

ALERT

2021 FCA Recoveries Bounce Back from Decade-Low . . . Maybe

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On February 1, the U.S. Department of Justice (DOJ) announced the second-largest annual total recoveries in the history of the False Claims Act (FCA)—\$5.6 billion—for FY 2021 (October 2020 – September 2021). While that staggering figure certainly demonstrates that the FCA remains one of the “most important tools available to the department both to deter and to hold accountable those who seek to misuse public fund,” it does not tell the whole story and it remains to be seen whether DOJ is truly on track to resume its “dazzling decade” following FY 2020’s decade-low recovery (\$2.2 billion).

Once again, the health care industry remained DOJ’s primary target, accounting for nine out of every ten dollars recovered last year. Notably, however, over half of these dollars were established by a single settlement within the first month of FY 2021. Purdue Pharma’s October 2020 \$2.8 billion settlement surpassed the prior year’s recovery in one fell swoop but was also likely the result of significant efforts expended before FY 2021. Indeed, dissecting last year’s statistics further reveals that this “second largest” annual total is mostly composed of one or two opioid settlements. Remove those, and the recoveries barely top FY 2020’s low-water mark.

In addition to the opioid epidemic, DOJ’s health care enforcement targeted the Medicare Advantage program, kickbacks, and unnecessary medical services. Notably, DOJ recovered almost \$100 million from health care service providers Sutter Health and Kaiser Foundation Health Plan of Washington to settle allegations of Medicare overbilling involving the submission of unsupported diagnosis codes. And, effectuating its often-articulated commitment to enforcement in the Medicare Advantage space, DOJ intervened in

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lawsuits against Independent Health Corporation and members of the Kaiser Permanente consortium alleging those plans submitted or caused the submission of inaccurate information about the health status of beneficiaries to increase reimbursements. Continuing a decade-long trend of leveraging the FCA to target Anti-Kickback Statute violations, DOJ secured a \$160 million settlement from diabetic testing supply company Arriva Medical to resolve allegations of purported kickbacks to Medicare beneficiaries involving “free” or “no-cost” diabetic testing devices by failing to collect required copayments.

Outside the health care space, DOJ’s enforcement priorities and recovery sources remained diverse, encompassing government contractors, individuals, and recipients of COVID-19 relief funds, amongst others. As it has since its advent as a means to fight fraud perpetrated against the Union Army during the Civil War, the FCA continues to be the Government’s favorite tool to target procurement fraud. For example, a \$50 million settlement resolved allegations of fraudulently inducing a contract modification at inflated prices. DOJ also recovered funds based on allegations that companies provided goods and services that did not comply with contract requirements, or provided kickbacks in exchange for contracting advantages. Interestingly, the total *qui tam* recoveries involving the U.S. Department of Defense more than doubled from last year (\$98.5 million v. \$44.4 million) but only a mere \$35 thousand of these recoveries were declined suits suggesting DOJ is saving its resources for heavy-hitting cases.

While procurement fraud, kickbacks, and non-conforming goods/service theories have long been the bread and butter of FCA enforcement in the government contracting space, DOJ is ready to expand its focus to new 21st Century threats, including cybersecurity. In particular, DOJ reiterated that it will be looking to use the FCA to “pursue misrepresentations by companies in connection with the government’s acquisition of information technology, software, cloud-based storage and related services designed to protect highly-sensitive government information from cybersecurity threats and compromises.”

While lacking the blockbuster numbers associated with corporate resolutions, DOJ’s announcement reiterated that the FCA can and will be used against individual wrongdoers. Consistent with its recently-announced return to Obama-era standards for individual accountability, DOJ touted numerous enforcement actions involving individuals in FY 2021. For instance, two Texas physicians entered into a \$3.9 million settlement for billing medically unnecessary drug testing.

Perhaps because they tend to target individuals or smaller corporations, COVID-related fraud recoveries were comparatively modest last year. Still, COVID-19 fraud remains a point of emphasis and—as FCA investigations and litigation can be notoriously slow—additional enforcement action is expected in FY 2022 and beyond.

Looking at the pipeline of FCA cases, the number of original actions (203) filed in FY 2021 dipped below the all-time record set in FY 2020 but remained historically high. And notably, for the first time since 2006, recoveries from original actions topped recoveries from *qui tam* suits—and it was not close, with original actions more than doubling *qui tam* recoveries. Whistleblowers filed only 598 *qui tam* suits in FY 2021—more than a 10% decline from FY 2020, and the lowest number in over ten years. It remains to be seen whether these whistleblower actions will continue to decline in coming years. Perhaps relators are taking extra measures before filing given the slight uptick in DOJ dismissals under 31 U.S.C. section 3730(c)(2)(A) since the

Granston Memo. Or, more likely, remote work during the pandemic has impeded whistleblowers, which could have a lasting impact as many businesses permanently shift workers to remote and hybrid work schedules. Even so, DOJ demonstrated it can readily fill this void with its own original actions, and that was before DOJ expanded the FCA landscape by rescinding its agency guidance policy.

All in, DOJ had an FCA year to remember headlined by massive recoveries in a few opioid cases and supplemented by more typical recoveries from the usual suspects—health care and government contractors—and increased rhetoric about new focus areas. For this upcoming year, we can likely expect to see improving diversity in enforcement targets and theories coupled with a continued focus on health care. In addition to a new emphasis on combatting cybersecurity-related fraud, we may also see a rise in COVID-related recoveries as pending matters progress and historic levels of government spending continue as the pandemic persists into a third year. In Congress, the decrease in relator suits could revitalize Senator Chuck Grassley’s efforts to amend the FCA and rein in DOJ’s dismissal authority should the Granston Memo be viewed as a deterrent to relator suits. Regardless of legislative efforts and DOJ-to-relator filing ratios, the FCA is still one of DOJ’s most powerful tools to combat fraud. Those doing business with the Government, entities and individuals alike, should remain vigilant and seek to mitigate potential FCA liability by establishing and routinely updating robust compliance programs to rapidly detect and address potential fraud.