

2023 DOJ FCA Enforcement: Expectations for Future

APRIL 8, 2024

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On Feb. 22, 2024, the US Department of Justice (DOJ) released its annual False Claims Act (FCA) recovery statistics and announced that it obtained more than \$2.68 billion in settlements and judgments in fiscal year (FY) 2023 from civil cases involving fraud and false claims against the government, a 21% increase over the prior year's recoveries. As such, FY 2023 was another strong year for FCA enforcement and marked the fifteenth straight year where recoveries exceeded \$2 billion. This past fiscal year also saw records set in several areas, including the highest number of settlements and judgments in DOJ history and a record number of civil investigative demands (CIDs) issued in connection with investigating FCA claims, revealing highly robust FCA investigative activity in 2023, which could signal even greater FCA judgments and recoveries in future years.

As in past years, the DOJ's haul was driven primarily by recoveries in the health care industry. It also reflects the DOJ's focus on several additional key enforcement priorities, including combatting fraud targeting pandemic-relief programs, and cybersecurity fraud, as well as holding accountable third parties that cause the submission of false claims, such as private equity firms involved in the management of companies in regulated industries. The 2023 FCA recovery statistics demonstrate that the FCA continues to be an increasingly powerful tool used by the DOJ to combat fraud in an ever-expanding array of industries doing business with the government and offer insights into what to expect in FCA enforcement in the coming years.

The following article explores the DOJ's FCA enforcement activities in FY 2023 via an analysis of the reported statistics relative to earlier years. The article also discusses the implications of the reported statistics and related DOJ announcements, along with certain legal developments, for what we can expect regarding FCA enforcement in 2024 and beyond.

SUMMARY OF STATISTICS

FCA Recoveries via Settlements & Judgments

The \$2.68 billion recovered in FY 2023 via FCA settlements and judgments represents a significant increase over the \$2.2 billion recovered the prior year and marked the fifteenth straight year since 2008 where FCA recoveries

exceeded \$2.2 billion. The amount recovered in 2023 brings the total recovered since FY 2010—the first full year since the FCA’s expansion through the 2009 Fraud Enforcement and Recovery Act amendments—to more than \$51 billion, an average of approximately \$3.7 billion per year since that time. Further, 2023 set a record for the highest number—543—of FCA settlements and judgments in a single year.

New FCA Matters & FCA Civil Investigative Demands

There were 1,212 new FCA matters docketed in FY 2023, the highest number of new FCA cases filed in a single year since the DOJ began reporting this data. This represents an increase of almost 26% in the number of new matters initiated from FY 2022. There was also a staggering 1,504 CIDs issued in connection with investigating FCA claims, the most issued in any one year. This reveals vigorous FCA investigative activity in 2023, which will likely translate into greater FCA judgments and recoveries in 2024. These record numbers are “unsurprising given the tremendous resources the government has allocated to ferreting out pandemic-related fraud and health-care fraud.”

Whistleblower-Initiated FCA Actions

As in every year since 1995, the overwhelming majority of the new matters filed in FY 2023 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 712 *qui tam* matters docketed in 2023 constituted nearly 59% of the total new matters initiated, marked an 8% increase over the prior year, and is the third-highest total ever. FY 2023 also saw an increase in recoveries in whistleblower actions. Of the \$2.68 billion recovered by the DOJ, over \$2.3 billion (87% of 2023 recoveries) was secured in *qui tam* matters—a 17% increase over the prior year—with the remainder of the recoveries having been secured in FCA matters initiated by the government. This remains in line with historical trends where recoveries in *qui tam* matters typically represented the majority of annual FCA recoveries.

Despite the increase in recoveries in *qui tam* actions, awards to whistleblowers in 2023 saw a nearly 30% decrease from 2022—from \$496 million to \$349 million. Notwithstanding this decrease from 2022, awards to relators remained significant—\$267.6 million where the government intervened and \$82 million where the government declined to intervene—and are likely to continue to incentivize whistleblowers to report fraud.

The vast majority—nearly \$1.9 billion—of the \$2.3 billion of total *qui tam* recoveries in 2023 were attributable to cases in which the government intervened, indicating a return to normalcy after the anomaly of last year. Conversely, the \$442 million recovered in *qui tam* actions in which the government declined to intervene plummeted from 2022’s nearly \$1.8 billion.

Government-Initiated FCA Actions

FY 2023 also saw a continuation of a trend in recent years of an increase in the number of government-initiated actions. Such actions accounted for 500 of the new FCA cases in 2023, a 64% increase from last year, and the highest total ever reported. Recoveries in government-initiated actions totaled approximately \$356 million in 2023—which is only 13% of the total recovered. Still, the increase in the number of government-initiated actions is 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.

FCA ENFORCEMENT FOCUS IN 2023 & IMPLICATIONS FOR THE FUTURE

Health Care Industry Fraud

The health care industry continues to be the prime target for FCA enforcement, which is unlikely to change in future years as the DOJ pursues fraudulent schemes across the entire health care system. Indeed, in remarks delivered the day the FCA recovery statistics were released, Deputy Assistant Attorney General Brian M. Boynton identified health care fraud as a continuing DOJ enforcement priority and also highlighted an expected expanded focus on the Medicare Part C program to include “an examination of the role that vendors and providers play in the diagnoses that are submitted to the government.”

Of the more than \$2.68 billion recovered by the DOJ in FY 2023, the largest portion—over 67%—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 \$1.8 billion recovered from the health care industry represents the second-lowest recovery from this industry since 2009, when the government recovered \$1.6 billion. Since FY 2010, the DOJ has recovered more than \$51 billion in health care fraud matters, which is just under 71% of the total recoveries during that period.

Although 2023 did not see any record-setting billion-dollar settlements or judgments in the health care space, the DOJ secured multiple eight- and nine-figure settlements. One of the largest recoveries was from the Community Health Network, which agreed to a \$345 million settlement to resolve allegations that it violated the FCA by knowingly submitting claims to Medicare for services that were referred in violation of the Physician Self-Referral Law.

A substantial number of the DOJ's health care industry recoveries also emanated from fraud and abuse schemes targeting the Medicare and Medicaid programs. For instance, The Cigna Group agreed to pay \$172 million to resolve allegations relating to its "chart review" program allegedly involving the submission and failure to withdraw inaccurate and untruthful diagnosis codes for its Medicare C plan enrollees to increase its payments from Medicare.

The DOJ also reached a \$68 million settlement with four health systems (collectively, the "CenCal Settlements") in California, resolving allegations that they 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—another enforcement priority referenced by Principal Deputy Assistant AG Boynton in his recent remarks.

COVID-19 Pandemic Relief Fraud

The DOJ has continued to aggressively pursue fraud targeting COVID-19 pandemic relief programs and hold responsible individuals and companies accountable. Indeed, in his recent remarks, Deputy Assistant AG Boynton stated that pandemic fraud was a continuing priority for the Department of Justice. Additionally, he noted that the "False Claims Act has been a critical part of the department's COVID-19 Fraud Enforcement Task Force and has been used to pursue a variety of pandemic related fraud schemes ... [with] significant focus [on] the Paycheck Protection Program (PPP)." In 2023 alone, the department resolved 270 FCA matters involving PPP loans—compared to 35 PPP loan FCA matters in 2022. According to the statistics, the DOJ recovered over \$48.3 million in connection with settlements and judgments arising from cases involving improper PPP loans. Although many of the individual cases involved relatively small recoveries, some matters resulted in more significant recoveries. For example, the DOJ recovered \$9 million through settlement agreements with Victory Automotive Group Inc. in connection with providing false information regarding the size of its business on its PPP application.

Although thus far the majority of the DOJ's cases have targeted borrowers, we anticipate that the DOJ will expand its efforts to ferret out wrongdoing in connection with pandemic-relief programs by focusing on the role of lenders in approving and issuing fraudulent loans and whether those lenders met the lending requirements as mandated by the various programs.

Defense Industry & Other Procurement Fraud

The government recovered \$551 million in FCA matters related to the Department of Defense (DOD) in FY 2023, which is a significant increase from last year's \$103 million haul and well above the average yearly defense recoveries over the last decade (\$177 million). More than two-thirds of that total was derived from a \$377 million settlement with a defense contractor specializing in intelligence. As one of the largest-ever procurement settlements, this settlement resolved allegations that the contractor improperly billed the government for costs associated with its non-government contracts. Another settlement reached with a defense contractor included a \$21.8 million agreement to resolve allegations of overcharging in contract proposals for communications equipment.

Other Enforcement Targets Including Cybersecurity Fraud & Third Parties

The DOJ has increasingly used the FCA to pursue fraud claims relating to a wide and diverse range of federal programs in 2023 beyond those involving health care, pandemic relief, and defense—recovering approximately \$271.7 million in connection with such claims in 2023 (subtracting \$48.3 million in PPP recoveries from the \$320 million in total Non-HHS and Non-DOD recoveries).

We anticipate that trend will continue as the government makes use of the FCA to hold individuals and organizations accountable for wrongdoing in connection with other areas identified as key enforcement priorities. Indeed, in discussing the DOJ’s enforcement priorities, Deputy Assistant AG Boynton noted that the DOJ plans to utilize the FCA in targeting cybersecurity fraud through its Civil Cyber Fraud Initiative. He also highlighted efforts to hold third parties—such as coding and billing consultants and private equity and venture capital firms—accountable for their role in FCA schemes. Accordingly, entities involved with ownership and management of regulated companies should consider the implications of increased FCA scrutiny. Firms should take care to engage in thorough due diligence with respect to investments and management of their portfolio companies and ensure compliance, especially when operating in heavily regulated industries, to avoid exposure to potential FCA liability. As cautioned by Deputy Assistant AG Boynton in his recent remarks, firms investing in the health care sector should be mindful of how they wield their influence when it comes to directing patient care.

Individual Accountability

As in recent years, the DOJ continued to highlight its focus on holding individuals accountable for corporate wrongdoing. The DOJ explained that doing so serves to “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.” This year, the DOJ increasingly used both civil and criminal penalties to hold individuals accountable for their participation in schemes to defraud the government.

In 2023, there was perhaps no better example of the extent to which the DOJ will hold individuals accountable than its approach to the fraud scheme carried out by Dr. Vasso Godiali, a vascular surgeon from Bay City, Michigan. Dr. Godiali’s multimillion-dollar health care fraud scheme began in 2009 when he started billing for surgical procedures and services that he never rendered, and then created false medical records to justify reimbursement for those procedures and services. Dr. Godiali faced criminal charges and FCA claims. Dr. Godiali was required to pay up to \$43.4 million to resolve allegations that he violated the FCA by fraudulently billing federal health care programs in addition to \$19.5 million in restitution that he was ordered to pay to Medicare, Medicaid, and Blue Cross/Blue Shield of Michigan. On top of that, Dr. Godiali was sentenced to 80 months in prison.

Other settlements with individuals highlighted by the DOJ include a Florida pharmacy owner who paid \$7.4 million to resolve FCA allegations that he added the antipsychotic drug aripiprazole to topical compound pain creams and paid remuneration to patients to induce purchases of compounded drugs to increase profits from Medicare and TRICARE reimbursements. Additionally, Peggy Borgfeld, former controller, chief financial officer, and chief operating officer of Little River Health care, agreed to pay \$325,000 plus additional contingent payments to resolve allegations she caused the submission of false claims to Medicare, Medicaid, and TRICARE via an unlawful kickback scheme. Borgfeld was also excluded from participation in federal health care programs for five years.

ANTICIPATED LITIGATION REGARDING KEY FCA ISSUES

Scienter

While 2023 was another quiet year on the legislative front, there were significant developments on the judicial front. On June 1, 2023, the US Supreme Court issued its decision in the most-watched FCA case of the year. In *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 143 S. Ct. 1391, 216 L. Ed.2d 1 (2023), a unanimous Court held that the question of scienter under the FCA turns on a defendant’s subjective beliefs, not what an objectively reasonable person may have believed—rejecting a standard that had been set by the Seventh Circuit and embraced by the Third, Eighth, Ninth, and D.C. Circuits. In so doing, the Court made clear that a party should not submit claims to the government where it is aware that there is a “substantial and unjustifiable risk” that the claims are false, but provided little guidance as to what this standard means in practice. The Court held that to establish scienter under

the FCA, a plaintiff must show the defendant: (i) actually knew its claim was false; (ii) was aware of a substantial risk that its claim was false and intentionally avoided learning whether the claim was false; or (iii) was aware of such a substantial and unjustifiable risk but submitted the claims anyway. The Court's holding therefore leaves open many questions about scienter and will likely cause protracted litigation in FCA cases as we move ahead in 2024.

Causation

In addition, a deepening circuit split over the meaning of "resulting from" in 42 U.S.C. § 1320a-b(g) and whether proof of an FCA violation based on the Anti-Kickback Statute (AKS) requires "but for" causation or just a causal link may garner the attention of the Supreme Court this year. The Sixth and Eighth Circuits have held that the AKS requires a "but for" causation standard, whereas the Third Circuit rejected a "but-for" causation standard and instead determined that the FCA and AKS require "something less than proof that the underlying medical care would not have been provided but for a kickback." The First Circuit is set to rule on this question, as a federal district court in Massachusetts has granted interlocutory appeal in two cases with opposite holdings on the issue. See *United States v. Regeneron Pharms., Inc.*, No. CV 20-11217-FDS (D. Mass.) and *United States v. Teva Pharms. USA, Inc.*, Civil Action No. 20-11548-NMG (D. Mass.). As the First Circuit resolves this issue, the Supreme Court may see the split become ripe for resolution.

KEY TAKEAWAYS

The DOJ's FY 2023 FCA recoveries and related statistics reveal some interesting insights into the DOJ's enforcement priorities and offer a window into what we can expect in FCA enforcement in the coming years.

First, the nearly 64% increase in government-initiated FCA actions indicates the government is much more active in investigating government fraud without waiting for whistleblowers. Coupling that with the 8% increase in *qui tam* actions and the record number of CIDs issued in 2023 suggests that the government is likely to recover significant amounts in the coming years as these FCA matters make their way through the court system or are resolved through negotiated settlements.

Second, the overwhelming majority of FCA matters brought in 2023 were commenced by whistleblowers as opposed to the government, and the vast majority of 2023 recoveries resulted from *qui tam* actions. These facts will likely serve as a continuing call to action to would-be whistleblowers, notwithstanding the decrease in FY 2023 in the dollar value of whistleblower awards.

Third, given the government's allocation of significant resources to its key enforcement priorities, we are likely to see an increasing number of FCA investigations and actions targeting fraud in connection with pandemic relief programs, cybersecurity fraud, and health care fraud. We are also likely to see efforts to hold third parties accountable for causing the submission of false claims, including potentially private equity and venture capital firms involved in the management of companies in regulated industries.

Fourth, as in years past, individual accountability was a top priority for FCA enforcement in 2023. Individuals who defraud the government by submitting false claims in violation of the FCA risk hefty financial exposure, including potential for treble damages, and/or large settlement sums, as well as potential bans on participation in federal programs. And where criminal prosecution accompanies the FCA claims, individuals may face substantial prison time and significant restitution requirements.

With assistance from Christina E. Zaldivar, Winston & Strawn LLP

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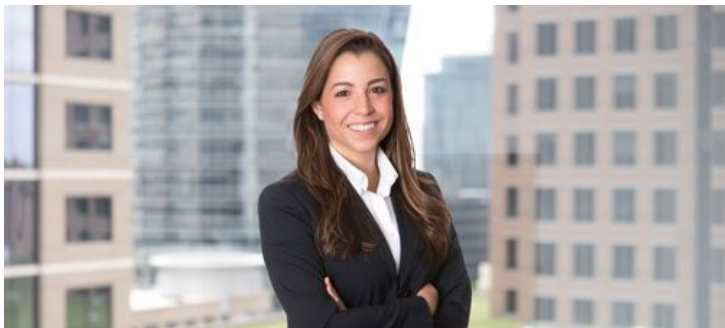
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