UNITED STATES of America ex rel. Jeffrey E. MAIN, Plaintiff-Appellant,

v.

OAKLAND CITY UNIVERSITY, Defendant-Appellee.

No. 05-2016.

United States Court of Appeals, Seventh Circuit.

Argued September 12, 2005.
Decided October 20, 2005.
Rehearing and Rehearing Denied November 17, 2005.

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Although no published appellate decision to date has addressed the question whether a multi-stage process forecloses liability for fraud in the first stage, the answer is straightforward. 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". 31 U.S.C. § 3729(a)(2). 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. See generally *United States ex rel. Lamers v. Green Bay*, 168 F.3d 1013, 1018 (7th Cir.1999). 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.

917 *917 The University protests that this approach would treat any violation of federal regulations in a funding program as actionable fraud, but that's wrong. A university that accepts federal funds that are contingent on following a regulation, which it then violates, has broken a contract. See *Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). But fraud requires more than breach of promise: fraud entails making a false representation, such as a statement that the speaker will do something it plans not to do. Tripping up on a regulatory complexity does not entail a knowingly false representation.

To prevail in this suit Main must establish that the University not only knew, when it signed the phase-one application, 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. See, e.g., *Perlman v. Zell*, 185 F.3d 850 (7th Cir.1999); *Bower v. Jones*, 978 F.2d 1004, 1012 (7th Cir. 1992). So if, as a district judge supposed in *United States ex rel. Graves v. ITT Educational Services*, 284 F.Supp.2d 487 (S.D.Tex.2003), educational institutions do not certify to the Department of Education at the phase-one stage that they know about and comply with the rule against paying capitation fees for recruiting students, then the University will win this suit whether or not it has violated that rule. But if 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.