# $78.5M Settles U. of Phoenix Case

Higher education company will pay U.S. $67.5 million and $11 million to plaintiffs' lawyers to settle claims that it illegally compensated its student recruiters.

By Doug Lederman // December 15, 2009

16 COMMENTS (/NEWS/2009/12/15/APOLLO#DISQUS_THREAD)

The owner of the University of Phoenix has agreed to pay $67.5 million to the federal government and another $11 million in legal fees to two former admissions officials who six years ago accused the higher education company of illegally paying its recruiters based on how many students they enrolled.

The Apollo Group's announcement (http://phx.corporate-ir.net/phoenix.zhtml?c=79624&p=irol-newsArticle&ID=1365655&highligh) appears to bring to an end a long-running legal fight that at points seemed poised to cost the country's largest postsecondary education provider hundreds of millions if not billions of dollars -- but ultimately cost it much less.

Not only that, but Apollo and Phoenix also avoided having to "acknowledge, admit or concede any liability, wrongdoing, noncompliance or violation as a result of the settlement." Company officials also said the settlement left them "confident" that the company "will not face any further civil or administrative exposure" concerning its compliance with the Higher Education Act provision that bars colleges from providing incentive compensation, "as a result of the various releases and related agreements it has obtained from the U.S. Department of Education, U.S. Department of Justice and the plaintiffs."

Asked why the company expressed such confidence, an Apollo spokesman said via e-mail that "as part of the settlement agreement, the U.S. Department of Education agreed not to take any action against the University as a result of the settlement agreement or with regard to its compliance or noncompliance with the HEA provision relating to incentive compensation."

As often happens with lawsuits like this, the settlement -- despite its seemingly big-ticket price -- seemed to please investors, as the company's stock rose sharply after the settlement was announced. (Wall Street seems to dislike uncertainty more than anything else.)

A lawyer for the plaintiffs could not be reached for comment on the settlement. But in a news release, (http://www.lieffcabraser.com/press_releases/20091214-phoenix.php) the lawyer, Robert J. Nelson, called the settlement "a huge victory for taxpayers and the federal government.... This settlement sends a clear message to the for-profit education industry [that] compliance with the Higher Education Act's incentive compensation ban must be achieved."

Another lawyer in the case, Cliff Palefsky, said that "the discovery and legal theories we developed in this case will help the Department of Education tighten up its regulations regarding incentive compensation. We expect the size of this settlement to deter other institutions from trying to circumvent the letter and spirit of the law as well."

The settlement came as a panel convened by the U.S. Education Department is in the process of negotiating possible changes in federal rules governing incentive compensation and other issues. At a negotiating session last week, (https://www.insidehighered.com/news/2009/12/11/compensation) the panel's members seemed inclined not to bar all use of merit-based compensation for college recruiters, but rather to tighten the rules from their current state, which allows a series of exceptions that lawyers for Apollo say Phoenix followed.

The lawsuit was brought in 2003 by two former enrollment counselors at Phoenix, Mary Hendow and Julie Albertson, who charged 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 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. In this case, the plaintiffs are expected to share as much as 30 percent of Apollo's payment to the government.)

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 the U.S. Court of Appeals for the Ninth Circuit ruled in October 2006 (https://www.insidehighered.com/news/2006/09/06/phoenix) that the two former admissions officers had indeed offered two legitimate theories (known as "false certification" and "promissory fraud") for how the university had defrauded the government.

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.

The case had been set to go to trial in March before the parties announced in September (https://www.insidehighered.com/news/2009/10/01/qt#209560) that they had entered into settlement talks.