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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



**EDITOR'S NOTE: SPLIT CIRCUITS**

Victoria Prussen Spears

**FALSE CLAIMS ACT CIRCUIT SPLITS:  
FCA ISSUES THAT MAY SOON REACH  
THE SUPREME COURT OR LEAD TO  
CONGRESSIONAL AMENDMENT - PART I**

Robert S. Salcido

**RAND CORP. REPORTS TO CONGRESS  
AND THE DEPARTMENT OF DEFENSE ON  
THE BID PROTEST SYSTEM**

Joseph R. Berger, Tom Mason, Francis E. Purcell, Jr., and Ray McCann

**ANALYSIS OF THE DOJ'S REPORTED  
\$3.7 BILLION IN FALSE CLAIMS ACT  
RECOVERIES IN FY 2017 REVEALS  
CONTINUED AGGRESSIVE USE OF  
THE FALSE CLAIMS ACT BY THE  
GOVERNMENT AND QUI TAM RELATORS**

Suzanne Jaffe Bloom, Benjamin Sokoly,  
and Cristina I. Calvar

**ANOTHER ONE BITES THE DUST:  
COURT TOSSES NEARLY \$350  
MILLION FALSE CLAIMS ACT  
VERDICT UNDER ESCOBAR**

D. Jacques Smith, Randall A. Brater,  
and Michael F. Dearington

**2017 WAS A BUSY YEAR  
FOR STATE IMPOSITION OF  
DRUG MANUFACTURER PRICE  
DISCLOSURE OBLIGATIONS AND  
2018 ISN'T LOOKING MUCH BETTER**

Merle M. DeLancey Jr.

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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VOLUME 4

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**Editor's Note: Split Circuits**

Victoria Prussen Spears

107

**False Claims Act Circuit Splits: FCA Issues That May Soon Reach the Supreme Court or Lead to Congressional Amendment—Part I**

Robert S. Salcido

109

**RAND Corp. Reports to Congress and the Department of Defense on the Bid Protest System**

Joseph R. Berger, Tom Mason, Francis E. Purcell, Jr.,  
and Ray McCann

121

**Analysis of the DOJ's Reported \$3.7 Billion in False Claims Act Recoveries in FY 2017 Reveals Continued Aggressive Use of the False Claims Act by the Government and *Qui Tam* Relators**

Suzanne Jaffe Bloom, Benjamin Sokoly, and Cristina I. Calvar

131

**Another One Bites the Dust: Court Tosses Nearly \$350 Million False Claims Act Verdict Under *Escobar***

D. Jacques Smith, Randall A. Brater, and Michael F. Dearington

138

**2017 Was a Busy Year for State Imposition of Drug Manufacturer Price Disclosure Obligations and 2018 Isn't Looking Much Better**

Merle M. DeLancey Jr.

142

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Editorial Office  
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# Analysis of the DOJ’s Reported \$3.7 Billion in False Claims Act Recoveries in FY 2017 Reveals Continued Aggressive Use of the False Claims Act by the Government and *Qui Tam* Relators

*By Suzanne Jaffe Bloom, Benjamin Sokoly, and Cristina I. Calvar\**

*The authors explore the U.S. Department of Justice’s 2017 False Claims Act recovery statistics.*

Late last year, the U.S. Department of Justice (“DOJ”) released its annual False Claims Act (“FCA”) recovery statistics and announced that it obtained over \$3.7 billion in settlements and judgments in fiscal year 2017 from civil cases involving government program fraud and false claims.<sup>1</sup> Although this marked a \$1 billion decline in recoveries from the previous fiscal year, the DOJ’s announcements and underlying statistics regarding its FCA recoveries reveal the continued aggressive use of the FCA by the government and *qui tam* relators in efforts to combat fraud—particularly in the health care industry. It also reveals a continuation of the recent focus on holding individuals accountable.

The reported recovery of \$3.7 billion recovered in fiscal year 2017 is the fourth highest recovery in FCA history and is the eighth consecutive year that recoveries have exceeded \$3 billion.<sup>2</sup> As in prior recent years, the largest

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\* Suzanne Jaffe Bloom (sbloom@winston.com), a litigation partner at Winston & Strawn LLP and co-chair of the firm’s Hiring Committee, represents public and private companies, special board committees, financial institutions, investment firms, corporate executives, and other individuals in all aspects of white collar criminal and regulatory matters, commercial litigation, and government and internal investigations, including FCA and *qui tam* matters. Benjamin Sokoly (bsokoly@winston.com) is of counsel in the firm’s litigation department focusing on white collar criminal and regulatory matters, complex commercial litigation, and government and internal investigations, including FCA and *qui tam* matters. Cristina I. Calvar (ccalvar@winston.com), an associate, concentrates her practice on complex commercial litigation and government investigations, and has experience representing clients in a variety of industries, including the health care and financial markets.

<sup>1</sup> See DOJ Press Release, “Justice Department Recovers Over \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017” (Dec. 21, 2017), available at <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>; see also DOJ Fraud Statistics—Overview (Dec. 19, 2017), available at <https://www.justice.gov/opa/press-release/file/1020126/download>.

<sup>2</sup> Although the DOJ reported that it secured over \$3.7 billion in Fiscal Year 2017, the total amount of recoveries decreased to approximately \$3.4 billion as a result of a federal district

recoveries—\$2.48 billion—were from the health care industry. Recoveries involving the Department of Defense totaled nearly \$220 million, an 80 percent increase over the prior fiscal year. The amount recovered in 2017 brings the total recovery since fiscal year 2010—the first full fiscal year following the expansion of the FCA through the 2009 Fraud Enforcement and Recovery Act (“FERA”) amendments—to over \$32 billion, an average of nearly \$4 billion per year since that time.<sup>3</sup>

There were nearly 800 new FCA matters docketed in fiscal year 2017, which was the fourth highest number of new matters filed in a single fiscal year and marked the eighth consecutive year that over 700 new FCA matters were filed. Once again, the vast majority of those matters—over 670<sup>4</sup>—were filed under the FCA’s whistleblower, or *qui tam*, provisions that allow individual whistleblowers, known as relators, to file lawsuits alleging false claims on behalf of the government and share in any recovery. Of the total recovered, approximately \$3.4 billion—92 percent—was secured in *qui tam* matters, with awards to whistleblowers of \$393 million.

## INDUSTRIES TARGETED

### Health Care Industry

Of the reported \$3.7 billion recovered by the federal government in fiscal year 2017, the largest portion—nearly \$2.48 billion, representing 67 percent of the total—was recovered from companies and individuals in the health care industry, including pharmaceutical manufacturers, hospitals, nursing homes, pharmacies, laboratories, and physicians accused of a variety of wrongdoing. As the government noted, in many of these cases, substantial additional amounts were recovered for state Medicaid programs. This marked the eighth consecutive year that recoveries in the health care industry exceeded \$2 billion. Since fiscal year 2010, the DOJ has recovered over \$20.4 billion in health care fraud matters—well over half of the total recoveries during that period. The vast majority of the recoveries from the health care industry in fiscal year 2017—\$2.44 billion—came from *qui tam* actions.<sup>5</sup>

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judge’s decision to reverse a \$347 million judgment in January 2018. *See, e.g., United States ex rel. Ruckh v. Salus Rehabilitation, LLC*, 8:11-cv-1303-T-23TBM (M.D. Fla. Jan. 11, 2018).

<sup>3</sup> A total of \$32,030,610,544 was recovered by the government from Fiscal Year 2010 through Fiscal Year 2017. *See* DOJ Fraud Statistics—Overview.

<sup>4</sup> As in prior years, there are slight discrepancies between the DOJ’s underlying statistical data and what is reported in its press release. The figures discussed above are derived from the DOJ’s underlying statistical data. *See* DOJ Fraud Statistics—Overview.

<sup>5</sup> *See* DOJ Fraud Statistics—Health and Human Services (Dec. 19, 2017), *available at* <https://www.justice.gov/opa/press-release/file/1020116/download>.

As was the case in fiscal year 2016, the largest recoveries from the health care industry in fiscal year 2017 came from pharmaceutical and medical device companies and totaled over \$900 million—roughly 36 percent of the total recovered in health care fraud matters. In one settlement highlighted by the DOJ, a pharmaceutical company agreed to pay \$350 million to resolve federal and state FCA allegations that the company and another company it had acquired employed kickbacks and various other unlawful means to induce clinics and physicians to use or overuse its product. Another drug manufacturer paid approximately \$465 million to resolve claims that it violated the FCA by knowingly misclassifying its drug as a generic drug to avoid paying rebates owed under the Medicaid Drug Rebate Program.

Significant recoveries were also obtained from other health care providers. For example, a skilled nursing provider and its owner agreed to pay \$145 million to resolve allegations that the provider violated the FCA by knowingly causing skilled nursing facilities to submit false claims to Medicare and TRICARE for rehabilitation therapy services that were not reasonable, necessary or skilled. The DOJ touted this settlement as the largest civil settlement with a skilled nursing facility chain in the history of the FCA. The government also recovered another \$155 million from an electronic health records software vendor and certain of its employees. That settlement resolved allegations that the company and its employees falsely obtained certification for the company's software by concealing from its certifying entity that its software did not comply with the requirements for certification.

In addition to these recoveries, fiscal year 2017 saw the commencement of 544 new FCA matters (68 percent of the 799 new matters initiated) involving the health care industry, and 90 percent of these new health care matters (491 out of 544) were *qui tam* actions.<sup>6</sup>

### **Financial Services Industry**

The second largest recoveries came from the financial services industry, where the DOJ recovered \$543 million in cases involving alleged housing and mortgage fraud. This marked a significant decline from the \$1.6 billion in settlements and judgments resulting from the housing and mortgage fraud crisis recovered in fiscal year 2016. More than half of the total recovered—over \$296 million—was awarded after a unanimous jury found that a residential mortgage lending corporation and its affiliate violated the FCA and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. The jury found that the defendants abused the Federal Housing Administration (“FHA”)

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<sup>6</sup> See DOJ Fraud Statistics—Health and Human Services.



mortgage insurance program by falsely certifying that thousands of high risk, low quality loans were eligible for FHA insurance and then submitting insurance claims to FHA when any of those loans defaulted. The court also entered judgment for over \$25 million against the corporation's president and chief executive officer. The significant decline in recoveries from the financial services industry may signal that actions against financial institutions arising from the 2008 subprime mortgage crisis are winding down nearly a decade after the financial crisis.

### **Recoveries Involving Other Industries**

Illustrating the far reaching scope of the FCA, the DOJ also continued to pursue claims relating to a variety of federal programs and contracts in other industries, including the energy, telecommunications, and defense industries. For example, a foreign government contractor agreed to pay \$95 million to resolve FCA claims that the contractor overcharged the Department of Defense for locally available fresh produce and failing to disclose and pass through rebates and discounts it obtained from U.S.-based suppliers, as required by its contracts. As part of the settlement, the foreign contractor agreed to forego its administrative claims against the United States seeking \$249 million in additional payments under its military food contracts, and to plead guilty to a criminal misdemeanor offense for theft of government funds. The DOJ also recovered \$30 million to settle claims alleging an illegal scheme by a mobile service provider to defraud a federal government subsidy program that offered discounted mobile phone services to eligible low-income consumers.

Recoveries in matters involving the Department of Defense increased in fiscal year 2017 over fiscal year 2016, from \$122 million to nearly \$220 million. In addition, 47 new matters involving the Department of Defense and the defense industry were commenced in fiscal year 2017. Unlike in the health care industry, where the vast majority of new matters were commenced by whistleblowers, 40 percent of these new matters (19 of 47) were initiated by the federal government.<sup>7</sup>

### **WHISTLEBLOWER ACTIONS**

In fiscal year 2017, 674 of the 799 new FCA matters—84 percent—were filed under the FCA's whistleblower, or *qui tam*, provisions. In such actions, the whistleblower, also known as the relator, receives up to 30 percent of any recovery. As in prior years, *qui tam* actions were a significant factor in FCA recoveries in fiscal year 2017. Of the total FCA recoveries this past fiscal year,

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<sup>7</sup> See DOJ Fraud Statistics—Department of Defense (Dec. 19, 2017), available at <https://www.justice.gov/opa/press-release/file/1020116/download>.

over \$3.4 billion—approximately 92 percent—was received in connection with *qui tam* lawsuits filed in this and prior years, which was the second highest yearly total for *qui tam* recoveries (behind only fiscal year 2014’s record \$4.47 billion).<sup>8</sup> The vast majority of this total—\$3.0 billion—was attributable to cases in which the government intervened in the *qui tam* action. Only approximately \$266 million was recovered in actions instituted by the government itself, without a corresponding *qui tam* complaint, which marked a significant decline from the \$1.86 billion recovered in government-initiated FCA actions in fiscal year 2016 and the lowest total in four years.<sup>9</sup>

In fiscal year 2017, whistleblowers received approximately \$393 million in FCA cases as relator share awards, a decline from the whistleblower awards paid in fiscal year 2016 and the lowest total since 2009. Nevertheless, from fiscal year 2010 (following the FERA amendments to the FCA) through the end of fiscal year 2017, the government recovered nearly \$24.8 billion in settlements and judgments related to *qui tam* actions and paid whistleblower awards of nearly \$4.1 billion.<sup>10</sup>

## TAKEAWAYS

As in prior years, the DOJ’s summary of fiscal year 2017 FCA recoveries and related statistics are noteworthy in several respects.

First, the statistics reveal that the health care industry remains a prime target for aggressive FCA enforcement. As discussed above, the health care industry once again represented the leading area by far for recoveries in fiscal year 2017, comprising over two-thirds of the total recoveries. Moreover, companies doing business in the health care industry are particularly susceptible to whistleblower actions, as 491 of the 799 total new FCA matters initiated in fiscal year 2017—61 percent—were *qui tam* actions commenced against participants in the health care industry.<sup>11</sup> This trend of significant recoveries under the FCA from the health care industry will likely continue in fiscal year 2018, as suggested by settlements that the DOJ has already announced in the current fiscal year. For example, in late October, the DOJ announced that it recovered \$6 million from a skilled nursing care provider to settle allegations that services provided at long and short-term skilled nursing care and post-acute care facilities were unreasonable, not medically necessary, and unsupported by the medical records. Even more recently, on December 22, 2017 the DOJ

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<sup>8</sup> See DOJ Fraud Statistics—Overview.

<sup>9</sup> See DOJ Fraud Statistics—Overview.

<sup>10</sup> See DOJ Fraud Statistics—Overview.

<sup>11</sup> See DOJ Fraud Statistics—Health and Human Services; DOJ Fraud Statistics—Overview.

announced that a large retailer agreed to pay \$32.3 million to settle allegations that its in-store pharmacies failed to report discounted prescription drug prices to Medicare Part D, Medicaid, and TRICARE. Notwithstanding the government's significant recoveries from the health care industry in the current and prior fiscal years, the DOJ also faced a significant setback when it was forced to dismiss a potential billion-dollar FCA lawsuit against a health care provider after the DOJ's main expert witness—a witness that was crucial to the government's efforts to establish falsity—was excluded from testifying because the witness was deemed unqualified and unreliable. The presiding magistrate judge also imposed a sanction against the DOJ and struck the expert witness's report and testimony from the record.

Second, the DOJ has continued its efforts to ensure individual accountability for corporate wrongdoing by pursuing FCA actions against individuals in addition to corporations. In fiscal year 2017, the DOJ recovered \$60 million in settlements and judgments directly from individuals under the FCA. In addition to these recoveries, the DOJ also highlighted that individuals agreed to be held jointly and severally liable for settlement payments with their corporations, including the \$155 million settlement with the electronic health records software vendor and the \$145 million settlement with the skilled nursing provider referenced above.<sup>12</sup> This is the third consecutive year that the DOJ has devoted a section of its press release to individual accountability. This trend may be traceable to the DOJ's publication on September 9, 2015 of a policy memorandum commonly referred to as the "Yates Memo" in which the DOJ announced an increased focus on ensuring that individuals are held accountable for corporate misdeeds, both criminally and civilly. Despite the subsequent change in administration, the DOJ's recent press release highlighting recoveries from individual defendants in FCA cases, as well as recent public remarks by administration officials,<sup>13</sup> suggest that the guidelines of the Yates Memo and the increased scrutiny of individuals for FCA enforcement is a trend that is likely to continue in years to come.

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<sup>12</sup> Notably, and further underscoring the first takeaway discussed above, all of the individuals specifically identified in the DOJ's press release as being held individually accountable were involved in the health care industry.

<sup>13</sup> Deputy Attorney General Rod J. Rosenstein recently delivered remarks in which he referenced the Yates Memo, as well as the \$60 million in recoveries against individuals under the FCA. Rosenstein indicated, among other things, that the DOJ "will not relent in seeking to hold corporate executives accountable if they violate the law." Deputy Attorney General Rod Rosenstein Keynote Address on Corporate Enforcement Policy, NYU Program on Corporate Compliance & Enforcement (Oct. 6, 2017), *available at* [https://wp.nyu.edu/compliance\\_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/](https://wp.nyu.edu/compliance_enforcement/2017/10/06/nyu-program-on-corporate-compliance-enforcement-keynote-address-october-6-2017/).

Third, recoveries in cases where the government declined to intervene surged in fiscal year 2017, which may be due in part to increased willingness by relators to pursue cases on their own. Although as in prior recent years, the vast majority of recoveries were in cases where the government intervened, the government recovered in fiscal year 2017 over \$425 million in cases where the government declined to intervene. This marked a fourfold increase from fiscal year 2016 and the second highest total ever, behind only the \$512 million recovered in fiscal year 2015. A significant portion of this \$425 million total stems from a \$280 million settlement (of which the United States received nearly \$260 million) with a pharmaceutical manufacturer. That settlement resolved allegations that the manufacturer unlawfully promoted two cancer drugs for uses that were not approved by the FDA and not covered by federal health care programs, including through the use of false and misleading statements and paying kickbacks to physicians to induce them to prescribe the drugs. The substantial recoveries in non-intervened cases in fiscal year 2017 suggests that more cases are being pursued by relators even when the government declines to intervene. This willingness by relators to press FCA cases absent government intervention poses additional risks for companies doing business with the government.

Finally, although many may have suggested that the new presidential administration would alter FCA enforcement activity, the statistics suggest that there has been little change. There continues to be a high number of new FCA matters initiated and significant recoveries. This is evidenced by the fact that fiscal year 2017 marked the eighth consecutive year where both (i) recoveries exceeded \$3 billion, and (ii) more than 700 new FCA matters were commenced. As such, the statistics suggest that the government and *qui tam* relators will continue to make aggressive use of the FCA in order to investigate and combat alleged fraud by those who do business with the government.