



White Collar, Government & Internal Investigations / Health Care Litigation ADVISORY ■

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FCA Recoveries Drop, but Signs Point to Increased Activity in 2023 and Beyond

The Department of Justice's (DOJ) recoveries under the False Claims Act (FCA) fell last year to their lowest levels since 2008, according to [statistics](#) released last week by the Civil Division. The amount recovered—roughly \$2.2 billion—was less than half that of the previous year, when the DOJ recovered approximately \$5.7 billion.

Although overall recovery numbers were down, one theme remained the same: health care continues to attract the most attention from the DOJ and the whistleblower bar. Nearly 80% of the recoveries in FY 2022 came from the health care industry—with settlements by Medicare Advantage organizations for alleged misrepresentations and companies accused of defrauding or abusing Medicaid programs, as well as the usual assortment of claims involving purported unnecessary services, substandard care, and relationships implicating the Anti-Kickback Statute. Other recoveries involved matters relating to COVID related fraud and violations of the relatively new Civil Cyber-Fraud Initiative, which enforces cybersecurity requirements in government contracts and grants.

As usual, the majority of recoveries in FY 2022 arose through whistleblower lawsuits filed under the qui tam provisions of the statute, which allow private plaintiffs (and their counsel) to pocket between 15% and 30% of the government's recovery, plus attorneys' fees. In FY 2022, qui tam actions constituted the majority of FCA cases (652 of 948 cases). Relators recovered approximately \$489 million in bounty payments, the highest since 2017. Underscoring the importance of cases where the government declines to intervene, the relator's share awards in these cases rose to their highest level ever, about \$347 million. This is a trend that should be watched.

FY 2022 was also a near-record year for cases initiated by the DOJ. The government initiated 296 cases, the most since 1993. And declined cases brought in settlements and judgments to the tune of about \$1.2 billion, the largest amount ever and nearly double the year with the previous highest total.

Looking Forward to FY 2023 and Beyond

- Although recoveries were down this year, the DOJ's statistics suggest that FCA enforcement will continue to be a top department priority. This will include typical enforcement areas like health care and defense, but will also include pandemic related fraud. These recoveries have typically been small and focused on low hanging fruit, but like with the fallout of the Great Recession, we expect larger, more complicated cases to emerge.
- Declined cases are more likely to go forward. FY 2022 was a banner year for relator awards and settlements and judgments in declined cases. We expect this trend to continue as relators' counsel (and other backers) are willing to finance litigation in the hopes of lucrative recoveries.
- We expect the government to continue aggressively pursuing cases against nursing homes and senior care providers. In the [press release](#) touting its accomplishments, the DOJ highlighted its case against American Health Foundation (a nonprofit corporation that owns and controls nursing homes in Ohio, Pennsylvania and Iowa), its affiliate management corporation, and three affiliated nursing homes for providing grossly substandard skilled nursing services between 2016 and 2018. And in his [State of the Union address](#), President Biden committed to "protecting seniors' lives and life savings by cracking down on nursing homes that commit fraud, endanger patient safety, or prescribe drugs they don't need."
- Health IT and cyber-related cases will continue to grow. Considering recent settlements in this area, the substantial certifications required of health IT and electronic medical records companies, and the rise of artificial intelligence, we expect more cases in this area.
- Investigations drag on and on and on. The government does not release statistics on the pace of its investigations, but experience suggests that investigations are taking longer from inception to an intervention decision or settlement. Companies receiving civil investigative demands or subpoenas are, unfortunately, subjected to a multiyear investigatory process, even for the substantial number of cases that are ultimately declined.
- Individuals remain in the crosshairs. We expect that the DOJ will keep a focus on individuals and their liability or exposure. And while an individual's financial contribution to a settlement or resolution may pale in comparison to the company's financial resolution, this typically becomes the hardest part of any matter since individuals' reputations are on the line, and most cases are usually resolved by settlement and not with the involvement of a judge.
- Private equity (PE) firms will likely continue to face investigations for their portfolio companies' conduct. The DOJ [announced](#) nearly three years ago that PE firms, particularly those invested in health care or life science businesses, could face liability simply for knowing about or recklessly disregarding their portfolio companies' potential FCA violations. Several U.S. Attorney's Offices have also made PE firms one of their top enforcement priorities. PE firms should consider engaging in careful diligence of portfolio companies that do business with the government.

Alston & Bird's [False Claims Act Team](#) will continue to monitor and report on further developments.

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