regulation as a condition to government payment. *See, e.g., id.* at 786; *Mikes v. Straus,* 274 F.3d 687, 697-700 (2d Cir.2001); *United States ex rel. Quinn v. Omnicare Inc.,* 382 F.3d 432, 441 (3d Cir.2004). The leading case on false certification in the Ninth Circuit is *United States ex rel. Hopper v. Anton.*

In *Anton,* a relator-plaintiff brought a False Claims Act suit against the Los Angeles Unified School District (LAUSD) for allegedly submitting false claims for federal funds while in knowing violation of an underlying statute granting funds for special education programs (the Individuals with Disabilities Education Act, "IDEA"). 91 F.3d at 1263. In particular, the relator alleged that LAUSD's method of evaluating potential student eligibility for the program violated the IDEA. *Id.* LAUSD allegedly (1) submitted forms stating the number of eligible students in the district; (2) cashed checks that were partially comprised of federal funds; and (3) submitted triennial certifications averring that LAUSD "`will meet all applicable requirements of state and federal law and regulations,' including `general compliance' with the IDEA." *Id.* at 1265. We held that False Claims Act liability can attach under the theory of false certification, although the relators had not presented sufficient evidence of fraud. *Id.*

In *Anton,* we explained the theory of false certification, identifying two major considerations: "`(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering Government's [sic] loss.'" *Id.* at 1266 (quoting John T. Boese, *Civil False Claims and Qui Tam Actions* 1-29 to 1-30 (1995)). We also held that "[m]ere regulatory violations do not give rise to a viable FCA action," but rather, "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Id.* at 1266-67 (emphasis in original). From the principles underlying these two statements, we created four conditions necessary to succeed on the false certification theory of False Claims Act liability.

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> Fourth and most obviously, for a false statement or course of action to be actionable under the false certification theory of false claims liability, it is necessary that it involve an actual *claim,* which is to say, a call on the government fisc. This is self-evident from the statutory language, of course, which requires a "claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). In *Anton,* the case involved direct receipt of federal funding, but we agree with the Fourth Circuit that a claim arises whenever the government is asked to "pay out money or to forfeit moneys due." *Harrison,* 176 F.3d at 788.

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The Seventh Circuit recently adopted a version of the promissory fraud theory in a case almost identical to this one, *United States ex rel. Main v. Oakland City Univ.,* 426 F.3d 914 (7th Cir.2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 1786, 164 L.Ed.2d 519 (2006). Relators in *Main* alleged liability under the False Claims Act based on an Oakland City University representation that it would comply with the incentive compensation ban, despite its knowledge of the ban and intent not to comply. *See id.* at 916. As here, the district court dismissed the case for failure to state a claim, ruling that even willful falsehoods in a "phase-one application" do not violate the False Claims Act, because such an application requests a declaration of eligibility rather than an immediate payment from the treasury. *See id.* The district court further ruled that the "phase two" applications for funds are not false, because they do not repeat the assurance that the University abides by the rule against paying contingent fees to recruiters. *See id.*

The Seventh Circuit reversed, analyzing the claim under a promissory fraud theory, and holding that the relators had stated a claim based upon allegations of fraud in the inducement of the original Program Participation Agreement. *See id.* The court did not address the false certification theory directly, although it implicitly recognized *1174 that the district court had rejected relator's arguments on that ground. Pursuant to the plain language of 31 U.S.C. § 3729(a)(2), the court determined that False Claims Act liability was clear: "[t]he 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." *Id.*

We find the Seventh Circuit's reasoning in adopting the promissory fraud theory persuasive. We also note that the promissory fraud theory, in substance, is not so different from the false certification theory, and even requires the same elements. For instance: first, a claim must be false and, second, that falsity must be knowingly perpetrated. The Seventh Circuit opined eloquently on this point:

> 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. at 917 (emphasis in original) (citations omitted). We, too, have held that for promissory fraud to be actionable under the False Claims Act, "the promise must be false when made." *Anton*, 91 F.3d at 1267. 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. *Id.* In short, therefore, under a promissory fraud theory, relator must allege a false or fraudulent course of conduct, made with scienter.

Third, as with the false certification theory, the promissory fraud theory requires that the underlying fraud be material to the government's decision to pay out moneys to the claimant. The Seventh Circuit in *Main* stated that the False Claims Act requires "a causal rather than a temporal connection between fraud and payment," 426 F.3d at 916, and we agree. And fourth and finally, there must exist a *claim*—a call on the government fisc. As the Seventh Circuit rightly noted, the precise logistical details of how the claim is made—with respect to timing, for instance, or the number of stages involved—are immaterial: "[i]f 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." *Id.* In other words, for there to exist a "claim" for purposes of False Claims Act liability, it must involve merely some sort of request for the government to pay out money or forfeit moneys due.