



## Recent kickback cases yield almost \$20 million in settlements for the United States

February 15, 2021

The Department of Justice (DOJ) and U.S. Attorney's Offices have been quite busy settling False Claims Act (FCA) cases during the first month and a half of 2021. Two recent FCA lawsuits based, at least in part, on allegations of violations of the Anti-Kickback Statute, have already brought in almost \$20 million in recovery to the United States in 2021.

### **athenahealth**

On January 28, 2021, the DOJ [announced](#) a settlement with athenahealth, Inc. Under the settlement, athenahealth agreed to pay \$18.25 million “to resolve allegations that it violated the False Claims Act (FCA) by paying illegal kickbacks to generate sales of its EHR [electronic health records] product athenaClinicals [and athenaOne].” According to the DOJ’s complaint-in-intervention, athenahealth operated three marketing programs that paid kickbacks to customers in exchange for referring new clients to athenahealth. According to the complaint, one of the marketing programs involved invitations to existing and prospective customers for all-expense-paid sporting, entertainment and recreational events including trips to the Masters Golf Tournament, the Indy 500, New York Fashion Week and the Kentucky Derby with complimentary travel, luxury accommodations, meals and alcohol.

Another marketing program allegedly paid fees to its customers for “Client Lead Generation” in which athenahealth paid up to \$3,000 per physician that signed up for athenahealth services, regardless of how much time the existing customer spent speaking or meeting with the prospective new customer. According to the United States’ complaint, after another EHR vendor, eClinicalWorks, settled a lawsuit alleging violations of the FCA and Anti-Kickback Statute related to its referral program,

athenahealth changed the name of its Client Lead Generation program to the “Introductions” program, but did not change the program substance and continued to pay existing clients for the volume and/or value of their referral of new customers. The third marketing program targeted competing EHR companies who were discontinuing their technology and offered “Conversion Deals,” in which athenahealth paid competitors based on the volume and/or value of practices that were successfully converted into athenahealth customers.

Many customers used the athenahealth EHR system to qualify for incentive payments under the Medicare and Medicaid EHR Incentive Programs, which required healthcare providers to submit certain attestations, including that they understood “that the use of any false claims, statements, or documents, or the concealment of a material fact used to obtain a Medicare EHR Incentive Program payment, may be prosecuted under applicable Federal or State criminal laws and may also be subject to civil penalties.” Additionally, under the Merit-based Incentive Payment System (MIPS) program, CMS assesses MIPS-eligible clinicians in four categories, including meaningful use of certified EHR technology, which can result in positive or negative payment adjustments for the participating clinicians. According to the DOJ press release, as a result of these kickbacks, athenahealth “improperly generated sales for itself while causing healthcare providers to submit false claims to the federal government related to incentive payments for adoption and ‘meaningful use’ of [athenahealth’s] EHR technology” under the Medicare and Medicaid EHR Incentive Programs and the MIPS program.

The athenahealth [settlement](#) with the United States stems from two whistleblower lawsuits filed against the EHR company. One of the whistleblower cases was filed in October 2017 by an employee of another EHR vendor who claimed that he had “acquired significant knowledge and a detailed understanding of EHR technology,” including athenahealth’s “marketing program and EHR technology as the result of his work.” The other whistleblower lawsuit was filed in December 2017 by co-owners of a home care business that purchased billing, credentialing and EHR services from athenahealth. The whistleblowers will share an undisclosed amount of the \$18.25 million settlement.

#### **Collier Anesthesia Pain and Tampa Pain Relief Center**

On February 1, 2021, the United States Attorney’s Office for the Middle District of Florida [announced](#) a settlement with Collier Anesthesia Pain, LLC (Collier) and Tampa Pain Relief Center, Inc. (Tampa Pain). Tampa Pain provides management, billing and accounts receivable services and employees for Collier. Pursuant to the settlement, Collier and Tampa Pain agreed to pay \$1,665,000 to resolve allegations that they violated the FCA and Anti-Kickback Statute. The primary allegations in the lawsuit were that Collier and Tampa Pain engaged in a kickback scheme whereby they caused ambulatory surgery centers (ASCs) to routinely waive the facility fee copayments for Medicare Advantage patients without an individual determination of financial need in order to induce these patients to select the ASCs (and the particular physician who owned Collier) for their pain injection procedures. The settlement agreement also resolves allegations that Collier and Tampa Pain submitted false claims to the Medicare program, TriCare program and Federal Employees Health Benefit program for evaluation and management and psychological testing services.

This case was also brought to the government’s attention by a whistleblower. In this case, the whistleblower was an employee of the ASCs where the pain procedures were performed whose role included billing patients for procedures performed at the ASCs. According to the settlement agreement, the whistleblower will receive 17 percent of the settlement amount (approximately \$283,000) for her part in bringing this case on behalf of the United States.

Prior to entering into this settlement agreement with the United States, Tampa Pain had previously entered into a [settlement](#) with the DOJ in April 2020 to resolve allegations related to billing for medically unnecessary urine drug tests. As part of the resolution of that lawsuit, Tampa Pain had entered into a [Corporate Integrity Agreement](#) (CIA) with the Health and Human Services Office of Inspector General (OIG). As part of the resolution of this most recent lawsuit, the Tampa Pain CIA was [amended](#) to add provisions relevant to the allegations of this settlement and also to add Collier as a party to the CIA.

# Authors

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