The "Materiality" of the Incentive Compensation Ban in Higher Education

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THE “MATERIALITY” OF THE INCENTIVE COMPENSATION BAN IN HIGHER EDUCATION

INTRODUCTION

Students of this generation are continuously troubled with the burden of loans taken out to attend their college of choice. Generally, the increase in salary as a result of their education will be enough to repay student loan debt.\(^1\) For first time students at public and private four-year colleges, twelve year default rates since 2003 are 12-13%.\(^2\) Conversely, twelve-year default rates for borrowers at for-profit colleges is 47%.\(^3\) More than 3 out of 4 students who graduate with a bachelor’s degree from a for-profit college will be saddled with $20,000 or more in debt.\(^4\) Certain for-profit colleges accept up to 90% of their gross tuition from federal grants, loans, or scholarships.\(^5\) The Department of Education has set forth quality assurance standards for institutions that accept federal funds to ensure they do not engage in activity that the Department of Education deems predatory.\(^6\) The Program Participation Agreement (PPA) administers regulations for colleges in order to ensure the use of accurate graduation statistics, student success, and legitimate educational practices.\(^7\)

Institutions may only participate in Title IV aid programs if they sign a written agreement with the Secretary of the Department of Education.\(^8\) Title IV financial aid includes grants, federal subsidized and unsubsidized loans, and need based opportunity grants from the government.\(^9\) Section 667.13 of the PPA sets out the standards that these institutions agree to when entering the PPA with the government.\(^10\) In particular, schools agree to an Incentive Compensation Ban (ICB), paying employees bonuses based solely on positive recruitment performance.\(^11\) The ICB states that an employee or independent party may not receive payment based on the number of students they recruit to a school.\(^12\)

\(^2\) Id.
\(^3\) Id.
\(^4\) Id.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^10\) 34 CFR § 668.14.
\(^11\) Id.
\(^12\) Id.
ICB does not forbid schools from marketing themselves to students, but payment cannot be based on enrollment numbers. Multiple for-profit colleges have been accused, and admitted to, paying persons in violations of the ICB. However, even after the government noticed such violations, some of these schools continued to receive Title IV funds. Under the False Claims Act (FCA), promises made to the government only give rise to liability if it is determined that the promise was “material” to the government’s decision to enter the contract. This “materiality” standard has caused differing opinions between circuits about the necessity of the ICB in the government’s decision about whether to enter the contract. Currently, there is a Circuit split between the Eighth and Tenth Circuit as to whether the ICB gives rise to liability under the FCA.

For-profit schools would risk losing substantial amounts of revenue in tuition funded by federal aid every year if their contract under the PPA was revoked. A number of different infractions have been litigated in the courts in recent years. Most notably, these schools are accused of paying employees or outside recruiters bonuses based on enrollment of students, along with altering records to boost students’ GPAs and attendance records. Often, the crux of these cases is not the truth of the assertions but whether these actions broke a “material” promise that affected the government’s decision regarding whether to pay these institutions. In other cases, investors in these for-profit colleges sue for security fraud due to the misrepresentation of their enrollment numbers and tuition revenue.

13 Id.
15 U.S. v. Sanford-Brown Ltd., 840 F.3d 445, 447 (7th Cir. 2016) (stating that the Department of Education had examined Sanford-Brown multiple times and never declined a request for payment of Title IV funds).
20 See U.S. ex rel. Main, 426 F.3d. at 916-18; Stevens–Henager College, 305 F.Supp.3d. at 1305-08; Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049, 1055-1056 (9th Cir. 2008).
21 See Sanford-Brown Ltd., 840 F.3d at 447-448; Stevens-Henager College, 305 F.Supp.3d. at 1297-1305.
22 Id.
23 Id.
For many for-profit colleges, a majority of their gross tuition is made up of students paying with some type of Title IV aid. For Heritage College, a private for-profit college working under Weston Education, Inc., roughly 97% of their students received Title IV aid. Remaining eligible to accept federal funds has become an integral piece of these for-profit colleges' business models. Two main theories have been recognized by the courts for FCA liability when evaluating ICB claims. First, promissory fraud, which “attaches liability to each and every claim submitted under a contract obtained through fraudulent statements.” Promissory fraud allows courts to attach liability to past statements made under false pretenses. Second, the implied false certification theory (IFCT) attaches liability to every request for payment from the government when they are not in compliance with the underlying statute; in this case, the PPA. The IFCT looks at present claims of non-compliance, rather than past representations, such as promissory fraud. This paper will cover the courts' analysis of these two legal theories and the key points that have created differing outcomes. The courts' precedent points heavily to the determination that the ICB does not rise to a level of materiality under either of these theories.

I. FALSE CLAIMS ACT

The FCA is the primary vehicle for the government, or private parties on behalf of the government, to recover funds from those who defraud the government or its programs. As noted earlier, institutions that want to receive federal loans from their students must sign a PPA. Signing the PPA gives rise to liability under the FCA if the institution fails to uphold their material promises to the government. A condition set forth by the government can be deemed material in a number of different ways. As stated in Allison Engine Co., Inc. v. U.S. ex rel. Sanders, “The False Claims Act is not an all-purpose antifraud

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26 Stevens-Henager College, 305 F.Supp.3d. at 1295-1297 (The two theories being promissory fraud and implied false certification theory).
27 Id. at 1295.
28 Id.
29 Id. at 1296.
30 Id.
31 Id.
32 Id. at 1294.
33 34 CFR § 668.14.
34 Id.
35 Universal Health Serv., 136 U.S. at 2001 (stating that materiality cannot be determined by a single dispositive fact, must have determinative of the government’s actions).
statute . . .” In other words, not every misrepresentation is an actionable claim under the FCA.\(^{36}\)

The FCA attempts to provide remedies for the government when its contractors do not fulfill the obligations that they are contracted with to complete.\(^{37}\) The point is not for the government to sue every contractor who fails to complete a job to satisfaction.\(^{38}\) Rather, the FCA was intended to protect the government against contractors who act far outside the bounds of the contract that the government is no longer getting the deal they bargained for.\(^{39}\) However, this means that even if a provision is not included in their contract with the government, the contractor is not released from all liability if they have “actual knowledge” that the provision would have been necessary for payment.\(^{40}\) For example, “If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has ‘actual knowledge.’”\(^{41}\) A reasonable person would seemingly know that if the government is contracting for guns, they expect the guns to be functional upon receipt of the weapons.\(^{42}\)

The main controversy surrounding the FCA when applied to for-profit colleges is what misrepresentations actually give rise to liability under the act.\(^{43}\) Simply because a term was laid out and agreed to in a government contract does not give rise to liability.\(^{44}\) In \textit{Univ. Health Services v. United States in rel. Escobar}, the Court ruled that there is no strict liability for a defendant that fails to disclose the violation of a contractual provision.\(^{45}\) Meaning that putting a provision in a contract, does not lead to a dispositive finding of materiality.\(^{46}\) Furthermore, a misrepresentation is only actionable if the nondisclosure is over a provision, expressed or implied, that was a material provision the government’s acceptance of the contract.\(^{47}\)

\(^{38}\) Id.
\(^{39}\) Id.
\(^{40}\) Id.
\(^{41}\) Id. at 2001.
\(^{42}\) Id.
\(^{43}\) Compare Sanford-Brown Ltd., 840 F.3d at 447-448 with Stevens-Henager College, 305 F.Supp.3d at 1305.
\(^{44}\) Universal Health Serv., 136 U.S. at 2001.
\(^{45}\) Id.
\(^{46}\) Id. at 2003.
\(^{47}\) Id. at 2000.
II. THE INCENTIVE COMPENSATION BAN

Different from most professions, institutions receiving Title IV funds from the Department of Education are unable to pay recruiters based on the numbers of students they enroll. The ICB bars institutions from “provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance.” However, the ICB has not always been in place for colleges. Today, for-profit schools are often charged with contracting personnel, with express or bonus compensation for boosted enrollment numbers, leading to increases in federal student loans for the institution. Without the ICB, colleges have engaged in predatory practices that often deceive potential students, luring them in with false promises and aggressive advertising. The Obama administration sued multiple colleges over the job statistics used to lure students, often promising much more lucrative job opportunities than statistics were able to back up.

III. PROMISSORY FRAUD

Promissory fraud is a legal theory that “attaches liability” under the FCA to every claim submitted to the government, under the terms of a contract, when the original contract was obtained due to false representations. Courts have found institutions liable under the FCA for promissory fraud when the institutions submitted requests for disbursement of Title IV funds that made “false or fraudulent” statements in their PPA. For a claim to be “false or fraudulent” a plaintiff must show 4 factors: (1) that the defendant made false statements; (2) that the defendant knew that the statements were false; (3) that the false statements were material to the Government’s decision to enter into a

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51 Id.
54 Stevens-Henager College, 305 F.Supp.3d at 1295.
55 U.S. ex rel. Hendow v. University of Phoenix, 461 F.3d 1166, 1174 (9th Cir. 2006).
contract with the defendant, and (4) that the defendant made claims for payment under the contract that was fraudulently induced.”

Litigation in this space heavily revolves around the government proving the defendant had knowledge of the false statements and that specific statements made to the Department of Education were material in their execution of the PPA. How the court defines materiality will be discussed later.

IV. IMPLIED FALSE CERTIFICATION THEORY

The other hook for liability under the FCA in Universal Health Servs. is the IFCT. The IFCT attaches liability to every claim for payment from the government that has an implicit promise to comply with all relevant government regulations. Adversely, University Health Services argued that these claims have no implicit representations and are not actionable barring actual fraud. To reach a basis of liability under the false certification, there are two conditions that must be met. “First, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.” Ultimately, the IFCT liability determination revolves around the finding of whether or not the specific misrepresentation is “material” to the government’s decision to enter the PPA.

The court in Escobar goes into a detailed analysis of why it is necessary for the government to have a recourse when contractors break material promises. The court analogized, “an applicant for an adjunct position at a local college makes an actionable misrepresentation when his resume lists prior jobs and then retirement, but fails to disclose that his “retirement” was a prison stint for perpetrating a $12 million bank fraud.” In the above situation, it seems clear that the potential professor concealing his arrest would have most likely weighed on the School Board’s decision in his hiring.

56 Stevens-Henager College, 305 F.Supp.3d. at 1296.
57 See generally Sanford-Brown Ltd., 840 F.3d 696; Stevens-Henager College, 305 F.Supp.3d. 1279.
59 Stevens-Henager College, 305 F.Supp.3d. at 1296.
60 Id.
61 Sanford-Brown Ltd., 840 F.3d at 447.
63 Id.
64 Id. at 2000.
65 Id.
V. MATERIALITY

Under Section (b)(4) of the FCA, a term is material to the government, if it “ha[s] a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” Courts also look to the Restatement (Second) of Contracts for more guidance on the determination of materiality. “A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.” The first determination by the court in Escobar was that simply because the government identifies a provision to receive payment does not make that provision material. The court laid out 3 factors in Junius Constr. Co. v. Cohen for determining the materiality of a promise “(1) whether the violation goes to the “essence of the bargain, (2) whether the violation is significant, as opposed to “minor or insubstantial,” and (3) whether the Government has taken action in response to similar, known violations.” Under the first element of materiality, courts look at the core of the transaction to determine whether the misrepresentation goes to the very essence of the bargain. In Junius Constr., the court held that when a misrepresentation is vital to the transaction, that is something that goes to the very essence of the bargain. In that case, the court held that the plaintiff would not have signed the contract had he known of the possibility that certain permit would be denied, making it impossible for him to fulfil the exact purpose of the agreement. Furthermore, a person only presenting positive facts about a certain transaction, while failing to disclose negative aspects that the buyer would have no other way of knowing, is an actionable misrepresentation.

The second element of materially requires that the misrepresentation be significant, and not only “minor or insubstantial.” The court in Junius Constr. states that if no one can say, within reason, that the government would have entered into the contract had the fact been disclosed, then that fact may rise to materiality. The court seems to combine this standard with the third prong and

66 Id. at 1906.
67 Id. at 2002.
68 Id. at 2002-2003.
69 Id. at 2003.
71 Id.
72 Id.
74 Id. at 400.
76 Junius Constr., 257 N.Y., at 400, 178 N.E., at 674.
considers past actions from the government under similar circumstances. 77 However, even if a government agency has continually ignored past violations, public changes in position on a certain provision is enough to give rise to materiality. 78 Many cases put forth different off-hand rules on how to determine materiality, going as far back as to review legislative history when the ICB was passed. 79 Materiality often comes down to a determination based on the fact-finding in specific cases. 80

The other main focus for courts in the materiality determination is the Restatement Second for Contracts. 81 The comments of the restatement defines materiality as:

The requirement of materiality may be met in either of two ways. First, a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent. Second, it is material if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent. 82

This definition of materiality seems to give a more lenient standard than the court in Junius Constr. The court in Junius Constr. necessitates that all three elements be met for a finding of materiality. 83 However, the Supreme Court in Escobar kept a heightened standard of materiality than that of what the Second Restatement of Contracts provides. 84 Seemingly, the Restatement is used more for guidance, rather than the final determination of materiality under the FCA. 85

VI. ANALYSIS

A. Sanford-Brown College

Sanford-Brown was a for-profit college located in Wisconsin that closed in May of 2017. 86 From June 2008 to January 2009, Brent Nelson served as a  

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78 Id. at 2004 (Knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material).
81 Id.
82 Restatement (Second) of Contracts § 162 (2019).
85 Id. (The Court focuses on the Junius factors for a determination of materiality rather than applying the facts to the Contracts restatement definition).
86 Information for Former Students, Sanford-Brown, https://www.sanfordbrown.edu/INFORMATION%20FOR%20FORMER%20STUDENTS (last visited Apr. 8, 2019).
Director of Education at one of Sanford-Brown’s campuses. During his time as a director, Nelson observed the use of incentive-based compensation for student enrollment, failure to refund unearned subsidies, and failure to maintain necessary records for student progress.

In 2014, Nelson brought a claim against Sanford-Brown College under promissory fraud and IFCT theories of liability. First, the former director of Sanford-Brown College alleged that directors of the college presented the government with false records in regard to student progress. These false records caused students to apply for Title IV funds, which Sanford-Brown College knew or should have known they were not eligible for. Second, the former director argued that even if Sanford-Brown college entered into the PPA with good intentions, they did not continually comply with the PPA.

Sanford-Brown set up its defense by arguing that it had entered into the PPA in good faith and further that its continued compliance was not dispositive of a material condition for payment. In U.S. ex rel. Main v. Oakland City University, the court noted that the promise of specific future performance is not a false statement due to non-compliance at a later date. Furthermore, Sanford-Brown cited precedent from the Eighth Circuit which held that the material factor for payment was the “good-faith entry into the PPA”, rather than continued compliance. In the brief submitted on behalf of the United States, the only evidence presented for knowledge of the alleged violations were witnesses to actions post-signing of the original PPA agreement.

The Tenth Circuit rejected the applicability of the doctrine of implied false certification. Judge Manion, writing for a unanimous bench, held that it was “unreasonable” for institutions such as Sanford-Brown to continually comply

87 U.S. v. Sanford-Brown, Ltd. 30 F.Supp.3d at 806.
88 Id. at 809.
89 Id. at 806.
90 Id.
91 Id. at 807.
93 Sanford-Brown Ltd., 840 F.3d at 710.
94 U.S. Ex rel. Main v. Oakland City University, 426 F.3d at 917.
95 U.S. ex rel. Vigil v. Nelnet, Inc., 639 F.3d 791, 797 (8th Cir.2011) (The 8th circuit later distinguished this case in ex rel. Miller when the point of contention was the False Records Requirement of the PPA rather than the ICB).
97 U.S. v. Sanford-Brown Ltd., 840 F.3d at 700.
with the countless pages of legislation incorporated and referenced in the PPA.\textsuperscript{98} The court agreed with the holding in \textit{U.S. ex rel. Vigil v. Nelnet, Inc.}, holding that absent some type of evidence of fraud before entering into the PPA with the government, there was no liability under the FCA.\textsuperscript{99}

However, in 2016 \textit{Universal Health Servs.} was decided by the Supreme Court and overruled the \textit{Sanford-Brown} determination that the IFCT was not applicable.\textsuperscript{100} The case was then remanded back to the Appeals Court for reconsideration in light of the new precedent.\textsuperscript{101} Upon remand, the appellate court granted summary judgment for Sanford-Brown. The court reasoned that Sanford-Brown made no misrepresentations when they made their claim for payment.\textsuperscript{102} Additionally, the plaintiff provided no evidence that the infractions committed by Sanford-Brown were material to the government’s decision to pay.\textsuperscript{103} Finally, the court pointed to evidence showing that the Department of Education examined Sanford-Brown multiple times in the past and continued to pay their claims in full.\textsuperscript{104} Evidence showing that the government had actual knowledge that specific agreements were not upheld and it still paid out those claims points very strongly to those agreements not being material to the government’s decision.\textsuperscript{105}

\textbf{B. Stevens-Henager College}

Steven-Henager College is a for-profit college that has multiple campuses spread out across Utah and Idaho.\textsuperscript{106} As of March 2019, Stevens-Henager College has a 23% graduation rate and roughly several hundred students.\textsuperscript{107} In 2013, Steven-Henager College was sued for promissory fraud under the FCA, due to their inability to comply with the ICB.\textsuperscript{108} Generally, admissions consultants for Stevens-Henager College received bonuses if they recruited a student who finished thirty-six credits or recruited a total of five students in a three-month window and maintained a proscribed “conversion ratio” over that

\begin{itemize}
\item \textsuperscript{98} \textit{Id.} at 711.
\item \textsuperscript{99} \textit{Id.} at 710.
\item \textsuperscript{100} \textit{Universal Health Servs., Inc.}, 136 U.S. at 2001.
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} \textit{U.S. v. Sanford-Brown Ltd.}, 840 F.3d at 445.
\item \textsuperscript{103} \textit{Id.}
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Universal Health Servs., Inc.}, 136 U.S. at 2003.
\item \textsuperscript{106} \textit{STEVEN-HENAGER COLLEGE, CAMPUS LOCATIONS}, https://www.stevenshenager.edu/locations (last visited Apr. 9, 2019).
\item \textsuperscript{107} \textit{STEVEN-HENAGER COLLEGE}, https://collegescorecard.ed.gov/school/7446677-Stevens-Henager_College (last visited Apr. 9, 2019).
\item \textsuperscript{108} \textit{U.S. v. Stevens-Henager College}, 305 F.Supp.3d. at 1285.
\end{itemize}
three month period. The “conversion ratio” was calculated by taking the number of students an admissions consultant actually enrolled and dividing it by the number of interviews that consultant conducted. For example, if the admissions consultant conducted 50 interviews with potential students and 30 of them enrolled at Steven-Henager College, the consultant would have a conversion ratio of 60%.

In March of 2009, Katie Brooks was hired at Stevens-Henager College as an admissions consultant with a base salary of $38,000. In 2010, Ms. Brooks received bonuses of $31,450, which totaled more than 80% of her base salary. Nannette Wride, another admissions consultant for Stevens-Henager College, was given between four and five separate bonuses based on her success in enrolling students. Each bonus payment ranged from $1,200 to $4,000, based on how many students were enrolled during a specific period of time.

Stevens-Henager College’s main defense to the claims brought under the FCA was that they had no reason to believe that the ICB was a material part of obtaining Title IV eligibility. In the defendant’s brief, the defense pointed to evidence that over a thirteen-year timeframe, the Department of Education knowingly paid out claims to colleges who were not in compliance with the ICB. Additionally, after the disclosure of the ICB violations, the Department of Education decided to enter into a new PPA agreement with Stevens-Henager College. Pointing to these key facts, coupled with the wording in Escobar that the FCA is not an “all-purpose antifraud statute”, Stevens-Henager College argued that the ICB is not material to the government’s decision for entering the PPA.

The court laid out the three factors that were discussed earlier in Junius Constr. Co., for their materiality determination. A holistic assessment of these factors was enough to convince the court that the Department of Education

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109 Id. at 1288 (A conversion ratio was used to determine the effectiveness of counselors’ enrollment tactics in meetings with prospective students).
110 Id. at 1279 (Footnote 1).
111 Id. at 1288.
112 Id.
113 Id.
114 Id.
115 Id. at 1300
116 Defendant’s Motion to Dismiss the Government’s Amended Complaint in Intervention, U.S. v. Stevens-Henager College, 2018 WL 7446425 (June 15, 2018).
117 Id.
118 Id.
viewed the ICB requirement as material. The court began its analysis of the materiality of the ICB requirement by showing that the PPA stated the required compliance with the ICB in three separate sections. Second, the court looked to the legislative history of Congress, pointing to a statute enacted in 1992 that banned incentives based on enrollment numbers in schools. Third, the court strayed from concrete precedent and described the opportunity for fraud and abuse if the ICB was disregarded as a material element of the PPA. Fourth, the court pointed to a contractual provision in the PPA stating that the Department of Education may choose to withhold funds if a school was not in compliance with the ICB. The most influential factor for the court in this case was that Stevens-Henager College took affirmative steps in concealing their non-compliance with the ICB requirement.

CONCLUSION

For-profit colleges are openly admitting to their wrong-doing and failure to comply with the federal regulations they contractually agreed to adhere to. Even after the Seventh Circuit’s decision was overturned in Escobar, the court still attached no liability to the misrepresentations of Sanford-Brown. It seems as though the PPA was written with rules that are not actually necessary to its enforcement. The court in United Health Servs. puts the bar of materiality at “look[ing] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” The court in Sanford-Brown held that, even with clear evidence that the a college had been operating in violation of the PPA, institutions are still allowed to accept Title IV student loans. This created an inference that any violation of the PPA was not automatically material to their decision.

The ability for the government to reject claims for payment from colleges

121 Id.
122 Id. at 1303.
123 Id.
124 Id. at 1304.
125 Id.
126 United States ex rel. Miller v. Weston Educational, Inc. at 499, 502, and 503.
128 Id. at 448 (Stating that there have been past cases with claims that violated the PPA but were not actionable due to lack of materiality).
129 Universal Health Serv. 136 U.S. at 2002.
130 U.S. v. Sanford-Brown Ltd., 788 F.3d at 714.
131 Id.
based on non-compliance with the ICB weigh on opposite sides of materiality for the courts in the above cases. In Sanford-Brown, the court noted that because the government never declined a payment based on non-compliance with the ICB, precedent weighs against a finding of materiality. Citing precedent from the Supreme Court in Escobar about the government continuing to pay on claims despite non-compliance points heavily towards it not being material. On the other side, the Tenth Circuit reasoned that the government explicitly contracting to withhold funds for non-compliance with the ICB spoke to the importance of this provision when drafting this contract. The rationale is that while drafting the PPA, the government saw specific importance in the ICB and reserved the right to withhold funds in the event of non-compliance. These incompatible rationalizations create precedents directly in conflict with one another.

The Tenth Circuit’s finding of materiality in regard to the ICB is unfounded and should be substituted for an analysis closer to that of the Eighth Circuit. Discussed earlier in the Stevens-Henager case, the court laid out five factors for determining materiality. In Escobar, the court stated that a proper analysis must include a wide-range of factors to decide whether the provision affected the government’s decision to enter the contract. Though the Tenth Circuit does weigh a wide-range of factors, they focus on factors that are not relevant to the materiality analysis.

The Tenth Circuit in U.S. v. Stevens-Henager College misinterprets the standard for finding materiality. As the court does touch lightly on the effect of the promise on the Department of Education’s decision to enter the contract, which is the main focus of a materiality determination, their analysis focuses on Steven-Henager’s actions to prove their knowledge of the provisions importance. The Tenth Circuit points towards public legislative notes from the drafting of the PPA, annual audits from independent professionals to ensure compliance with PPA standards, and Steven-Henager’s attempts to conceal their

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132 Id. at 700.
133 Universal Health Serv. 136 U.S. at 2001.
135 Id.
136 Id. at 1303-1305.
137 Id.
138 Universal Health Serv. 136 U.S. at 2001 (“the misrepresentation must be material to the other party’s course of action.”).
139 U.S. Ex. Rel. Brooks v. Stevens-Henager College, 305 F.Supp.3d. at 1300, (stating “Put Simply, Steven-Henager argues that the Government has not alleged sufficient facts to establish that Stevens-Henager knew or should have known”).
140 Id. at 1303 (noting that four out of their five determining factors pointed more towards knowledge rather than the Department of Education attaching importance).
noncompliance with the ICB.\textsuperscript{141} Furthermore, the Tenth Circuit’s determination of materiality looks to whether the statements about their intent to comply with the ICB were false at the time they originally entered into the PPA with the government.\textsuperscript{142} While all of these factors are relevant in a determination for liability under the FCA, they are not particularly relevant in the materiality determination.\textsuperscript{143} The Tenth Circuit focuses heavily on facts that speak to whether the college was aware of their practices, which speaks more to the scienter factor in the FCA determination, rather than materiality. These are two separate factors. Mixing the analysis of the two factors to find liability defeats the purpose of a four-factor test. The Supreme Court in Escobar specifically rejected the argument “that any statutory, regulatory, or contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware of the violation”.\textsuperscript{144}

Additionally, the Supreme Court in Escobar stated that “if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements were not material”.\textsuperscript{145} As pointed out in the Stevens-Henager’s Motion to Dismiss, in the 20 year history that the ICB has been included as a provision of the PPA, the government has never denied a payment because of non-compliance with it.\textsuperscript{146} The Tenth Circuit admits that the Department of Education employs independent professionals to audit these Institutions to ensure compliance with the ICB along with other provisions.\textsuperscript{147} However, even after completion of the audits of Stevens-Henager College, and others who were in violation of the ICB, the government continued to pay out Title IV funds.\textsuperscript{148}

The Department of Education hires independent auditors annually to review operating procedures of these Institutions and ensure their compliance with the PPA.\textsuperscript{149} Furthermore, the government made sure to place in the contract that a violation of a single provision gives the Department of Education the authority

\begin{itemize}
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id. (Stating that the only way Stevens-Henager could receive federal funds was by promising to comply with the ICB, while having intentions not to do so).
\item \textsuperscript{143} Id. at 1298-1299 (Discussing the four elements of an FCA claim in order to establish a promissory fraud claim); Escobar.
\item \textsuperscript{144} Universal Health Serv. 136 U.S. at 2003.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Defendant’s Motion to Dismiss the Government’s Amended Complaint in Intervention, U.S. v. Stevens-Henager College, 2018 WL 7446425 (June 15, 2018).
\item \textsuperscript{147} Stevens-Henager College, 305 F.Supp.3d. at 1303.
\item \textsuperscript{148} Defendant’s Motion to Dismiss the Government’s Amended Complaint in Intervention, U.S. v. Stevens-Henager College, 2018 WL 7446425 (June 15, 2018).
\item \textsuperscript{149} U.S. v. Stevens-Henager College, 305 F.Supp.3d. at 1304.
\end{itemize}
to revoke their ability to receive federal funds and sue for any funds received under false pretenses. Had the government felt that any evidence from their audits warranted a withdrawal from the PPA they had full power to do so. In *Stevens-Henagar College*, a non-governmental individual was seeking to be enriched by funds that the government had expressed no interest in obtaining. The False Claims Act is not an all-encompassing statute to recover from any fraudulent act by a contractor with the government.

The arguments the court made on their own are not sufficient to find the ICB as a material provision to the decision of the government. However, government practices over the past couple of years have been changing, possibly in ways that favor a finding of materiality. Recently, the government settled with for-profit institutions violating the ICB to stop their predatory practices for tens of millions of dollars. In 2019, the Department of Justice settled with another university due to their violation of the ICB. This sudden change by the Department of Education to go after these institutions for their violations of the ICB will be a strong factor in future cases for the materiality determination. To be even more clear, the Department of Education can release a press statement saying that in the future, any non-compliance with the ICB will be met with the contractual repercussions agreed to by the parties. These developments speak to the new mindset of the Department of Education when they enter into a PPA with contractors. However, as of 2017, there is still a dispute about whether the Department of Education has shown enough interest in the ICB for non-compliance with it to rise to the level of materiality. Until the government

150 *Id.*
151 *Id.*
152 *Id.*
153 Universal Health Serv. 136 U.S. at 2002.
155 *Id.*
157 Universal Health Serv. 136 U.S. at 2004 (The government stating a new policy to sue for non-compliance with certain provisions can speak to materiality).
158 *Id.*
159 Department of Justice, *supra* note 146; Department of Justice, *supra* note 148.
160 US ex rel. Rose v. Stephens Institute, No. 17-15111 (9th Cir. 2018) (Dissenting opinion states that the plaintiff simply showing that the government cares about the ICB, does not make it a material factor for motion to dismiss purposes).
takes more affirmative action to demonstrate that the ICB is material in their
decision to enter into PPA’s with institutions, non-compliance with the ICB
does not rise to the level of materiality in the context of FCA analysis.161

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