False Claims Act Lawsuits Increasingly Target Universities

Jonathan Cedarbaum

Mark Rotenberg

Alexandra Bonneau

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Research universities have increasingly become targets for False Claims Act actions, both by private plaintiffs and by the government. Because the FCA began as a statute focused on government procurement and has only more recently been used with any regularity to target recipients of federal grants, many universities may not have focused on the full scope of this kind of potential jeopardy.

As FCA suits against universities become more frequent, universities should take care to assess possible areas of risk and put in place policies to diminish that risk. Two areas in particular have left universities facing FCA judgments and settlements in recent years: research funding and Medicare and Medicaid claims at university hospitals.

Research Funding

Since at least 2012, universities have faced increased scrutiny under the FCA, resulting in several multimillion-dollar suits for errors in grant applications or alleged improper billing under those research grants. In 2012, for example, a jury found Cornell Medical College liable under the FCA for making false claims in three renewal applications for National Institutes of Health grant funding.

The NIH grant at issue required that any program receiving funding had to train its fellows "with the primary objective of developing or extending their research skills and knowledge in preparation for a research career," as opposed to a clinical career. Although Cornell's original application detailed a proposed research program focused on the neuropsychology of HIV/AIDS, the jury found that the medical college's program deviated from the renewal applications substantially and included clinical work involving non-HIV/AIDS patients. The Second Circuit affirmed the lower court's ruling that "the appropriate measure of damages" was "the full amount the government paid based on materially false statements."[1]

In December 2014, the Regents of the University of California settled a suit for $499,700 based on allegations that the University of California, Davis submitted false and misleading statements in connection with obtaining grants from the U.S. Department of Energy and the National Science Foundation. U.C. Davis was alleged to have received duplicative grants from the DOE and NSF to perform the same work and to have failed to disclose to each agency's grant to the other.

In announcing the settlement, the U.S. Attorney's Office for the Eastern District of California stated that the settlement "sends a clear message that recipients of federally funded grants must strictly adhere to the regulations applicable to those grants and fully and fairly disclose the information called for under these grants."[2]

Universities have also faced liability for allegedly improper billing practices on grants previously awarded. For example, in November 2015, the University of Florida agreed to pay nearly $20 million to settle allegations that the university

improperly billed the government from 2005 to 2010 in connection with hundreds of grants totaling approximately $1 billion from the U. S. Department of Health and Human Services. The government claimed that the university had overcharged for its employees' salaries without providing proper documentation to support the level of effort claimed. The government also contended that the university had charged for the costs of equipment and supplies not eligible for reimbursement, and inflated costs charged to several grants at the university's Jacksonville campus for services provided by an affiliate.[3]

Similarly, in July 2016, Columbia University entered into a $9.5 million FCA settlement to resolve allegations that it had overbilled NIH for use of facilities in connection with more than 400 federal grants. Although universities are permitted to charge a higher rate for research conducted on their campus rather than off-site, and although Columbia believed in good faith that it was appropriate to apply an on-campus rate to federally sponsored research performed by Columbia faculty in certain New York state-owned buildings located on its medical center campus, the government disagreed and took the position that the lower off-campus rate was appropriate.[4]

Closely related to increased FCA litigation against universities is increased scrutiny of university research expenditures by federal auditors and investigators, especially the NSF Office of Inspector General and the HHS OIG. The NSF OIG fiscal year 2017 budget request specifically cites a threefold increase in allegations of grant related misconduct in the last 10 years, as well as studies suggesting that 25 to 30 percent of scientists engage in questionable research practices. Similarly, the HHS OIG has sought a 22 percent budget increase for FY 2017 over its FY 2016 appropriation, with specific programmatic focus on grants and contracts oversight, among other areas.[5]

Often this increased regulatory scrutiny results in administrative demands to recover grant funds and impose associated penalties, in addition to threatened or actual FCA and related civil litigation.[6] These administrative demands, however, often are exaggerated and can be substantially reduced if universities maintain appropriate records and prepare a persuasive factual and legal response. For example, at University of California, Santa Barbara, the NSF OIG questioned a total $6 million of costs claimed by the university, including $1.9 million of alleged overcharged summer salaries and $2.8 million of unfulfilled cost-share requirements, among other allegations. The university's final resolution with NSF resulted in a disallowance of a mere $43,000.[7]

Medicare and Medicaid

Universities also frequently face FCA liability for alleged health care-related fraud that takes place at their hospitals — notably falsely certifying work or overbilling programs such as Medicare. Universities with academic medical centers in particular have faced heightened FCA scrutiny. Recently, such universities have settled FCA suits for billing Medicare and Medicaid for services provided by medical residents without supervision and for submitting claims for medical services provided by attending physicians when such services were actually performed by residents. In other cases, much like nonuniversity health care providers, universities have been targeted for seeking reimbursement for premium or unnecessary services when less expensive services should have been billed, and billing for procedures without sufficient substantiation in patient records.

In June 2016, the University of Missouri-Columbia settled an FCA case with the U.S. Department of Justice for $2.2 million. Attending physicians allegedly certified that they had reviewed radiology images associated with interpretive reports prepared by resident physicians when the attendant physicians had in fact not reviewed the images. Charges for the services were billed to Medicare, Medicaid and TRICARE.[8]

In March 2014, the Duke University Health System settled an FCA suit for $1 million after it was alleged that it had overbilled Medicare, Medicaid and TRICARE for at least six years. The suit claimed that Duke billed health care agencies at surgeon rates for procedures performed by physician assistants, and that it billed for physician assistants at coronary bypass surgeries even though the assistants were not in the operating room.[9]

Similarly, in August 2013, Emory University settled an FCA case for $1.5 million to resolve allegations that it had billed Medicare and Medicaid for clinical trial services that were not permitted by Medicare and Medicaid rules. Under the rules, health care providers are generally not permitted to bill Medicare for care and services for which the clinical trial sponsor has agreed to pay. At Emory it was alleged that the clinical trial sponsor had agreed to pay and in some cases did pay for certain clinical trial services, resulting in Emory being paid twice for the same service.[10]

Conclusion

False Claims Act judgments and settlements now total multiple billions of dollars a year. Universities' receipt of federal funds means that they too are subject to being sued for alleged improprieties in the handling of those funds. Knowing the circumstances that have led to litigation in the past can help universities put in place policies and procedures to reduce risk and be prepared to respond in the event allegations of impropriety arise.

—By Jonathan G. Cedarbaum, Mark B. Rotenberg, Alexandra B. Bonneau and David Beraka, WilmerHale

Jonathan Cedarbaum is a partner at WilmerHale in Washington, D.C. He is co-chairman of the firm's False Claims Act group and is a leader of its cybersecurity, privacy and communications group. Cedarbaum previously served as acting assistant attorney general in charge of the Office of Legal Counsel at the U.S. Department of Justice.

Mark Rotenberg is special counsel at WilmerHale in Washington, D.C. He is a senior member of the firm's education practice and previously served in the U.S. Department of Justice's Office of Legal Counsel.

Alexandra Bonneau is an associate at WilmerHale in Boston. David Beraka is a senior associate at WilmerHale in Washington, D.C.

[1] United States ex rel. Feldman v. van Gorp, 697 F.3d 78, 80 (2d Cir. 2012).

[2] Press Release, U.S. Department of Justice, The Regents Of The University Of California To Pay Half a Million Dollars To Resolve Allegations Of False Statements In Obtaining UC Davis Grant Funding (Dec. 11, 2014) (https://www.justice.gov/usao-edca/pr/regents-university-california-pay-half-million-dollars-resolve-allegations-false).

[3] Press Release, U.S. Department of Justice, University of Florida Agrees to Pay $19.875 Million to Settle False Claims Act Allegations (Nov. 20, 2015) (https://www.justice.gov/opa/pr/university-florida-agrees-pay-19875-million-settle-false-claims-act-allegations).

[4] Danielle Douglas-Gabriel, Columbia University to pay $9.5 million to settle fraud charges, Wash. Post, July 14, 2016, https://www.washingtonpost.com/news/grade-point/wp/2016/07/14/columbia-university-to-pay-9-5-million-to-settle-fraud-charges/.

[5] The HHS OIG has stated that it "will assess colleges' and universities' compliance with selected cost principles … [and] will conduct reviews at selected colleges and universities on the basis of the dollar value of federal grants received and input from HHS operating divisions ..." HHS OIG Fiscal Year Workplan, Mid-Year Update, 2016, at x.

[6] In its 2015 semiannual report to Congress, the HHS OIG reported "925 criminal actions against individuals or organizations that engaged in crimes against HHS programs and 682 civil and administrative enforcement actions, including False Claims Act and unjust enrichment suits filed in federal district court, Civil Monetary Penalty (CMP) law settlements, and administrative recoveries related to provider self-disclosure matters." HHS OIG FY 2017 Justification of Estimates for Appropriations Committees, at 5.

[7] Other examples include: (1) at UCLA, NSF questioned $2.4 million in costs; final resolution resulted in a disallowance of $130,000; and (3) at Virginia Tech, NSF initially claimed $1.6 million in questionable costs; final resolution resulted in a disallowance of $64,000. [Huron report June 17, 2015, at 10-11.]

[8] Press Release, U.S. Department of Justice, University of Missouri-Columbia Agrees to Pay United States $2.2 Million to Settle Alleged False Claims Act Violations, available at University of Missouri-Columbia Agrees to Pay United States $2.2 Million to Settle Alleged False Claims Act Violations (last visited Sept. 6, 2016).

[9] Press Release, U.S. Department of Justice, Duke University Health System Inc. Agrees To Pay $1 Million For Alleged False Claims Submitted To Federal Health Care Programs (March 21, 2014) (https://www.justice.gov/usao-ednc/pr/duke-university-health-system-inc-agrees-pay-1-million-alleged-false-claims-submitted).

[10] Press Release, U.S. Department of Justice, Emory University To Pay $1.5 Million To Settle False Claims Act Investigation (Aug. 28, 2013) (https://www.justice.gov/usao-ndga/pr/emory-university-pay-15-million-settle-false-claims-act-investigation).