

## DOJ's 2022 FCA Recoveries Announcement Reveals One of the Smallest Hauls in Recent Years, But Indicates a Different 2023 Outlook

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### INTRODUCTION

On February 7, 2023, the U.S. Department of Justice (DOJ) released its annual False Claims Act (FCA) recovery statistics and announced that it had obtained more than \$2.2 billion in settlements and judgments in fiscal year 2022 from civil cases involving fraud and false claims against the government.<sup>[1]</sup> The significant decrease in 2022 recoveries stands in stark contrast with DOJ's near-record breaking fiscal year 2021 where it obtained more than \$5.6 billion in settlements and judgments. That said, fiscal year 2022 marked the fourteenth straight year where recoveries exceeded \$2 billion. As in past years, the DOJ's haul was driven primarily by recoveries in the health care industry. Notably, 2022 represented the second-highest number of settlements—351—for a single year in DOJ history.<sup>[2]</sup> Moreover, the government and *qui tam* relators filed 948 new cases in 2022, surpassing the previous record set in 2020 (937).<sup>[3]</sup> A close analysis of the statistics and announcement demonstrates that the FCA continues to be a powerful tool supporting one of the DOJ's "top priorities"—combatting fraud and protecting taxpayer dollars, especially in the wake of the COVID-19 pandemic, in an ever-expanding array of industries doing business with the government—and reveals what to expect in FCA enforcement in the coming years, from both the government and whistleblowers.

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 discusses what is revealed by the DOJ's press release, including the implications of the statistics and what we can expect regarding FCA enforcement in 2023 and beyond.

### SUMMARY OF THE STATISTICS

The \$2.2 billion recovered in fiscal year 2022 was the lowest total since 2008 and marked a steep decline from the DOJ's FCA recoveries in the previous fiscal year when recoveries exceeded \$5.6 billion—the second-largest total recoveries in a single year since the DOJ began tracking this data back in 1986.<sup>[4]</sup> However, last year marked the fourteenth straight year (also dating back to 2008) where FCA recoveries exceeded \$2.2 billion.<sup>[5]</sup> The amount recovered in 2022 brings the total recovered since fiscal year 2010—the first full year since the FCA's expansion through the 2009 Fraud Enforcement and Recovery Act amendments—to more than \$48.1 billion, an average of approximately \$3.7 billion per year since that time.<sup>®</sup>

As in past years, the health care industry dominated FCA recoveries in 2022, representing over \$1.7 billion—or roughly 77%—of the total.<sup>[8]</sup> As in prior years, there was an array of other industries beyond health care that were the target of FCA enforcement in 2022, “reflecting the diversity of fraud recoveries and enforcement efforts arising under the False Claims Act.”<sup>[9]</sup> The DOJ announced more than \$103 million in Department of Defense (DOD) recoveries, which is a slight decline from last year’s \$119 million haul, and well below average yearly defense recoveries over the last decade (\$142 million)<sup>[10]</sup>. Outside of health care and defense, the DOJ saw recoveries decline by more than \$100 million from fiscal year 2022 to just over \$342 million, which still managed to be the second-highest total recovered in non-health care and non-defense industries since 2017.<sup>[11]</sup>

There were 948 new FCA matters docketed in fiscal year 2022, an increase of 18% in the number of new matters initiated from fiscal year 2021, and the most new FCA cases filed in any year since the DOJ began reporting this data.<sup>[12]</sup> As in every year since 1995, the overwhelming majority of the new matters filed in fiscal year 2022 were filed under the FCA’s whistleblower, or *qui tam*, provisions that allow individual whistleblowers, also known as relators, to file lawsuits alleging false claims on behalf of the government and share in any recovery (typically between 15% and 30%). The 652 *qui tam* matters docketed in 2022—nearly 69% of the total new matters initiated—was only a slight (9%) increase from the number of *qui tam* matters docketed the prior year (598). Fiscal year 2022 also saw an increase in whistleblower recoveries. Of the \$2.2 billion total recovered by the DOJ, over \$1.9 billion—86%—was secured in *qui tam* matters, with the remainder of the recoveries having been secured in FCA matters initiated by the government.<sup>[13]</sup> Despite constituting the vast majority of FCA recoveries in 2022, the \$1.9 billion recovered in *qui tam* matters is still one of the lowest totals since 2008, but remains in line with historical trends from prior years where recoveries in *qui tam* matters typically represent the majority of annual FCA recoveries. Notwithstanding the relatively low annual recovery, awards to whistleblowers in 2022 saw an 86% increase from 2021—from \$263 million to \$488 million.

## INDUSTRIES TARGETED

### HEALTH CARE INDUSTRY

Of the more than \$2.2 billion recovered by the DOJ in fiscal year 2022, the largest portion—over 77%—of these funds was recovered from companies and individuals in the health care industry. As in past years, the FCA was used to pursue matters involving a wide array of health care providers, goods, and services, including drug and medical device manufacturers, durable medical equipment, home health and managed care providers, hospitals, pharmacies, hospice organizations, and physicians. Although a significant amount, the \$1.7 billion recovered from the health care industry represents the lowest recovery from this industry since 2009 (\$1.6 billion).<sup>[14]</sup> Since fiscal year 2010, the DOJ has recovered more than \$34 billion in health care fraud matters, which is just under 71% of the total recoveries during that period. As discussed below, the health care industry continues to be the prime target for FCA enforcement, a trend that seems unlikely to change going forward as the DOJ pursues fraudulent schemes across the entire health care system.

Notwithstanding last year’s blockbuster year for FCA recoveries from the health care industry, where more than \$3.5 billion came from government-initiated actions, 2022 saw somewhat of a return to normal.<sup>[15]</sup> Recoveries from the health care industry in *qui tam* matters totaled \$1.6 billion—just above last year’s total of \$1.5 billion—which was the fourth-lowest total since 2009.<sup>[16]</sup> The number of new *qui tam* matters involving the health care industry remained relatively stable compared to 2021, but the 371 whistleblower actions commenced in 2022 represent the lowest number of new health care-related *qui tam* actions initiated since 2009.

Although 2022 did not see any record-setting billion-dollar settlements or judgments in the health care space, the DOJ got close when it secured a nearly ten-figure settlement from a pharmaceutical manufacturer to resolve alleged kickback violations. Biogen, Inc. paid \$843.8 million to settle claims that the company offered and paid kickbacks, including in the form of honoraria, speaker training fees, consulting fees, and meals, to physicians who spoke at or attended the pharmaceutical manufacturer’s programs in connection with its multiple sclerosis drugs.

As in years past, a substantial amount of the DOJ’s health care industry recoveries emanated from fraud and abuse schemes targeting the Medicaid program. Mallinckrodt ARD LLC agreed to pay \$260 million to resolve allegations relating to its multiple sclerosis and infantile spasms drug, and that the company knowingly underpaid rebates to the

Medicaid program by improperly designating the drug as a “new drug” as of 2013, rather than a preexisting drug. The settlement agreement also resolved allegations that the company used a foundation as a conduit to pay illegal kickbacks in the form of copay subsidies so that it could market the multiple sclerosis and infantile spasms drug as “free” to doctors and patients while increasing its price significantly. The DOJ also reached a \$70.7 million settlement with a county-organized health system in California and three of its providers to resolve claims that they knowingly submitted or caused the submission of false claims to California’s Medicaid program in connection with the “Adult Expansion” population that was created by the Patient Protection and Affordable Care Act.

Other health care-related recoveries included resolutions of matters alleging false claims regarding the provision of unnecessary medical services and substandard care. For example, a hearing aid device company paid \$34.37 million to resolve FCA and common law allegations that it submitted or caused to be submitted claims containing unsupported hearing loss-related diagnosis codes to the Federal Employees Health Benefits Program for the reimbursement of its hearing aid devices. Another example included a Washington-based health care and hospital system that paid \$22.7 million to resolve allegations that it billed federal health care programs for medically unnecessary neurosurgeries.

## DEFENSE INDUSTRY AND OTHER PROCUREMENT FRAUD

The government recovered \$103 million in FCA matters related to the DOD in fiscal year 2022.<sup>[16]</sup> Just over one-third of that total was derived from a \$35.2 million settlement with a defense contractor that operates dozens of privatized military housing communities at military installations across the country and earns fees for managing and maintaining those facilities. The settlement resolved allegations that the contractor fraudulently induced each of the United States’ service branches to pay performance incentive fees for military housing management and maintenance that it did not earn. Specifically, the defense contractor hid performance failures by altering or manipulating data in its property management software and by destroying or falsifying resident comment cards. Another settlement reached with a defense contractor included a \$13.67 million agreement to resolve allegations relating to the provision of logistics support to U.S. Army forces in Operation Iraqi Freedom. The DOJ alleged that certain defense contractor employees responsible for awarding subcontracts rigged the bidding process in favor of local companies and that those employees received kickbacks from the local companies in exchange for being awarded the subcontracts.

## RECOVERIES INVOLVING COVID-19 PANDEMIC RELIEF PROGRAMS

The DOJ has made no secret of its intent to aggressively pursue any and all fraud targeting the COVID-19 pandemic relief programs. Indeed, in March 2022, Deputy Attorney General Lisa Monaco delivered remarks stating that “pandemic fraud is a top priority of this . . . Department of Justice.”<sup>17</sup> However, the results of those efforts have not fully revealed themselves in the statistics to date. Of the DOJ’s 351 FCA settlements in fiscal year 2022, only 35 of those matters were related to fraud targeting the pandemic-relief programs, with the DOJ recovering \$6.8 million in the process.<sup>[18]</sup> However, this included the DOJ securing its first-ever settlement with a bank that allegedly made a Paycheck Protection Program loan to a customer it knew was ineligible at the time of the loan. The DOJ also secured a \$1.75 million settlement against a Florida-based nursing home and assisted living facility company to resolve allegations that it facilitated COVID-19 vaccinations for hundreds of individuals ineligible to participate in the Centers for Disease Control and Prevention’s Pharmacy Partnership for Long-Term Care Program. Despite relatively low numbers in 2022, it is likely that we will continue to see the full extent of pandemic-related FCA activity in coming years as the long pipeline of these cases comes to a head and the government begins to focus on participants in the pandemic-relief programs beyond recipients of the relief such as lenders.

## RECOVERIES INVOLVING OTHER INDUSTRIES

The DOJ also continued to pursue fraud claims relating to a wide and diverse variety of federal programs in 2022, reinforcing the FCA’s dominance as the primary fraud-fighting tool of both the government and private whistleblowers. In 2022, the DOJ recovered \$342 million in non-health care and non-DOD matters—the second-highest total since 2017.<sup>[19]</sup> Headlining these recoveries was a \$48.5 million settlement entered into by a Massachusetts-based restaurant supply company to resolve allegations that its subsidiaries improperly manipulated federal small business set-aside contracts by using a subsidiary, rather than an awardee, to perform substantially all the work for which it billed the government. Elsewhere, the DOJ obtained \$14.4 million in settlement agreements



with various air carriers in connection with contracts with the U.S. Postal Service and false claims that mail receptacles were delivered to specified destinations or falsification of the time of such deliveries.

## INDIVIDUAL ACCOUNTABILITY

As in recent years, the DOJ continued to highlight its focus on holding individuals accountable for defrauding the government, which the DOJ explained helps “deter future fraud, incentivize changes in both corporate and individual behaviors, ensure that the proper parties are held responsible, and promote the public’s confidence in our justice system.”<sup>[20]</sup> The settlements with individuals highlighted by the DOJ include a Los Angeles physician who paid \$9.5 million to resolve allegations that he submitted false claims to Medicare and Medi-Cal for procedures and tests that he never performed, including injections of medication designed to treat osteoarthritis and osteoporosis. Another agreement involved a physician and his wife who agreed to pay \$3 million to resolve allegations that they submitted false claims to the U.S. Department of Labor’s Office of Workers’ Compensation Program for psychiatric services that were not provided, as well as upcoding and double-billing patient claims.

## WHISTLEBLOWER ACTIONS

New *qui tam* filings surpassed last year’s total of 598 and far outpaced government-initiated actions, but 2022 was still a below-average year for newly filed whistleblower matters over the last decade (2012–2022).<sup>[21]</sup> 2022 also saw a slight increase over the prior year in recoveries in whistleblower actions. Last year also marked a return to the normal pattern of recoveries in such actions constituting the majority of the DOJ’s total recovery—approximately \$1.96 billion of the \$2.2 billion total, or approximately 89%.<sup>[22]</sup> Awards to relators in 2022 also jumped to \$488 million from just \$263 million in 2021.<sup>[23]</sup>

Despite the year-over-year increase from 2021, the \$1.96 billion recovered in connection with *qui tam* matters in 2022 was still one of the lowest totals since 2008 but remained in line with historical trends from recent years where *qui tam* recoveries typically represent a substantial majority of annual FCA recoveries.<sup>[24]</sup>

Significantly, unlike last year and most prior years, where most of the total *qui tam* recoveries were attributable to cases in which the government intervened, 2022 saw the opposite. Of the \$1.96 billion recovered in *qui tam* actions, nearly \$1.2 billion came from cases where the government declined to intervene—the single-highest annual total, by more than half a billion dollars, since the DOJ began tracking this data in 1987.<sup>[25]</sup> Not only does this suggest a sustained appetite on the part of whistleblowers to continue litigating FCA cases without government intervention, but it may also serve as a call to action to other would-be whistleblowers seeking to prevent fraud and hoping to share in the recovery of successful cases. Conversely, the \$776 million recovered in *qui tam* actions in which the government intervened marked the lowest annual total since 2004.<sup>[26]</sup>

## GOVERNMENT-INITIATED ACTIONS

Fiscal year 2022 also saw a continuation of a trend in recent years of an increase in the number of government-initiated actions. Such actions accounted for 296 of the new FCA cases in 2022, a 39% increase from last year, and the third consecutive year that the government initiated over 200 FCA matters. This was the highest total since 1994.<sup>[27]</sup> Recoveries in government-initiated actions totaled only approximately \$245 million in 2022—just 11% of the \$2.2 billion total recovered—which marks the lowest total since 2013.<sup>[28]</sup> Still, the increase in government-initiated actions is a part of a growing trend suggesting the government is becoming more aggressive in commencing and prosecuting FCA matters on its own, and that larger recoveries for government-initiated actions may be on the horizon.

## LEGISLATION AND KEY SUPREME COURT CASES

2022 was another quiet year on the legislative front. The FCA Amendments Act of 2021 was introduced by Senator Chuck Grassley (R.) and a bipartisan group of co-sponsors in July 2021. The legislation failed to make it to the Senate floor for a vote during the previous Congress. The proposed bill would amend the materiality requirement by providing that the government’s continued payment to a defendant after the discovery of fraud is not determinative of a lack of materiality “if other reasons exist for the decision of the government with respect to such refund or

repayment.” The bill would also change the standard of review for evaluating a whistleblower’s objection to the government’s decision to dismiss an FCA action. In February 2023, at the Federal Bar Association’s annual *Qui Tam* Conference, Sen. Grassley indicated that he planned to reintroduce the legislation this year, but pending Supreme Court cases may encourage the Senate to adopt a “wait and see” approach. For example, *United States ex rel. Schutte v. SuperValu Inc. et al.*, and *United States ex rel. Proctor v. Safeway, Inc.* challenge the relevance of a defendant’s subjective beliefs (whether the defendant acted “knowingly”) to the FCA’s scienter requirement.

## KEY TAKEAWAYS

Although a down year in total recoveries, the DOJ’s summary of fiscal year 2022 FCA recoveries and related statistics reveal some interesting insights and suggest what we can expect in FCA enforcement, from both the government and whistleblowers, in the coming years.

**First**, while 2022 may have been a down year for FCA recoveries, 2023 may see a return to form due in part to the likely aggressive use of the FCA to hold both companies and individuals accountable in connection with pandemic relief programs—particularly with respect to the Paycheck Protection Program.

**Second**, despite only comprising 11% of FCA recoveries, government-initiated FCA actions increased by 39% in 2022—a trend that will likely continue in 2023.

**Third**, health care industry fraud and abuse remains a top enforcement priority for the DOJ and whistleblowers alike. Two major settlements against pharmaceutical companies accounted for \$1.1 billion—half of the total recovery for fiscal year 2022. This year’s statistics suggest that whistleblowers successfully played a more active role in rooting out fraud targeting the health care industry than they did last year. The settlements reflected in the DOJ’s press release also reveal certain health care enforcement priorities that will likely remain the focus in the coming years—chiefly, combatting fraud and abuse in the Medicaid program, unlawful kickbacks, and the provision of medically unnecessary services and substandard care.

**Fourth**, the fact that the overwhelming majority of FCA matters brought in 2022 were commenced by whistleblowers as opposed to the government, as well as the vast majority of 2022 recoveries coming as a result of *qui tam* actions, may suggest a call to action to would-be whistleblowers. The statistics bear out a sustained appetite by relators to pursue FCA litigation even when the government declines to intervene.

If you have additional questions or need further assistance, please reach out to Suzanne Jaffe Bloom, Co-Chair – White Collar, Regulatory Defense, and Investigations Practice; T. Reed Stephens, Partner – White Collar, Regulatory Defense, and Investigations Practice; Benjamin Sokoly, Of Counsel – White Collar, Regulatory Defense, and Investigations Practice; Christopher Parker, Associate – White Collar, Regulatory Defense, and Investigations Practice, or your Winston relationship attorney.

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<sup>[1]</sup> See DOJ Press Release, “False Claims Act Settlements and Judgments Exceed \$2 Billion in Fiscal Year 2022” (Feb. 7, 2023), available at

<https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022> (“2022 FCA Recoveries Press Release”); see also DOJ Fraud Statistics – Overview, October 1, 1986 – September 20, 2022, available at <https://www.justice.gov/opa/press-release/file/1567691/download> (“DOJ Fraud Statistics”).

<sup>[2]</sup> 2022 FCA Recoveries Press Release.

<sup>[3]</sup> DOJ Fraud Statistics – Overview.

<sup>[4]</sup> See DOJ Fraud Statistics – Overview.

<sup>[5]</sup> See *id.*

<sup>[6]</sup> See *id.*

<sup>[7]</sup> DOJ Fraud Statistics – Health and Human Services (“HHS”).

<sup>[8]</sup> 2022 FCA Recoveries Press Release.

<sup>[9]</sup> DOJ Fraud Statistics – Department of Defense (“DOD”).

<sup>[10]</sup> See DOJ Fraud Statistics – Other (Non-HHS and Non-DOD).

<sup>[11]</sup> DOJ Fraud Statistics – Overview.

<sup>[12]</sup> See *id.*

<sup>[13]</sup> See DOJ Fraud Statistics – HHS.

<sup>[14]</sup> See *id.*

<sup>[15]</sup> See *id.*

<sup>[16]</sup> DOJ Fraud Statistics – DOD.

<sup>[17]</sup> Lisa O. Monaco, Deputy Att’y Gen., Dep’t of Just., Address at COVID-19 Fraud Enforcement Task Force Roundtable (Mar. 10, 2022), *available at* <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-covid-19-fraud-enforcement-task>.

<sup>[18]</sup> See 2022 FCA Recoveries Press Release.

<sup>[19]</sup> See DOJ Fraud Statistics – Other (Non-HHS and Non-DOD).

<sup>[20]</sup> See 2022 FCA Recoveries Press Release.

<sup>[21]</sup> See DOJ Fraud Statistics – Overview.

<sup>[22]</sup> See *id.*

<sup>[23]</sup> See *id.*

<sup>[24]</sup> See *id.*

<sup>[25]</sup> See *id.*

<sup>[26]</sup> See *id.*

<sup>[27]</sup> See *id.*

<sup>[28]</sup> See *id.*

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