

US Government Uses Receipt of PPP Funds to Create Piggyback Liability in FCA Case

Physician Partners of America's settlement highlights significant risks facing False Claims Act defendants who received Paycheck Protection Program funds.

An April 2022 US Department of Justice (DOJ) settlement suggests that False Claims Act (FCA)¹ defendants who received Paycheck Protection Program (PPP) funds can face additional FCA liability based on certifying compliance with the law as part of the PPP loan application process. The settlement agreement resolved a series of whistleblower FCA actions against Physician Partners of America (PPOA) alleging overbilling and improper physician remuneration. DOJ additionally and independently alleged that PPOA, a Tampa-based healthcare management company, violated the FCA by falsely certifying compliance with the law in connection with its PPP loan application when, at the time of its PPP loan application, PPOA was engaged in the healthcare fraud at issue. In other words, DOJ used the receipt of emergency relief funds as a stand-alone basis for FCA liability — even though there was no clear nexus to the principal fraud nor any determination of wrongdoing at the time the certification was made.

Receipt of PPP funds required certification of compliance with the law

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) became law. The CARES Act made more than \$650 billion² available to eligible small business concerns under the Small Business Administration's (SBA's) PPP loan program. The CARES Act also made PPP loans eligible for full forgiveness if borrowers complied with certain restrictions on use of the funds. The PPP loans were only available to certain eligible businesses that qualified as small — typically businesses with fewer than 500 employees, although the CARES Act provided certain exceptions.³

When applying for PPP loans, businesses were required to make a number of certifications, including certifications regarding eligibility for the PPP loan, the need for the loan funds, the accuracy and truthfulness of information submitted with the loan application, and the use of funds.⁴ When signing and submitting a PPP loan application, a business had to expressly certify that it was “not engaged in any activity that is illegal under federal, state or local law.”⁵ Moreover, the business had to certify that it was “eligible to receive a loan under the rules in effect at the time” it applied for the PPP loan,⁶ and the SBA specified that businesses “engaged in any activity that is illegal under Federal, state, or local law” were ineligible for PPP loans.⁷

The SBA estimates that it has issued approximately 11.5 million PPP loans as of October 2, 2022.⁸ The SBA has partially or fully forgiven approximately 10.5 million of these PPP loans.⁹

DOJ uses receipt of PPP funds as independent basis for FCA liability based on allegations of unrelated fraud

In April, DOJ announced what appears to be the first settlement to impose derivative federal FCA liability based on allegedly false certifications related to receipt of PPP funds.¹⁰ The FCA is the government's primary tool to pursue government fraud, and the statute imposes treble damages and penalties on contractors who knowingly submit false statements or invoices to the government.¹¹

In 2018, a former healthcare consultant alleged that PPOA and its affiliates compensated its physicians based on the volume and value of urine drug tests ordered or referred, billed government healthcare programs for tests and services that were medically unnecessary or otherwise fraudulent, and knowingly retained overpayments from government healthcare programs.¹² Other former PPOA employees filed similar *qui tam* actions in 2019 and 2020,¹³ also alleging that PPOA engaged in fraudulent schemes designed to maximize reimbursement of fraudulent and medically unnecessary medical testing and services. In each case, the operative complaints remained under seal until DOJ intervened for the purposes of settlement years after the *qui tam* suits were filed.¹⁴ At the time of settlement, DOJ alleged that between October 2015 and November 2021, PPOA billed for diagnostic tests, telehealth visits, and pain management services that were (1) medically unnecessary, (2) ordered by physicians who unlawfully profited from referrals, and (3) up-coded to maximize the reimbursement—all in violation of the federal FCA and Florida FCA.¹⁵

DOJ also alleged that PPOA separately violated the FCA and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA)¹⁶ by falsely certifying that PPOA was not engaged in "illegal activity" when it applied for (and received) a PPP loan in April 2020.¹⁷ DOJ took the position that PPOA's PPP application constituted a false submission to the SBA actionable under the FCA because, at the time that PPOA applied for and received its \$5.9 million loan, PPOA was engaged in the overbilling and fraud described above yet certified eligibility for PPP funds.¹⁸

PPOA agreed to pay \$24.5 million and enter into a five-year Corporate Integrity Agreement with the US Health and Human Services Department of the Inspector General in exchange for a release from civil and administrative liability arising from its alleged fraud. The settlement releases PPOA from civil and administrative liability related to its PPP loan, though does not specify to what extent the \$24.5 million settlement amount represents a government clawback of the PPP funds. The settlement agreement states that the settlement "is neither an admission of liability by PPOA nor a concession by the United States or the State of Florida that its claims are not well-founded," and the PPOA denies the allegations set forth in the settlement agreement and in the relators' *qui tam* complaints.¹⁹

DOJ's pursuit of FCA liability under these circumstances could signal a significant broadening of FCA exposure for PPP loan recipients. PPOA's alleged misconduct was entirely unrelated to its PPP loan, and in some instances, took place as many as five years before PPOA received any COVID-relief funds. It is not clear how PPOA would have known or reasonably should have known that it was falsely certifying compliance with the law when it applied for its loan in April 2020 because, at the time, there had been no determination of wrongdoing. Most of the allegations against PPOA were first raised in the *qui tam* actions filed by corporate relators between 2018 and 2020, but at the time PPOA applied for its loan, all four complaints were still under seal. Thus, PPOA may not have even known the *qui tam* actions had been filed. Regardless, there had been no litigation or ruling on the merits. Moreover, even in resolving

the matter PPOA expressly refused to admit any liability or wrongdoing in connection with the alleged healthcare fraud.

Takeaways

The settlement with PPOA suggests a possible DOJ civil enforcement trend of investigating all FCA defendants who received COVID-era loans for possible PPP fraud. FCA defendants could be subject to damages resulting from the principal fraud and additional FIRREA damages, and could also be required to immediately repay all loans obtained through the SBA.

Companies that applied for and received PPP or other emergency relief funds should consider taking the following steps to mitigate the risk of derivative FCA liability:

- Inventory all existing allegations of government-related fraud to assess both FCA and FIRREA liability
- Document efforts to diligence or investigate allegations of noncompliance and fraud
- Consider to what extent settlement of existing government-related disputes involve direct or indirect admissions of noncompliance that could result in FCA and FIRREA exposure
- Consider preemptive repayment of emergency relief funds, which could reduce statutory damages (though penalties could still apply)

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Kyle R. Jefcoat

kyle.jefcoat@lw.com
+1.202.637.2152
Washington, D.C.

Anne W. Robinson

anne.robinson@lw.com
+1.202.637.2161
Washington, D.C.

Morgan L. Maddoux

morgan.maddoux@lw.com
+1.202.637.3318
Washington, D.C.

Danielle J. McCall

danielle.mccall@lw.com
+1.202.637.2349
Washington, D.C.

You Might Also Be Interested In

[Empowering Corporate Compliance Functions in a Post-Pandemic Environment](#)

[False Claims Act Resource Center](#)

[US Regulators Increase Focus on Corporate Compliance and its Gatekeepers](#)

[FAQs: Small Business Loans Under the CARES Act](#)

[Caring for the CARES Act: The New Oversight and Investigations Landscape for COVID-19 Relief Programs](#)

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's Client Alerts can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham, [visit our subscriber page](#).

Endnotes

- ¹ 31 U.S.C. § 3729, *et seq.*
- ² See *Paycheck Protection Program*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/paycheck-protection-program> (last visited Dec. 15, 2022).
- ³ See CARES Act, Pub. L. No. 116-136, § 1110(a)(2), (b), 134 Stat. 281, 306-07.
- ⁴ PPP Borrower Application Form, available at <https://www.sba.gov/document/sba-form-2483-ppp-first-draw-borrower-application-form>. Over the course of the PPP, there were 10 versions of the PPP Borrower Application Form. Every version includes these certifications.
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ See 85 Fed. Reg. 20811, 20812 (Apr. 15, 2020).
- ⁸ See *Update: 11.5 Million PPP Loans Were Forgiven. Here's Why*, PANDEMIC OVERSIGHT, <https://www.pandemicoversight.gov/data-interactive-tools/data-stories/how-many-paycheck-protection-program-loans-have-been-forgiven> (last visited Dec. 15, 2022).
- ⁹ See *id.*
- ¹⁰ Press Release, U.S. Dep't of Justice, Physician Partners of America to Pay \$24.5 Million to Settle Allegations of Unnecessary Testing, Improper Remuneration to Physicians and a False Statement in Connection with COVID-19 Relief Funds (Apr. 12, 2022) (hereinafter "Press Release"), <https://www.justice.gov/opa/pr/physician-partners-america-pay-245-million-settle-allegations-unnecessary-testing-improper>.
- ¹¹ 31 U.S.C. § 3729(a)(1).
- ¹² See Complaint, *United States ex rel. Haight v. Physician Partners of Am., LLC*, No. 8:18-cv-267-SCB-AEP (M.D. Fla. Feb. 1, 2018), ECF No. 1.
- ¹³ See Complaint, *United States ex rel. Baker v. Physician Partners of Am., LLC*, No. 8:19-cv-902-MSS-TGW (M.D. Fla. Apr. 16, 2019), ECF No. 1; Complaint, *United States ex rel. Lupi v. Physician Partners of Am., LLC*, No. 8:19-cv-2375-SCB-CPT (M.D. Fla. Sept. 24, 2019), ECF No. 1; Complaint, *United States ex rel. Dookwah-Roberts v. Physician Partners of Am., LLC*, No. 8:20-cv-541-SCB-AEP (M.D. Fla. Mar. 9, 2020), ECF No. 1.
- ¹⁴ See Order of Dismissal, *United States ex rel. Haight*, No. 8:18-cv-267-SCB-AEP (M.D. Fla. Mar. 28, 2022), ECF No. 46; Notice of Election to Intervene, *United States ex rel. Baker*, No. 8:19-cv-902-MSS-TGW (M.D. Fla. Mar. 24, 2022), ECF No. 32; Order of Dismissal, *United States ex rel. Michael Lupi, D.O.*, No. 8:19-cv-2375-SCB-CPT (M.D. Fla. Mar. 28, 2022), ECF No. 22; Order of Dismissal, *United States ex rel. Dookwah-Roberts*, No. 8:20-cv-541-SCB-AEP (M.D. Fla. Mar. 28, 2022), ECF No. 23.
- ¹⁵ Settlement Agreement between U.S. Dep't of Just. and Physicians Partners of Am., LLC at 3-5 (Mar. 24, 2022) (hereinafter "Settlement Agreement"), <https://www.justice.gov/opa/press-release/file/1493671/download>.
- ¹⁶ Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989). FIRREA affords the DOJ a ten-year statute of limitations to bring fourteen broad criminal offenses, including bank, mail, and wire fraud, under a preponderance of the evidence standard. 12 U.S.C. § 1833a(c), (f), (h).
- ¹⁷ See Press Release; Settlement Agreement at 5.
- ¹⁸ Press Release; Settlement Agreement at 5.
- ¹⁹ Settlement Agreement at 6.