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What Can Be Learned from the DOJ's 2018 False Claims Act Recoveries?

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

The U.S. Department of Justice's $2.88 billion in False Claims Act recoveries in fiscal year 2018 reveals its continued focus on the health care industry, an expanding focus on additional industries and defendants, and more aggressive government enforcement independent of whistleblowers.

The U.S. Department of Justice ("DOJ") released its annual False Claims Act ("FCA") recovery statistics and announced that it obtained over $2.88 billion in settlements and judgments in fiscal year 2018 from civil cases involving fraud and false claims against the government.[1] Although substantial, this was the second straight year in which overall recoveries declined and marked the lowest annual recovery since fiscal year 2009. Nevertheless, the DOJ's announcements and underlying statistics regarding its FCA recoveries suggest that the government is expanding its use of the FCA as a powerful tool for combatting fraud not only in the health care industry, but in other industries as well, and that it is being used increasingly against third parties viewed as having facilitated or permitted the wrongdoing by the primary actors. They also suggest that the government is securing large recoveries in claims initiated based on its own investigation independent of whistleblower complaints. The following article first presents a summary of the statistics reported by the DOJ with an analysis of those statistics relative to earlier years and the particular industries and defendants targeted. The article then addresses what is revealed by these

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[1] *See* DOJ Press Release, "Justice Department Recovers Over $2.8 Billion From False Claims Act Cases in Fiscal Year 2018" (Dec. 21, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018; *see also* DOJ Fraud Statistics—Overview, October 1, 1986—September 30, 2018, *available at* https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

statistics and other matters addressed in the DOJ's press release, including what we can expect in 2019.

SUMMARY OF THE STATISTICS

The $2.88 billion recovered in fiscal year 2018 is the 10th consecutive year that recoveries have exceeded $2 billion. As in prior recent years, the largest recoveries—$2.5 billion—were from the health care industry. This amount represents more than 87 percent of the total amount recovered—the highest percentage of total recoveries ever. This high proportion of recoveries from the health care industry—and the decrease in overall recoveries—is a result of significant declines in recoveries from other industries. Recoveries involving the Department of Defense totaled over $107 million, representing a 51 percent decrease from the prior fiscal year. Although the DOJ's press release indicates that a wide range of industries was targeted for FCA enforcement, the remaining recoveries from non-health care and non-defense matters totaled only approximately $260 million, representing a decrease of over $800 million (or over 75 percent) from fiscal year 2017. The amount recovered in 2018 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 $34.8 billion, an average of over $3.8 billion per year since that time.[2]

There were 767 new FCA matters docketed in fiscal year 2018. As in prior years, the vast majority of new matters—645—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 $2.1 billion—73 percent—was secured in *qui tam* matters, with awards to whistleblowers of $301 million. Although this was the ninth consecutive year that over 700 new FCA matters were filed, this marked the second consecutive year that the number of new FCA matters initiated declined and the fourth fewest new matters since fiscal year 2010.

INDUSTRIES TARGETED

Health Care Industry

Of the $2.88 billion recovered by the federal government in fiscal year 2017, the largest portion by far—over $2.5 billion, representing an increase of over $329 million from fiscal year 2017 and over 87 percent of the total—was

[2] A total of $34,862,901,454 was recovered by the government from Fiscal Year 2010 through Fiscal Year 2018. *See* DOJ Fraud Statistics—Overview.

recovered from companies and individuals in the health care industry, including pharmaceutical and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, 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 ninth consecutive year that recoveries in the health care industry exceeded $2 billion. Since fiscal year 2010, the DOJ has recovered approximately $22.8 billion in health care fraud matters—well over half of the total recoveries during that period. As discussed below, these statistics reveal that the health care industry has become the prime target for FCA enforcement, a trend that is unlikely to end in the coming years, barring any large, aberrational recoveries in other industries. As in prior years, the vast majority of the recoveries from the health care industry in fiscal year 2018—$1.9 billion—came from *qui tam* actions, suggesting that whistleblowers continue to play a prominent role in alerting the government to alleged fraud in the health care industry and facilitating significant recoveries.[3] The remaining recoveries—over $568 million—were attributable to non-*qui tam* matters, which represents the second-highest amount ever, behind only the over $1 billion recovered in such matters in 2006.

As was the case in fiscal years 2016 and 2017, the largest recoveries from the health care industry in fiscal year 2018 came from pharmaceutical and medical device companies. The DOJ highlighted several settlements with such companies that totaled hundreds of millions of dollars. In one settlement touted by the DOJ, a drug wholesale company and its subsidiaries agreed to pay $625 million to resolve FCA allegations arising from their operation of a facility that improperly repackaged oncology-supportive injectable drugs into pre-filled syringes and distributed those syringes to physicians treating cancer patients. That settlement took place after one of the company's wholly-owned subsidiaries pled guilty last year to illegally distributing misbranded drugs and agreed to pay $260 million to resolve criminal liability for its distribution of these drugs from a facility that was not registered with the Food and Drug Administration. The DOJ also recovered $210 million to settle claims that a pharmaceutical company paid kickbacks to Medicare beneficiaries in violation of the Anti-Kickback Statute by using a charity as an illegal conduit to cover the copays of Medicare patients taking the company's pulmonary arterial hypertension drugs.

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[3] *See* DOJ Fraud Statistics—Health and Human Services, *available at* https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

Significant recoveries were also obtained from other health care providers. For example, a managed care provider agreed to pay $270 million to resolve allegations that it provided inaccurate information that caused Medicare Advantage Organizations ("MAOs") to receive inflated Medicare payments. The settlement also resolved allegations made by a whistleblower that the provider engaged in "one-way" chart reviews in which it scoured its patients' medical records for diagnoses its providers may have failed to record. According to the DOJ, the provider submitted these "missed" diagnoses to private MAOs to be used by the MAOs to obtain increased Medicare payments and, at the same time, ignored inaccurate diagnosis codes that would have decreased Medicare reimbursement or required the MAOs to repay money to Medicare. Another healthcare provider, a former hospital chain, agreed to pay over $216 million to resolve claims that it knowingly billed government health care programs for inpatient services that should have been billed as outpatient or observation services, paid remuneration to physicians in return for patient referrals, and submitted inflated claims for emergency department facility fees. In addition to the civil recoveries, the provider's subsidiary pled guilty to one count of conspiracy to commit health care fraud and paid a $35 million monetary penalty.

Furthermore, fiscal year 2018 saw the commencement of 506 new FCA matters (nearly 66 percent of the 767 new matters initiated) involving the health care industry.[4] Although 88 percent of these new health care matters (446 out of 506) were *qui tam* actions, the 60 non-*qui tam* matters initiated by the government tied for the second-highest total of such matters ever.[5] These newly-filed health care matters are likely to fuel FCA recoveries in the future.

Defense Industry

The government recovered approximately $107 million in matters involving the Department of Defense. This represents only four percent of the total recovered in fiscal year 2018 and marks a decline of over 50 percent from 2017 recoveries. More than half of the total recovered—approximately $66 million—is attributed to a settlement involving a Japanese fiber manufacturer and its American subsidiary that allegedly sold defective Zylon fiber used in bulletproof vests that the United States purchased for federal, state, local, and tribal law enforcement agencies. According to the DOJ, the foreign manufacturer actively marketed Zylon fiber for bulletproof vests, published misleading degradation data that understated the degradation problem, and even started a public

[4] *Id.*

[5] *Id.*

relations campaign designed to influence other body armor manufacturers to keep selling Zylon-containing vests notwithstanding its defects. The federal government also recovered $20 million from a United Kingdom marine services contractor to resolve FCA allegations that the contractor and its subsidiaries knowingly overbilled the U.S. Navy under contracts for ship husbanding services by overstating the quantity of goods and services provided, billing at rates in excess of applicable contract rates, and double-billing for some goods and services.

Recoveries Involving Other Industries and a New Class of Defendants

Although this past year marked the DOJ's lowest annual FCA recoveries total since fiscal year 2009, the DOJ continued to pursue fraud claims relating to a variety of federal programs in diverse contexts, illustrating the government's and relators' ever-expanding use of the FCA. For example, the government recovered $10.5 million from a home furnishings company, alleging that the company had made false statements on customs declarations to avoid paying anti-dumping duties on wooden bedroom furniture that the company had imported from China over a five-year period. Additionally, the DOJ publicized the fact that it recovered $2.25 million from an oil and gas acquisition company to resolve allegations that the company underpaid royalties owed on natural gas produced from federal lands.

The DOJ also pursued fraud claims against a new class of defendants—third parties. One example of this expanded use of the FCA is the case pursued against a Big Four accounting firm, resulting in a recovery of $149.5 million. The government alleged that the accounting firm knowingly deviated from traditional auditing standards, which the government argued allowed the accounting firm's client, a mortgage originator, to defraud the government. The government averred that by failing to detect the fraudulent scheme during its independent audit, the accounting firm permitted its client, the mortgage originator, to sell sham and double-pledged mortgages and was therefore liable under the FCA.

In addition, there were 214 new FCA matters instituted in these other industries.[6] The government's and whistleblowers' continued targeting of non-traditional industries for FCA enforcement could lead to increased recoveries in future years.

WHISTLEBLOWER ACTIONS

In fiscal year 2018, 645 of the 767 new FCA matters—84 percent—were filed under the FCA's whistleblower, or *qui tam*, provisions. In such actions, the

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[6] *See* DOJ Fraud Statistics—Other (Non-HHS, Non-DOD), *available at* https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.

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 2018. Of the $2.88 billion total FCA recoveries this past fiscal year, over $2.1 billion—73 percent—was received in connection with *qui tam* lawsuits.[7] Although substantial, this marked a decline from fiscal year 2017, when recoveries in *qui tam* actions were the third-highest ever and represented 92 percent of the total FCA recoveries.[8]

The vast majority of the total for *qui tam* recoveries—nearly $2 billion—was attributable to cases in which the government intervened in the *qui tam* action.[9] This demonstrates that the greatest risk to companies doing business with the government is from *qui tam* actions where the government intervenes.

In fiscal year 2018, whistleblowers received over $301 million in FCA cases as relator share awards, which marked the second consecutive year that whistleblower awards declined and the lowest total since 2009. Nevertheless, from fiscal year 2010 (following the FERA amendments to the FCA) through the end of fiscal year 2018, the government recovered over $26.8 billion in settlements and judgments related to *qui tam* actions and paid whistleblower awards of over $4.5 billion.[10]

Fiscal year 2018 saw a significant increase in recoveries in actions instituted by the government alone, without a corresponding *qui tam* complaint. The recoveries of approximately $767 million in these actions represents an increase of over $486 million from 2017 and the fifth-highest total since 1987.[11] This suggests that the government is becoming more proactive in investigating and aggressively pursuing alleged violations of the FCA independent of whistleblower complaints.

INDIVIDUAL ACCOUNTABILITY

In fiscal year 2018, the DOJ recovered at least $122 million in settlements and judgments from individuals that did not involve joint and several liability with a corporate entity. That is a substantial increase from the $60 million in settlements and judgments recovered from individuals in fiscal year 2017.

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[7] *See* DOJ Fraud Statistics—Overview.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

KEY TAKEAWAYS FROM THE STATISTICS AND OTHER MATTERS ADDRESSED IN THE DOJ'S PRESS RELEASE

The DOJ's summary of fiscal year 2018 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. The health care industry once again represented the leading area by far for recoveries in fiscal year 2018, with the over $2.5 billion recovered representing the fifth-highest total ever and comprising a record 87 percent of 2018's total FCA recoveries. Significantly, the health care industry is the only industry where recoveries increased over fiscal year 2017. Moreover, companies doing business in the health care industry continue to be particularly susceptible to whistleblower actions, as 446 of the 767 of the total new FCA matters initiated in fiscal year 2017—58 percent—were *qui tam* actions commenced against participants in the health care industry.[12] This trend of significant recoveries under the FCA from the health care industry shows no signs of ending in fiscal year 2019. For example, as noted in the DOJ's press release, the DOJ is engaged in ongoing litigation with a managed health care company involving allegations similar to those that resulted in this past year's $270 million settlement discussed above. As such, there is a possibility that the DOJ will secure a similar substantial recovery in this litigation. In addition, the DOJ has already announced some significant settlements involving the health care industry in the current fiscal year. For example, in mid-December 2018, the DOJ announced that a pharmaceutical company had agreed to pay $360 million to resolve claims it illegally used a foundation as a conduit to pay the copays of thousands of Medicare patients taking pulmonary arterial hypertension drugs.

Second, the government and whistleblowers appear to be expanding their focus for FCA enforcement to include additional industries doing business with the government and a new class of defendants. As indicated in the DOJ's press release, this past year's recoveries demonstrated the reach and versatility of the FCA, with settlements recovered from companies involved in the home furnishings, textiles, and oil and gas industries. Additionally, the DOJ used the FCA as a means to impose liability on defendants who are essentially third parties—those who allegedly facilitated or permitted fraud by the primary perpetrators. For example, the government recovered $149.5 million from an accounting firm to resolve allegations that it had failed to detect fraudulent conduct during the audit of its client, a mortgage originator. Notably, a week prior to this settlement, the DOJ announced that it had intervened in a case

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[12] *See* DOJ Fraud Statistics—Health and Human Services; DOJ Fraud Statistics—Overview.

against a private equity sponsor of a pharmacy because the sponsor oversaw its investment and was thus responsible in part for an alleged illegal kickback scheme designed to obtain increased prescriptions for compounded creams and vitamins, and thus greater reimbursement from TRICARE, in violation of the FCA. Although the case is still pending, it reaffirms the government's willingness to seek to impose FCA liability beyond those industries and defendants traditionally targeted for FCA enforcement, including third parties such as investors, auditors, and private equity firms that the government views as having sufficient knowledge of misconduct, oversight, or control over an alleged wrongdoer.

Third, while whistleblowers continue to be a driving force behind FCA enforcement in the health care industry, the government has become more aggressive in its independent FCA enforcement initiatives. There was a marked increase in the total FCA recoveries in fiscal year 2018 related to FCA claims brought by the government based on its own investigation, rather than an investigation prompted by a whistleblower complaint.[13] Indeed, this was also true in the health care industry, where recoveries in non-*qui tam* matters totaled $568 million, up from $32 million in fiscal year 2017, and represented the second-highest amount ever.[14]

Fourth, this is the fourth consecutive year that the DOJ has devoted a section of its press release to individual accountability, thus illustrating the government's continued commitment to hold individuals accountable for wrongdoing under the FCA. In fiscal year 2018, the DOJ recovered at least $122 million in settlements and judgments from individuals that did not involve joint and several liability with a corporate entity. That is a substantial increase from the $60 million in settlements and judgments recovered from individuals in fiscal year 2017. This trend of individual accountability likely stems from 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, both criminally and civilly, for corporate misdeeds. In fact, a recent announcement changed the guidelines set forth in the Yates Memo, such that companies are no longer required to identify all individuals involved in wrongdoing in order to receive cooperation credit. Rather, companies are now required to identify only those who were "substantially involved" in wrongdoing in order to receive cooperation credit. This change may strengthen the government's ability to gather evidence against and pursue more culpable individuals. The DOJ's focus on

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[13] *See* DOJ Fraud Statistics—Overview.

[14] *See* DOJ Fraud Statistics—Health and Human Services.

issues related to individual liability suggests that in the coming years, the government is likely to increase its scrutiny of individuals "substantially involved" in alleged FCA violations.

Finally, the DOJ's press release suggests that the government may seek more *qui tam* dismissals in 2019, in accordance with the internal memorandum from Michael Granston, Director of the DOJ's Civil Fraud Section, that was leaked to the public in January 2018 and directs government attorneys handling FCA cases to consider whether the government's interests are served by seeking dismissal of the action (the "Granston Memo").[15] As the Granston Memo explains, despite the authority granted the government by the FCA to dismiss *qui tam* actions and the significant increase in the number of *qui tam* actions filed over time and the relatively constant rate of intervention, the government in the past has sought dismissal only "sparingly."[16] Emphasizing that the government "plays an important gatekeeper role in protecting the False Claims Act," the Granston Memo describes dismissal as "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent," and sets forth a non-exhaustive list of seven factors that government attorneys should consider in evaluating whether to seek dismissal.[17] The DOJ's press release highlights that the government "made increasing use of [its] tool" under 31 U.S.C. § 3730(c)(2)(A) to dismiss *qui tam* cases.

This will likely continue in fiscal year 2019, as evidenced by the DOJ's recent decision to seek dismissal of 11 *qui tam* cases filed in seven different jurisdictions brought by whistleblowers that were financially backed by the same group of private investors and asserted nearly identical claims. In these actions, the government noted that dismissal was warranted because the DOJ would be forced to spend substantial time and expense to monitor and respond to discovery and further stated that relators should not be allowed to advance claims on behalf of the government that challenge common industry practices the government has already established are appropriate and helpful to federal healthcare programs and their beneficiaries. And earlier, in response to a request by the Supreme Court for the United States' views on a petition for a writ of certiorari in a case out of the U.S. Court of Appeals for the Ninth Circuit regarding the FCA's "materiality" standard under *Universal Health Services, Inc.*

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[15] This direction has since been codified in the DOJ's Justice Manual. *See* Justice Manual 4-4.111, *available at* https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111.

[16] DOJ Commercial Litigation Branch, Fraud Division, "Factors for Evaluating Dismissal Pursuant to 31 USC 3170(c)(2)(A)" (Jan. 10, 2018).

[17] *Id.*

v. U.S. ex rel. Escobar,[18] the Solicitor General filed a brief stating that although the conclusion of the Ninth Circuit was correct and thus no further review is warranted, the DOJ planned to move to dismiss the action upon remand to the district court. Such efforts by the government to seek dismissal of cases in which it declines to intervene is likely to continue in 2019.

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[18] 136 S. Ct. 1989 (2016).