

## Whistleblower Watch

### A quarterly update on FCA Enforcement and Qui Tam Litigation

*Whistleblower Watch is a critical resource for in-house counsel and compliance professionals. Each quarter, Cozen O'Connor summarizes the most notable False Claims Act (FCA) enforcement actions, settlements, and legal trends, and provides an in-depth look at emerging FCA-related issues. Subscribe to stay on top of these changes and find out how they may affect you.*

#### Recent FCA Settlements and Enforcement Actions

#### **Penn State Agrees to Pay \$1.25M to Resolve FCA Allegations Regarding Non-Compliance with Contractual Cybersecurity Requirements (Eastern District of Pennsylvania)**

Penn State University has agreed to pay \$1.25 million to settle allegations of violations of the FCA for its failure to comply with cybersecurity requirements in more than a dozen contracts with the Department of Defense (DoD) or National Aeronautics and Space Administration (NASA). The Government alleged that, from January 2018 to November 2023, Penn State failed to implement certain cybersecurity controls required by its contracts with DoD and NASA and/or develop and implement plans of action to correct deficiencies and reduce vulnerabilities in IT systems involved in said contract performance. The settlement is yet a win for DOJ's Civil Cyber-Fraud Initiative and its efforts to use the FCA to enforce compliance with cybersecurity provisions even where there has been no data breach or other loss to the Government. For more on DOJ's Civil Cyber-Fraud Initiative and cybersecurity enforcement, see our prior article [here](#).

#### **IT Training Provider Agrees to Pay \$975K to Settle FCA Lawsuit for Inflation of Educational Assistance Benefits (Eastern District of Michigan)**

Michigan-based information technology training provider, NH Learning Solutions Corp. (NHLS) has agreed to pay \$975,000 to resolve claims that it violated the FCA by submitting false claims to the Department of Veterans Affairs (VA) for educational assistance benefits under the Post-9/11 Veterans Educational Assistance Act of 2008 (the Bill). The Bill requires the VA pay tuition and fees to qualifying schools on behalf of veteran students pursuant to the "last payer rule." This means the VA pays the actual net cost for tuition and fees, after any scholarships, waivers, grants, or other assistance. According to the Government, NHLS violated this rule by reporting tuition to the VA without making the proper deductions, causing the VA to overpay NHLS for educational assistance. This settlement shows the FCA's core role in protecting federal programs to ensure the assistance reaches the intended beneficiaries.

#### **Medical Equipment Provider and Founder Agree to Pay \$20M to Settle FCA Claims for Improper Billing Government Healthcare Plans (Eastern District of Pennsylvania)**

Electrostim Medical Services, Inc. (EMSI), a Florida-based durable medical equipment provider, and its founder and chairman, Mario Garcia, Jr., have agreed to pay \$20 million to resolve allegations under the FCA that they improperly billed federal healthcare programs for excessive and unnecessary supplies associated with electrically-stimulated pain relief called Transcutaneous Electrical Nerve Stimulation (TENS). According to the Government, in 2018 and 2019, EMSI and Garcia improperly billed TRICARE for sending certain supplies to patients, including replacement electrodes and batteries, when they had already received a starter kit with all the supplies they could need. Additionally, EMSI and Garcia improperly submitted claims for a monthly resupply of



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#### Related Practice Areas

- White Collar Defense & Investigations

electrodes for customers who had special garments with TENS devices sewn into them, where replacement electrodes were not needed. Notably, the deal was based on EMSI and Garcia's limited ability to pay, and that if EMSI tried to evade payments by declaring bankruptcy, the amount due would increase as much as tenfold.

### **City of Los Angeles Agrees to Pay \$38.2M to Resolve FCA Lawsuit for Misuse of HUD Grant Funds (Central District of California)**

The City of Los Angeles has agreed to pay \$38.2M to resolve claims that it sought and used grant funds from the Department of Housing and Urban Development (HUD) while knowingly failing to meet federal accessibility requirements. By law, HUD funding recipients must comply with federal accessibility requirements, including the Rehabilitation Act, Americans with Disability Act, and Fair Housing Act, which prohibit discrimination against people with disabilities in activities receiving federal financial assistance. In 2017, the Government intervened in a whistleblower suit brought by a Los Angeles resident who uses a wheelchair and nonprofit disability rights advocacy group, the Fair Housing Council of San Fernando Valley, who alleged that the City failed to follow those federal accessibility laws when building and renovating affordable multifamily properties. Upon intervention, the Government asserted that the housing was not structurally accessible to people with disabilities; however, the City, on an annual basis, knowingly and falsely certified to HUD that it complied with its grant obligations. The settlement highlights that the FCA can be used to indirectly enforce compliance with other federal laws, and that the Government is using that tool aggressively, even against municipalities.

### **Walgreens Agrees to Pay \$106.8M to Resolve Three FCA Lawsuits Relating to Billing for Prescriptions it Never Dispensed (District of New Mexico, Eastern District of Texas, Middle District of Florida)**

Pharmaceutical giants Walgreens Boots Alliance Inc. and Walgreen Co. (Walgreens) have agreed to pay \$106.8 million to resolve allegations that it violated the FCA by billing federal healthcare programs for prescriptions it never dispensed. The Government asserted that, between 2009 and 2020, Walgreens submitted false claims to federal healthcare programs, such as Medicare and Medicaid, for prescriptions it processed, but that were never picked up by customers. The company then restocked and resold the medications without withdrawing their claims, meaning they were paid twice for the prescriptions. Walgreens claimed the billing issue stemmed from a software error that has since been corrected. Notably, Walgreens received credit under DOJ guidelines for disclosing, cooperating, and remediating the issue by voluntarily refunding all overpayments and implementing enhancements to its electronic pharmacy management system. For more on the DOJ's Voluntary Self Disclosure Policy, click [here](#).

### **Los Angeles Executive Pays \$800K to Resolve Allegations of FCA Violations in Connection with Paycheck Protection Program Loans (Central District of California)**

The owner and operator of an accounting firm, law firm, and consulting company based in Los Angeles, Yosef Manela, has paid \$802,341 to resolve claims that he and his three companies violated the FCA in connection with loans received under the Paycheck Protection Program (PPP). According to the Government, Manela and his companies received six PPP loans based on duplicative payroll expenses for multiple business and/or on behalf of employees that did not exist. They then made capital distributions to family members, falsely characterizing them as wages in PPP loan applications and forgiveness applications. This settlement suggests that the Government's PPP enforcement efforts continue, as we predicted [here](#).

### **Humana Agrees to Pay \$90M To Settle FCA Lawsuit Alleging Fraudulent Bids for Medicare Part D Prescription Drug Contracts (Western District of Kentucky)**

Health insurance company Humana, Inc. has agreed to pay \$90 million to settle an eight-year battle involving allegations it submitted fraudulent bids for Medicare prescription drug deals. The lawsuit, originally brought by a whistleblower in 2016, alleged that, from 2011 to 2017, Humana said in its bids that it would offer the mandated level of coverage, but behind the scenes, planned to pay less. This led to both the federal government and Humana enrollees unknowingly paying more than their appropriate share. According to the whistleblower's lawyers, this is the first settlement resolving

fraud allegations in Medicare's prescription drug contracting process. We are following this trend to see if it expands to other Government healthcare programs administered by private insurers, like Medicare Advantage.

## Legal Trends and Insights

### DOJ Implements Corporate Whistleblower Awards Pilot Program

In August, DOJ's Criminal Division launched and released the framework for its three-year Corporate Whistleblower Awards Pilot Program, aimed to "uncover and prosecute corporate crime." Under the Program, a whistleblower who reports original, truthful information pertaining to corporate misconduct that results in a successful civil or criminal forfeiture may be eligible for an award of up to 30% of forfeitures that are \$100 million or less and 5% of forfeitures between \$100 million and \$500 million. The information must relate to: (1) certain crimes involving financial institutions, (2) foreign corruption involving misconduct by companies, (3) domestic corruption involving misconduct by companies, or (4) health care fraud schemes involving private insurance plans. This is the first official program of its kind to offer monetary awards to whistleblowers. For more information on the Program, click [here](#). While seemingly straightforward, the Program is already garnering criticism, including, for example, that any whistleblower who "meaningfully participated" in the misconduct is ineligible, and that DOJ has discretion to deny an award with no right to appeal that decision. For more coverage on these issues from Law360, click [here](#), [here](#), and [here](#).

### SCOTUS Hears Oral Argument On FCA's Definition of "Claim" in Upcoming E-Rate Decision

On November 4, 2024, the Supreme Court heard oral argument on the question of whether reimbursement requests submitted to the Federal Communications Commission's E-rate program are "claims" under the FCA. The case is *Wisconsin Bell, Inc. v. United States ex rel. Todd Health* and was brought in 2008 by relator Todd Health, who alleged that Wisconsin Bell violated the FCA by over-charging schools and libraries under the E-rate program, which provides discounted services to eligible participants. Wisconsin Bell submitted that the relator could not establish an FCA violation because, inter alia, reimbursement requests are not "claims" within the meaning of the FCA. During argument, attorneys for Wisconsin Bell argued that "the government doesn't provide a cent of the money at all" and, therefore, there should be no damages for overpayments. In response, relator's counsel submitted that "the government is the only relevant decision-maker at all stages of creating, funding, and then controlling the distributions from this program." We await the Court's decision on where the FCA's boundaries lie between federal funds and purely private funds. For more coverage on this case, click [here](#), [here](#), [here](#), and [here](#).

### a deeper dive

Companies are racing to harness the power of artificial intelligence. The applications are myriad. What many of those companies may not appreciate at this stage, however, is that they could also face exposure under the FCA if their clients include Government agencies or contractors. For an in-depth analysis of the AI product-implementation risks that companies should consider to avoid the costs and burden of Government scrutiny, please see our article titled [Avoiding FCA Scrutiny While Reaping the Benefits of AI](#).

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