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Qui Tam Suit Against University Nets $78.5 Million Settlement

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A team of Bay Area plaintiffs lawyers struck a $78.5 million deal in a long-running false claims suit that accused the University of Phoenix of rewarding recruiters for enrolling students, according to a settlement agreement announced Monday.

The agreement, which includes $11 million in attorney fees for the plaintiffs, is among the largest settlements ever of a False Claim Act fraud case in which the government didn't intervene, said Eric Havian, a *qui tam* expert and partner with Phillips & Cohen in San Francisco who was not involved in the case.

Former University of Phoenix enrollment counselors Mary Hendow and Julie Albertson filed the suit in 2003, accusing the university of defrauding the government by paying counselors incentive payments for enrolling students. Under Title IV of the Higher Education Act, universities that qualify for student aid are barred from paying incentives, like commissions and bonuses, to recruiters to boost enrollment.

The team of plaintiff lawyers came together after a 9th U.S. Circuit Court of Appeals panel reinstated the case, which U.S. District Judge Garland Burrell Jr., of Sacramento, had dismissed in 2004. That's when the original plaintiffs lawyers, Redwood City, Calif., solo Nancy Krop and Novato attorney Daniel Bartley, enlisted lawyers from three additional firms -- lead counsel Robert Nelson, a partner in the San Francisco office of Lieff Cabraser Heimann & Bernstein, as well as Cliff Palefsky of McGuinn, Hillsman & Palefsky and Michael Rubin, a partner at Altshuler Berzon.

"This is a very important case raising critical public policy issues as well as legal issues," Nelson said.

The plaintiffs' legal theory, Palefsky said, hinged on the idea that the University of Phoenix wrongly rewarded enrollment counselors largely -- but not solely -- on enrollment numbers. Palefsky acknowledged that safe harbor provisions added to federal law allowed institutions to adjust compensation as long as the adjustments weren't based "solely" on enrollments, but the plaintiffs argued that compensation that fluctuates wildly is disguised incentive compensation.

Havian said the Department of Education under the Bush administration had taken a friendlier interpretation to the notion of paying recruiters based

on enrollment.

"Now it's really clear that they're wrong and that they were basically just cozying up to the educational institutions," Havian said. "Hopefully this settlement will persuade the government to start intervening in these cases."

The University of Phoenix believes its compensation practices have followed federal law, said the general counsel for its parent company, Apollo Group Inc., in a statement Monday. But "the regulations at issue in this case were unclear and inconsistent and, even after they were clarified by Safe Harbor provisions, involved complex judgments and interpretations," added P. Robert Moya. The company did not admit any wrongdoing under the deal.

Defense counsel with Gibson, Dunn & Crutcher referred questions to the company.

The settlement is notable partly because in *qui tam* cases where the government declines to get involved, "the win rate is ridiculously low," said Palefsky.

Rubin said the case was "incredibly hard-fought." He argued, for example, about 10 discovery disputes within a three-week period before Magistrate Judge Dale Drozd. There were about 40 depositions taken and both sides had retained numerous experts, Nelson said. "From our perspective, we were trial ready." Hendow v. University of Phoenix , 03-457, had been set to go to trial in March 2010 before Burrell.

***United States ex rel. Hendow v. University of Phoenix*, 461 F. 3d 1166, *reh. den.* (9th Cir. 2006), *cert. denied* 127 S.Ct. 2099**