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U. of Phoenix Loses in U.S. Court

The University of Phoenix must defend itself against charges that it violated federal law by paying its recruiters based on how many students they enrolled, the U.S. Court of Appeals for the Ninth Circuit ruled Tuesday. The federal appeals panel's unanimous decision, which overturned a lower court's ruling in Phoenix's favor, had been eagerly awaited because of the for-profit university's high profile as one of the country's largest and because of the mammoth size of the malfeasance alleged — billions of dollars could be at stake.

But the case is also important because it is the latest in a string of decisions in which federal courts have gradually expanded the grounds under which colleges can be sued under the federal False Claims Act, much to the consternation of some college and university lawyers and legal experts. In siding with the former admissions officials who sued Phoenix on the government's behalf, the Ninth Circuit panel leaned heavily on one of those earlier decisions, involving Oakland City University.

At issue in the Phoenix case is a provision in the Higher Education Act that prohibits colleges from offering bonuses or other incentive pay to admissions officers or recruiters based on specific enrollment goals, to discourage them from giving officials extra incentive to bring in any potential student, regardless of academic ability. Two former enrollment counselors at Phoenix, Mary Hendow and Julie Albertson, charge that the for-profit university paid cash bonuses and other gifts to them and to other recruiters based strictly on how many students they enrolled — charges Phoenix has denied.

In 2003, Hendow and Albertson filed what is known as a *qui tam* lawsuit, which is filed under the federal False Claims Act by an individual who believes he or she has identified fraud committed against the federal government, and who sues hoping to be joined by the U.S. Justice Department. (The plaintiff then shares in any financial penalties, which can include trebled damages.) The women charged that the allegedly fraudulent behavior had put more than $1.5 billion in federal funds at risk, which set the value of a potential verdict in the case at several times that. The federal government declined to join the lawsuit as a third party, but the Justice Department did file a friend of the court brief in 2005 encouraging the court to rule against Phoenix.

A federal district court dismissed the women's lawsuit in May 2004, concluding that they had not put forward a valid theory for how Phoenix had defrauded the government under the False Claims Act.

But in its decision Tuesday, a three judge panel of Ninth Circuit appeals court concluded differently.

Reinforcing and even expanding on last October's decision by the U.S. Court of Appeals for the Seventh Circuit in *United States of America ex. rel. Jeffrey E. Main v. Oakland City University*, the Ninth Circuit judges declared that the two former admissions officers (known in False Claims Act parlance as the "relators") had indeed offered two legitimate theories (known as "false certification" and "promissory fraud") for how the university had defrauded the government.

Without ruling on whether the women had actually proven their claims — impossible without a trial on the facts of the case — the court concluded that they had met the four requirements of filing a legitimate claim under the federal fraud law: (1) alleging that a defendant had made false statement or engaged in fraudulent conduct; (2) that the action had been taken deliberately; (3) that the act or statement played a direct role in money flowing out of government coffers; and (4) that the government did indeed pay out or forfeit money as a result. At its core, the Ninth Circuit ruled that the university had — by participating in a several-step process to accept federal financial aid — committed to abiding by a wide range of rules and requirements, including the prohibition on incentive compensation.

On multiple fronts, the court rejected arguments made by lawyers for Phoenix. To the suggestion — which other college officials have echoed in fighting False Claims Act cases — that "the incentive compensation ban is nothing more than one of hundreds of boilerplate requirements with which it promises compliance," as the appeals panel phrased it, the court wrote: "This may be true, but fraud is fraud, no matter how 'small.'

"The university is worried that our holding today opens it up to greater liability for innocent regulatory violations, but that is not the case — as we held above, innocent or unintentional violations do not lead to False Claims Act liability," Judge Cynthia Holcomb Hall wrote for the court. "But that is no reason to innoculate [sic] institutions of higher education from liability when they knowingly violate a regulatory condition, with the intent to deceive, as is alleged here."

With that statement, the court seemed to clearly reject the arguments made by college officials that the federal courts' decisions in this line of cases are making colleges significantly more vulnerable to False Claims Act challenges — even if they have violated federal law by simple mistake.

And Phoenix's assertion that the ban on incentive compensation is a condition on participating in the federal student aid programs, but not a condition on receiving payment from the government, "is a distinction without a difference," the court said. "In the context of Title IV and the Higher Education Act, if we held that conditions of participation were not conditions of payment, there would be no conditions of payment at all — and thus, an educational institution could flout the law at will."

The Ninth Circuit's decision not to dismiss the lawsuit against Phoenix would send the case back to the lower federal court for a trial on the merits. But several other possibilities seem likelier at this point. The university could ask the entire U.S. Court of Appeals for the Ninth Circuit to review the decision of the three judge panel.

Or Phoenix's lawyers could appeal the Ninth Circuit's decision to the U.S. Supreme Court, on the hope that the nation's highest court decides to hear the case because it concludes that federal appeals courts have split on the issues in the case. But the Supreme Court declined in April to consider the Oakland City case, letting the Seventh Circuit's decision stand, which would appear to make it unlikely to hear the Phoenix case.

Timothy J. Hatch, a Los Angeles lawyer who represented Phoenix in this case, said that he and the university "obviously disagree" with the court's conclusions but had not yet decided how to respond to

the ruling. Terri Bishop, chief communications officer for the Apollo Group, which owns the University of Phoenix, added in a statement that the decision "greatly expands the scope of False Claims Act liability beyond what Congress had intended or even what other courts have recognized." The company is "carefully reviewing the opinion in order to determine our next steps," she said.

The two California lawyers who represented the relators in the case, Nancy G. Krop and Daniel R. Bartley, were practically giddy on the telephone late Tuesday afternoon, and said they were eager to get the case before a jury. "The evidence is all sitting there waiting for a courtroom, and once we get a courtroom," Krop said, Phoenix "is in big trouble."

— Doug Lederman

The original story and user comments can be viewed online at http://insidehighered.com/news/2006/09/06/phoenix.