

What DOJ's 2022 Recovery Stats Say About FCA Enforcement

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On Feb. 7, the U.S. Department of Justice issued its annual press release summarizing the False Claims Act recovery statistics for the 2022 fiscal year.

The \$2.2 billion in total recoveries is a drop from the prior year when the \$5.7 billion in recoveries was supercharged by several blockbuster settlements. But even though recoveries were down, the year saw a record amount of activity, with 948 new FCA matters initiated, and 351 settlements and judgments, the second-highest number recorded in a given year.

This article delves into those figures and analyzes what the 2022 fiscal year recovery statistics reveal about potential FCA enforcement trends in the year ahead.

The Pandemic's Imprint on the FCA Landscape

The DOJ's continued focus on pandemic-related fraud is reflected in the 2022 fiscal year figures for both new FCA matters and settlements.

As to new matters, cases involving allegations of Paycheck Protection Program fraud contributed to the rise in the number of non-qui tam matters initiated in 2022 — 296 in 2022 as compared with 212 in 2021. Last year alone, the U.S. Attorney's Office for the Northern District of Mississippi filed close to 50 FCA actions in cases involving allegations of fraud related to COVID-19.

Pandemic-related fraud suits may have also contributed to the uptick in the number of qui tam suits filed in 2022 — 652 in 2022 as compared with the 598 filed in 2021. Although the majority of the qui tam suits filed in 2022 remain under seal, there are some indications that relators have been active in filing pandemic-related fraud cases.

Last year, a lawyer in Utah publicly stated that he had filed more than 30 qui tam cases alleging PPP fraud based entirely on his review of small businesses in public databases. This particular relator's modest but successful recoveries to date may encourage other private actors to try to use the FCA to recover fraudulent funds associated with the more than \$800 billion that was available through loan guarantees and subsidies.[1]



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The focus from the government and whistleblowers on PPP cases also contributed to the high volume of settlements last year. Following the rollout of PPP funds, the department announced that the FCA would be an important arrow in the government's quiver when pursuing individuals and businesses that received relief payments to which they were not entitled.[2]

The intervening months have borne this out, as the statute has been used to go after schemes involving the misuse of program funds, misrepresentations about eligibility, false certifications regarding loan forgiveness and the making of PPP loans to ineligible customers. Of the 351 cases that were resolved through settlement or judgment in 2022, 35 of these recoveries involved pandemic-related fraud.

In light of the department's stated prioritization of pandemic-related fraud, there are almost certainly more cases in the queue that will be unsealed or initiated in the coming months. Indeed, in a March 2022 announcement, the department stated that it had opened more than 240 civil investigations into some 1,800 individuals and entities for alleged misconduct in connection with pandemic relief loans.[3]

To date, these investigations have yielded recoveries that are small when compared to the headline-grabbing health care settlements trumpeted in the department's Feb. 7 press release — such as pharmaceutical company Mallinckrodt ARD LLC's \$260 million settlement to resolve allegations that it paid kickbacks and underpaid Medicaid rebates.[4]

However, this trend of smaller PPP fraud recoveries could change in the years ahead as the department investigates more complex fraud schemes — with more dollars at issue — such as instances in which a loan recipient was ineligible under the size requirements due to the Small Business Administration's affiliation rules, which are designed to prevent large businesses from exercising inordinate control over a loan or set-aside eligible small business.

Continued Rise in Non-Qui Tam Initiated Matters

As has been the case for more than 25 years, qui tam cases were once again the DOJ's primary referral source for opening new matters in 2022. The 652 whistleblower suits filed in fiscal year 2022 is largely consistent with the past five years, where there have generally been 600 to 700 new actions brought under the statute's qui tam provisions.

But what is notable in recent years is the steady rise of new non-qui tam matters. This trend continued in fiscal year 2022, a year in which more than 30% of the new matters were initiated directly by the government. While this trend can be attributed in part to the newcomer PPP cases, it likely also reflects the government's increased focus on proactively pursuing fraud using of data analysis tools to uncover fraudulent activity, as well as the department's opening of cases based on referrals from other investigative agencies.

This trend of government-initiated investigations is particularly pronounced in matters involving U.S. Department of Defense funds, where the majority of the new cases over the past three years were opened for reasons other than the filing of a qui tam complaint. This trend underscores that government contractors need to be on alert when responding to requests from an Office of Inspector General or the Defense Contract Audit Agency because these inquiries are increasingly becoming a top referral source for procurement fraud investigations.

Priorities for 2023 and Beyond

The annual press release is an opportunity for the department to tout the dollar amounts it recovered for taxpayers and federal agencies as well as a chance to showcase specific settlements in priority areas. For example, the Feb. 7 press release highlighted the first settlement of a case under the department's Civil Cyber-Fraud Initiative,[5] which aims to use the FCA to combat cyber threats to the security of sensitive information.

As an area involving rapidly changing technology and an evolving regulatory regime, it remains fertile ground for allegations of noncompliance by companies in the years ahead.

The DOJ statistics were consistent with recent years in that the majority of dollars recovered came from the health care industry. Of the \$2.2 billion in FCA recoveries in the 2022 fiscal year, about \$1.7 billion came from health care entities, including drug and medical device manufacturers, durable medical equipment, home health and managed care providers, hospitals, managed care organizations, pharmacies, hospice organizations, and physicians.

This allotment of the overall recovery is not a shock, given enforcement statistics in recent years and the sheer number of dollars flowing through the Medicare, Medicaid, and TRICARE programs, but it serves as an annual caution to contractors in the health care industry of the pitfalls of often-complex regulatory and compliance schemes.

Some of the notable settlements and litigations highlighted by the DOJ were emblematic of some of the more common health care-related FCA theories of liability.

Among these were examples of violations of the Federal Anti-Kickback Statute at Title 42 of the U.S. Code, Section 1320a-7b(b) — which prohibits exchanging value to induce the referral of federal health care program payments, unlawfully inflated drug prices charged to federal agencies, and fraud allegations related to the growing Medicare Advantage (Part C) program by both payors and providers.

Contractors should expect to see these enforcement actions — which are often some of the largest FCA recoveries — continue into 2023 and beyond.

The Feb. 7 press release also highlighted a \$48.5 million settlement by TriMark USA LLC to resolve allegations that it had manipulated small business contracting opportunities — while also resolving claims against company executive Kimberley Rimsza.[6] This settlement underscores the government's resolve to use the FCA to root out fraud in SBA programs as well as the department's continued commitment to hold individuals accountable under the FCA.

The settlements featured in the Feb. 7 press release are likely harbingers of similar enforcement actions to come. For a sophisticated relators bar that continues to initiate the majority of FCA cases, the brass ring remains an intervention decision by the government.

As such, relators counsel will likely continue to take on cases that align with DOJ priorities and companies should anticipate a steady pipeline of cases involving a range of issues such as SBA program fraud, telehealth and cybersecurity.

Last year's decline in FCA recoveries should not be interpreted as a reflection of diminished enforcement activity. On the contrary, the record number of new matters initiated by both the government and relators in 2022 suggests a likely bump in the annual recovery amounts in the years ahead.

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[1] See, e.g., First-Ever Paycheck Protection Program False Claims Act Whistleblower Case in Which the United States Intervened Against the Borrower Settles, Sept. 22, 2022 press release. <https://www.justice.gov/usao-sdfl/pr/first-ever-paycheck-protection-program-false-claims-act-whistleblower-case-which-united>.

[2] Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference, Feb. 17, 2021 speech. <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar>.

[3] Justice Department Announces Director for COVID-19 Fraud Enforcement: Criminal and Civil Enforcement Actions Alleging Fraud Related to Over \$8 Billion in Pandemic Relief, March 10, 2022, press release. <https://www.justice.gov/opa/pr/justice-department-announces-director-covid-19-fraud-enforcement>.

[4] Mallinckrodt Agrees to Pay \$260 Million to Settle Lawsuits Alleging Underpayments of Medicaid Drug Rebates and Payment of Illegal Kickbacks, March 7, 2022, press release. <https://www.justice.gov/opa/pr/mallinckrodt-agrees-pay-260-million-settle-lawsuits-alleging-underpayments-medicaid-drug>.

[5] Medical Services Contractor Pays \$930,000 to Settle False Claims Act Allegations Relating to Medical Services Contracts at State Department and Air Force Facilities in Iraq and Afghanistan, March 8, 2022, press release. <https://www.justice.gov/opa/pr/medical-services-contractor-pays-930000-settle-false-claims-act-allegations-relating-medical>.

[6] Government Contractor Agrees to Pay Record \$48.5 Million to Resolve Claims Related to Fraudulent Procurement of Small Business Contracts Intended for Service-Disabled Veterans, Feb. 23, 2022 press release. <https://www.justice.gov/usao-edwa/pr/government-contractor-agrees-pay-record-485-million-resolve-claims-related-fraudulent>.