DOJ-Initiated False Claims Act Activity on the Rise

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Key Points

- The volume of new False Claims Act (FCA) case filings remained high in 2021, and the Department of Justice (DOJ) collected more than $5.6 billion in settlements and judgments — the second-largest annual total in FCA history. The majority stemmed from *qui tam* actions where the government intervened.
- The DOJ continues to increase FCA enforcement against Medicare Advantage organizations and affiliated entities.
- Circuit courts rendered noteworthy decisions regarding the government's dismissal authority and the application of the Eighth Amendment's excessive fines clause.
- A Senate bill amending key provisions of the FCA could have broad implications for FCA enforcement.

The volume of new False Claims Act case filings remained high in 2021, although it decreased from the record 922 new filings in 2020. In total, 801 new FCA cases were filed, 203 of which the Department of Justice initiated, reflecting the DOJ's continued emphasis on using the FCA to combat alleged fraud.

The DOJ collected more than $5.6 billion in FCA settlements and judgments in 2021, marking the second-largest annual total in FCA history. More than $5 billion in those recoveries involved health care matters, and more than half derived from settlements with prescription opioid manufacturers. Notably, about 70% of the total recoveries were from actions the DOJ initiated; the rest were from *qui tam* actions where the DOJ either intervened or the private plaintiff-relator pursued the action. In 2014, the year with the largest total FCA awards, only about 27% of the total recoveries stemmed from DOJ-initiated actions and about 73% were recovered from *qui tam* actions.

In light of the government's renewed commitment to using in-house data analytics to detect and investigate alleged fraud, particularly involving health care matters, we anticipate that DOJ-initiated cases and recoveries will continue to trend upward in 2022 and beyond. Indeed, the DOJ has already announced several multimillion-dollar FCA settlements in 2022 that did not stem from *qui tam* suits.

Notwithstanding the DOJ's efforts, the whistleblower bar, again, materially contributed to FCA recoveries in 2021, with more than $1.6 billion resulting from *qui tam* lawsuits, yielding relator awards of $238 million. In *qui tam* cases where the DOJ declined to intervene, the government recovered about $480 million, which marks the third-highest annual amount since 1986. Yet relators received only about half of what was awarded in the other years with comparable recoveries.

At the same time, the approximately $62 million awarded in nonintervened actions represents the fourth highest awarded amount and is consistent with the average total awarded amount in the past decade. For this reason, we expect the rate of new *qui tam* filings in 2022 to remain on par with years past and the whistleblower bar to continue to litigate FCA cases where the government declines to intervene.

Enforcement Efforts on Medicare Advantage Organizations

The DOJ continues to focus its FCA enforcement efforts on Medicare Advantage organizations (MAOs) and contracted providers that allegedly manipulate data used by the government to calculate the payments that it will make to cover Medicare enrollees' expected

medical costs. The emphasis is not surprising, given that Medicare Advantage expenditures account for nearly 50% of total federal Medicare spending. The DOJ has articulated this enforcement priority publicly since 2020, including most recently in its February 1, 2022, press release announcing 2021 FCA recoveries. For example, the DOJ recently inked a $90 million settlement with a health care services provider resolving allegations that the company knowingly submitted inaccurate information about the health status of Medicare Advantage beneficiaries.

The DOJ is currently litigating several cases against MAOs in which the government has alleged that MAOs (1) conducted reviews of beneficiaries' medical records and pressured and incentivized physicians to add diagnoses to those records retrospectively; (2) reviewed charts to identify and submit additional diagnosis codes allegedly supported by medical records but simultaneously failed to delete codes identified through the review that were not supported by medical records, resulting in a higher payment to the MAOs; and (3) submitted allegedly false certifications that their data submissions were accurate.

Given this increased FCA enforcement focus on MAOs, we expect that MAOs and affiliated entities will be compelled to increase compliance and auditing efforts, and reevaluate chart review and similar programs to ensure they do not run afoul of government guidance or create heightened FCA risk.

Noteworthy Circuit Court Decisions Interpreting Key FCA Provisions

In 2021, the U.S. Court of Appeals for the First Circuit deepened the circuit split concerning the government's authority to dismiss FCA *qui tam* actions and, in a case of first impression, the U.S. Court of Appeals for the Eleventh Circuit applied the Eighth Amendment's excessive fines clause to a damages award in a *qui tam* action where the government did not intervene.

First Circuit addresses government's dismissal authority. In *United States ex rel. Borzilleri v. Bayer Healthcare Pharms., Inc*. (2022), the First Circuit created a new standard of review for dismissals under 31 U.S.C. § 3730(c)(2)(A), which permits the government to dismiss an FCA action over the private relator's objection. It held that a district court should grant a government's motion to dismiss unless "the relator … can show that the government's decision to seek dismissal of the *qui tam* action transgresses constitutional limitations or … is perpetrating a fraud on the court." Although the First Circuit did not elaborate on what circumstances might satisfy this standard, it is clear that relators face a high burden in seeking to overturn the government's decision to dismiss an FCA case.

Eleventh Circuit considers excessive fines issue in nonintervened action. In *Yates v. Pinellas Hematology & Oncology, P.A.* (2021), the Eleventh Circuit held that the Eighth Amendment's excessive fines clause applies in FCA cases even where the government is not a party. The court held that "all monetary awards in FCA *qui tam* actions are imposed by the United States" regardless of government intervention, reasoning that monetary awards are mandated by a federal law enacted by Congress, and the United States has considerable authority over — and receives a considerable amount of the award from — FCA cases, even when it lacks formal party status.

Congress and DOJ Seek Increased FCA Enforcement

FCA amendments. On November 16, 2021, the False Claims Amendment Act of 2021 cleared the Senate Judiciary Committee and was reported to the full Senate. As reported, the bill included changes requested by senior Republicans on the committee that significantly watered down the intent of the original version. The present version of the bill seeks to:

- modify the materiality standard adopted in the U.S. Supreme Court's *Universal Health Services v. United States, ex rel. Escobar*, which made it difficult to assert FCA claims where the government knew of allegedly fraudulent claims and paid them anyway, by requiring courts to consider other reasons that may have existed for the government's decision to forgo a refund or pay a claim despite actual knowledge of fraud;
- add a provision that would place the burden on the government to identify a valid purpose for seeking dismissal of a *qui tam* action over the relator's objection and a rational relation between dismissal and that purpose; and
- extend the FCA's anti-retaliation provision to former employees.

Given the significance of the proposed amendments and the objections already made by senior Republicans, it remains uncertain whether the bill will pass.

FCA policy changes. In 2021, the DOJ reinstated prior guidance requiring companies to disclose information about all individuals involved in misconduct in order to receive cooperation credit (the Monaco Memorandum) in negotiations. It also restored the use of nonbinding agency guidance in FCA actions where appropriate and lawful (the Garland Memorandum).

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Following the Monaco Memorandum, we anticipate that the DOJ will expect companies seeking cooperation credit to disclose all individuals who may have relevant information about any alleged misconduct even if they played less than substantial roles. We also anticipate that the DOJ will increase its reliance on nonbinding agency guidance, particularly in cases where it interprets ambiguous regulations and may be entitled to deference, or where a party's compliance with it relates to the claims at issue.

Conclusion

We expect the DOJ's FCA enforcement efforts to remain strong and DOJ-initiated investigations in the health care sector based on data-mining efforts to increase. Companies should remain vigilant and take a fresh look at their audit and compliance programs to make sure they are effectively detecting and preventing fraud, waste and abuse.