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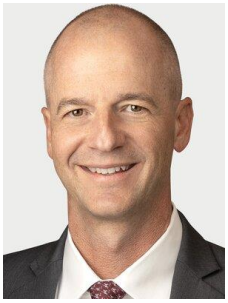
Inside Higher Education's New FCA Liability Challenges

By **James Zelenay and Jeremy Ochsenbein** (December 21, 2023, 5:16 PM EST)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Educational institutions are the recipients of a host of funding from different governmental sources. Their reliance on government funding — e.g., federal financial aid for students, federal research grants and state aid — makes them prime candidates for False Claims Act litigation.[1]

The FCA is the primary means by which the government — or whistleblowers on the government's behalf — can sue for alleged fraud against the government or in connection with government programs. The consequences of an FCA liability can be dire — automatic trebling of damages, per claim penalties, and potential suspension or debarment from further government contracts.

Recent developments — including a nearly $2 million settlement entered into by Stanford University premised on a failure to disclose work for foreign governments, and a new suit brought by a whistleblower against Pennsylvania State University premised on a failure to meet cybersecurity requirements — illustrate the myriad ways in which educational institutions can find themselves subject to potential liability under the FCA.

This article provides an update on FCA liability relating to educational institutions.

How FCA Applies To Educational Institutions

Historically, FCA litigation against schools was directed toward for-profit educational institutions. The prime theory pursued against these schools was that they knowingly misrepresented their intent to comply with Title IV rules and regulations contained in their program participation agreement with the U.S. Department of Education, in order for their students to receive Title IV student financial aid.

Court dockets in the early 2000s were filled with cases espousing this theory. But relators and their counsel quickly discovered that traditional schools, in addition to for-profit schools, could be subject to this theory. As a result, traditional schools have faced similar claims.

For instance, in 2019, North Greenville University in South Carolina entered into a $2.5 million settlement with the U.S. Department of Justice to resolve allegations that it violated the FCA by paying its recruiters in violation of the DOE's incentive compensation rules.[2]

But government funding for schools — particularly traditional schools — does not stop with student

financial aid. They also receive government research grants, defense contract arrangements and local state supplemental funding, not to mention Medicare, Medicaid, and other government funding for school-affiliated hospitals and medical facilities. Relators and their counsel target alleged misconduct in these funding areas for FCA claims as well.

We outline below the more trending topics in this space.

Cybersecurity

The DOJ, as well as relators counsel, have made cybersecurity a focus, using the FCA to enforce cybersecurity requirements. The DOJ's Civil Cyber-Fraud Initiative, combining the DOJ's civil fraud enforcement, government procurement and cybersecurity expertise, was established in 2021 to address new and emerging cyber threats to sensitive information and critical systems.[3]

According to the DOJ press release announcing its creation, the initiative uses the FCA to pursue cybersecurity-related fraud by government contractors and grant recipients that are "knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches."[4]

In February, the DOE similarly stated that cybersecurity requirements are a condition for receipt of Title IV funds, further illustrating that cybersecurity requirements are a potential source of FCA exposure.[5] The agency issued advice to schools relating to cybersecurity, including guidance letters and a direction that a school's cybersecurity program should include nine outlined elements.[6]

As might be expected, universities have begun to face FCA cases relating to cyber requirements. For instance, on Sept. 1 a qui tam FCA suit, Decker v. Pennsylvania State University was unsealed in the U.S. District Court for the Eastern District of Pennsylvania.[7]

The relator in that case — the former chief information officer for the school's applied research laboratory — alleges that the school's self-attestations of compliance with cybersecurity requirements, proffered to obtain DOD funding, were false. The relator alleges he investigated and presented his concerns to university leadership, that they ignored the issue and failed to fix the deficiencies.

At the state level, on Sept. 21, the New York attorney general announced a settlement with Marymount Manhattan College, resolving similar claims that inadequate safeguards exposed personal data belonging to nearly 100,000 students, faculty and alumni in a 2021 cyberattack.[8] The attorney general's investigation concluded with allegations that the college had failed to take necessary steps to protect personal information, including the failure to use multifactor authentication for accounts and encrypt sensitive information.

Under the terms of the settlement, the college agreed to invest an additional $3.5 million to improve data encryption and security protocols.

We can expect that an increase in cyberattacks will be followed by more FCA suits.

Federal Grants and Disclosure of Foreign Government Work

FCA cases have been focusing on compliance and reporting requirements associated with government-

sponsored university grant programs. Given the unique nature of individual grant programs — each with its own rules — the types of activities that could trigger potential FCA liability are peculiar to each program. But in short, a representation or promise in a grant application to or contract with the government might provide the basis for FCA liability.

One particular area of focus has been the alleged failure of schools to disclose relationships with foreign governments — particularly China.

On Oct. 2, for instance, the DOJ announced a $1.94 million FCA settlement with Stanford University, arising from research grants that were provided by five federal agencies.[9] The agencies — the Departments of the Army, Navy, and Air Force, NASA, and the National Science Foundation — required grant applicants to disclose on their grant proposals all current and pending support received they receive, and to identify principal investigators and co-investigators, including support from foreign government sources.

The DOJ alleged that the university knowingly failed to comply with this requirement by failing to disclose that one of the professors involved in work for which the grant was sought received research funding in connection with his employment at a public university in China. As a result, the DOJ claimed, the grant funding was falsely obtained in violation of the FCA. The university did not admit any liability as part of the settlement.

Similarly, in November 2022, Ohio State University agreed to pay over $875,000 to resolve FCA allegations based on an alleged failure to disclose a professor's affiliations with and support from a foreign government in connection with federal research funding.[10] Ohio State also did not admit liability in settling the matter.

Cases like these demonstrate the need to analyze and scrutinize carefully all terms involved with grant applications and funding.

Educational Medical Facilities

The biggest source of FCA recoveries each year by far is the medical sector, particularly those related to claims that Medicare or Medicaid payments were wrongfully obtained. Medical facilities at educational institutions are no exception.

For instance, in 2021, the University of Miami in Florida agreed to pay $22 million to resolve allegations it violated the FCA in connection with the alleged ordering of medically unnecessary laboratory tests and submission of false claims through its laboratory and its off-campus hospital-based facilities.[11]

Educational facilities also often have additional relationships with the government in the form of conducting clinical trials and research grants. This is also a hot topic for the DOJ.

In fact, in a 2021 speech to the Food and Drug Law Institute, DOJ Deputy Assistant General Arun G. Rao identified clinical trial fraud as an area of DOJ emphasis.[12]

In 2018, the University of North Texas Health Science Center agreed to pay over $13 million to settle FCA allegations that it inaccurately measured, tracked and paid researchers for their time spent on National Institutes of Health research grants.[13]

Other Theories of Liability

Beyond these fronts, there are myriad ways in which educational institutions may face FCA liability. Wherever government dollars flow, or dollars are to be paid to the government, FCA exposure follows.

For instance, on Sept. 21, the DOJ announced an over $1.5 million settlement with Yale University and one of its professors to resolve FCA allegations premised on an alleged failure to share patent royalties from inventions with the U.S. Department of Veterans Affairs.[14]

The inventions at issue were discovered while the professor was employed part-time by the VA as a salaried clinical psychiatrist with research responsibilities. The government claimed that the university wrongfully failed to disclose the inventions to the government pursuant to an agreement between the parties. The university did not admit any liability in connection with the settlement.

Mitigating Risks

Educational institutions can take certain actions to mitigate their risk of FCA actions.

Familiarity With Government Contracts

The starting point for reducing risk is understanding the institution's contractual relationships with government agencies. Having a clear understanding of the institution's obligations to the government and the scope of those obligations will enable the institution to better evaluate its compliance and make needed adjustments.

Strong Compliance Program

A strong compliance program is critical in at least two ways. First, it provides a method of finding and addressing potential risks. Second, a strong compliance program provides evidence that the institution is performing in good faith and therefore lacks the intent required for FCA liability.

Strong Human Resources Program

FCA complaints are most often initiated by an educational institution's former or current employees. And most qui tam whistleblowers attempt to report matters internally before suing. A strong human resource program provides a mechanism to ensure employees' concerns are expressed and addressed. It also helps avoid or fend off claims that a reporting employee was retaliated against for voicing their concerns.

Reporting Mechanism

A strong and well-published internal reporting mechanism for employees — and a defined process for reviewing reports made through that mechanism — is helpful in avoiding FCA issues and perhaps in convincing the government not to become involved in an FCA case.

Avoid Government Intervention

Arguably the most critical juncture in an FCA case filed by a whistleblower, as opposed to the government itself, is when the government decides whether to intervene.

Year to year, over 90% of recoveries in FCA cases come from ones initiated by the government or where the government intervened. As a result, it is critically important that a school takes warning signs of a potential FCA investigation seriously, and establishes a constructive and early dialogue with the government.

File Early Motions

Once in litigation, evaluating the potential for early motion practice is critical. The FCA includes a variety of strong arguments for seeking to dismiss a case early on, before discovery starts. Relators counsel file FCA cases looking to get the government to intervene and, if that fails, to survive a motion to dismiss, after which the floodgates of discovery may be opened.

As government funding continues to infiltrate more aspects of the educational sector and educational institutions expand their operations into additional areas that involve government funding, it is expected that more FCA cases will follow. There will be expanding theories of liability, news releases about large settlements and plaintiffs lawyers looking to represent disgruntled current and former employees, and even students, as potential relators. The list above provides some guidance to assist in navigating these matters.

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[1] 31 U.S.C. § 3729 et seq.

[2] Department of Justice, South Carolina University to Pay $2.5 Million to Settle False Claims Act Allegations Arising From Violation of the Ban on Incentive Compensation, February 11, 2019, https://www.justice.gov/opa/pr/south-carolina-university-pay-25-million-settle-false-claims-act-allegations-arising.

[3] Department of Justice, Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative, October 6, 2021, https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-new-civil-cyber-fraud-initiative.

[4] Id.

[5] Department of Education, Updates to the Gramm-Leach-Biley Act Cybersecurity Requirements, February 9, 2023, https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2023-02-09/updates-gramm-leach-bliley-act-cybersecurity-requirements.

[6] See, e.g., ED, (GENERAL-23-09) Updates to Gramm-Leach-Bliley Act Cybersecurity Requirements (February 9, 2023).

[7] Complaint, U.S. ex rel. Decker v. Pennsylvania State Univ., Case No. 2:22-cv-03895 (E.D. Pa.), Dkt. 1.

[8] Allison Grande, NY AG Inks $3.5M Deal To Boost College's Cybersecurity, Law360, September 21, 2023, https://www.law360.com/governmentcontracts/articles/1724311.

[9] Department of Justice, Stanford University Agrees to Pay $1.9 Million to Resolve Allegations That It Failed to Disclose Foreign Research Support in Federal Grant Proposals, October 2, 2023, https://www.justice.gov/opa/pr/stanford-university-agrees-pay-19-million-resolve-allegations-it-failed-disclose-foreign.

[10] Department of Justice, Ohio State University Pays Over $875,000 to Resolve Allegations that It Failed to Disclose Professor's Foreign Government Support, November 10, 2022, https://www.justice.gov/opa/pr/ohio-state-university-pays-over-875000-resolve-allegations-it-failed-disclose-professor-s.

[11] Department of Justice, University of Miami to Pay $22 Million to Settle Claims Involving Medically Unnecessary Laboratory Tests and Fraudulent Billing Practices, May 10, 2021, https://www.justice.gov/opa/pr/university-miami-pay-22-million-settle-claims-involving-medically-unnecessary-laboratory.

[12] Department of Justice, Deputy Assistant Attorney General Arun G. Rao Delivers Remarks at the Food & Drug Law Institute's (FDLI) 2021 Enforcement, Litigation and Compliance Conference, December 9, 2021, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-arun-g-rao-delivers-remarks-food-drug-law-institute-s.

[13] Department of Justice, University of North Texas Health Science Center to Pay $13 Million to Settle Claims Related to Federal Grants, February 16, 2018, https://www.justice.gov/usao-ndtx/pr/university-north-texas-health-science-center-pay-13-million-settle-claims-related.

[14] Department of Justice, Yale University and Its Professor Agree to Pay $1.5 Million For Failure to Share Patent Royalties with VA, September 21, 2023, https://www.justice.gov/opa/pr/yale-university-and-its-professor-agree-pay-15-million-failure-share-patent-royalties-va.