

Recent Case Finds FCA Immunity for State University Accused of Grant Mischarging

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WHAT: On April 11, 2017, an Oregon federal judge dismissed a False Claims Act (FCA) lawsuit against Oregon Health & Science University (OHSU), finding that as a public university, OHSU was immune from FCA liability. The court found that because OHSU was an “arm of the state” it was not a “person” that could be held liable under the FCA. The court adopted the analysis and reasoning of several state and federal court decisions that found OHSU to be entitled to sovereign immunity based on its affiliation with the state. The court also invoked the Ninth Circuit’s test for evaluating whether an entity is an arm of the state for sovereign immunity purposes, which includes evaluating whether any judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether it may sue or be sued, as well as the entity’s corporate status. As the court noted, “OHSU is a public corporation created by the State of Oregon and defined by the Oregon Legislature as a governmental entity.” The government argued in the alternative that under the Supreme Court’s 2000 holding in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, OHSU was only immune from FCA liability in cases brought by private individuals, and not those brought by the federal government. The court rejected this argument, however, finding that nothing in the *Stevens* opinion “purports to limit its scope solely to *qui tam* suits brought by private parties.”

The lawsuit involved allegations that OHSU was overbilling under federal research grants. It was initially brought by a former OHSU employee who worked in the university’s primate research center. The federal government later intervened, alleging that the university had submitted false claims for payments under a National Institutes of Health (NIH) grant that exceeded allowable reimbursement rates.

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According to the complaint, OHSU submitted claims requesting reimbursements from NIH at higher rates that applied only to certain unique NIH research grants, instead of requesting reimbursement at the lower rates that actually applied to its grant. OHSU had publicly announced that its Vaccine & Gene Therapy Institute was becoming a part of the Oregon National Primate Research Center, which would have made it eligible to be reimbursed at the higher rates. But according to the complaint, the university had not received the requisite NIH approval to do so. The case is *U.S. et al. v. Oregon Health & Sciences University*, No. 3:13-cv-01306 (D. Or. Apr. 11, 2017).

WHAT DOES IT MEAN FOR INDUSTRY: While the decision is specific to the facts of the OHSU case, it could potentially be used to shield other similarly-situated state entities – particularly state colleges and universities – from FCA liability. Whether the decision will be appealed is yet to be determined. But in the interim, state colleges or universities currently involved in FCA investigations or litigation may be able to rely on the ruling as persuasive authority in their disputes with the federal government. This ruling could also serve as a disincentive for pursuing FCA actions against state colleges and universities, both for whistleblowers and the government.