



USDOJ Announces \$5.6 Billion in False Claims Act Recoveries: What the Increased Emphasis on FCA Cases Means for Your Business

By: Caitlin M. Poe & Wes J. Camden

02.04.2022

In a press release issued on February 1, 2022, the Department of Justice announced that its fiscal year 2021 recoveries on False Claims Act settlements and judgments totaled over \$5.6 billion. This number represents the highest annual recovery amount since 2014 and is the second-largest annual figure recorded.

These recoveries show that the False Claims Act, which provides for potential criminal prosecution as well as civil monetary consequences including treble damages plus penalties for each claim, remains a primary tool for the government to combat alleged waste and abuse of federal funds. Several of the facts and figures that the Department of Justice released regarding its 2021 outcomes are relevant to business owners and employees in affected industries.

Health Care

The health care industry, including Medicare, Medicaid, and Tricare, remains the primary source of False Claims Act settlements and judgments, adding up to over \$5 billion of the \$5.6 billion total (with the Purdue and Sackler family settlements alone accounting for over half of this number). Over the past several years, enforcement has focused on various areas such as medical products or DME, medicines or prescription drugs, or long-term care or rehabilitation. The Department of Justice highlighted its and the Medicaid fraud control unit's (or MFCU) efforts in a few particular health care areas:

- **Opioids** ? The government continued its focus on the inappropriate provision of opioid substances, with impacted industries ranging from manufacturers to physicians.
- **Medicare Managed Care (Part C)** ? As managed care programs grow, the Department of Justice is prioritizing investigation into the basis for per patient services. Questions regarding inflated diagnoses, yielding a higher payment per patient, appear to be a growing area of emphasis.

- **Kickbacks** ? The government's ongoing emphasis on kickbacks encompasses not only traditional "pay to play" arrangements but also arrangements like discounting services or waiving copayments, supposedly to induce overconsumption of medical services.
- **Medical Necessity** ? These claims can arise from both substandard services and services that allegedly lack clinical basis. The Department of Justice tends to question the medical necessity of provider-directed care when there are factors like business incentives promoting certain services or a rate of providing those services that is out of line with others in the market.

Procurement

Outside of health care, the largest area of False Claims Act enforcement continues to be in government procurement—the original reason for the passage of this law during the Civil War. Procurement fraud cases vary widely from false billing to kickback schemes to contractual noncompliance. Because the nature of these cases can vary so widely, and because numerous personnel may be involved in the contracting and performance process, entities and individuals working as government contractors have broad False Claims Act exposure.

Paycheck Protection Program (PPP)

PPP loans were designed to be distributed as quickly as possible with minimal front-end screening in order to provide support for the economy at the outset of the coronavirus pandemic. Now, the government is pursuing companies—mostly small businesses—that improperly received or used these funds. Companies that benefitted from the PPP program should be prepared to justify their loan applications and the uses of those funds through documentation.

Going Forward

The Department of Justice also forecast areas of emphasis going forward in addition to those discussed above. First, the federal government will continue to dedicate resources to cyber enforcement, particularly the security of government networks and information technology. This is consistent with the increase in federal resources being dedicated to cybercrime and cybersecurity more broadly, such as the FBI's IC3 program. As the government expands its capacity and expertise in the cyber arena more broadly, it is natural to apply those resources in the False Claims Act context as well.

Second, the government has emphasized its intent to continue pursuing individuals for alleged fraudulent activity, and not just corporate entities. For the government, pursuing cases against individuals creates additional opportunity to obtain a recovery, allows the most culpable individuals to be identified and held accountable, and increases leverage in settlement negotiations. For individuals and companies involved in False Claims Act investigations, lawsuits, or prosecutions, simultaneous proceedings against corporate entities and individuals force complex and difficult decisions regarding fiduciary and other duties, cooperation, and even potential self-incrimination.

Finally, the Department of Justice indicated its intent to continue relying on whistleblowers in the False Claims Act arena. Over \$1.6 billion of the government's 2021 recovery came from whistleblower-

initiated proceedings, with the *qui tam* relators receiving over a quarter billion dollars in whistleblower awards. Individuals and companies who deal with the federal government should have in place policies and best practices to encourage internal reporting and prevent retaliation in order to manage the strong incentives promoting whistleblower complaints.

The initiation of a False Claims Act investigation can range from actions as overt as a search warrant to those as seemingly innocuous as a civil investigative demand (CID), an audit request (such as a Zone Program Integrity Contractors, ZPIC), subpoena, or an informal request for an interview or information. For companies in regulated industries, any request from the government should be treated with great care. All False Claims Act litigation puts the existence of the company on the line, and potentially also implicates the liberty of the company's officers and employees.

Related People

- Anthony H. Anikeeff ? 703.760.5206 ? aanikeeff@williamsmullen.com
- Wes J. Camden ? 919.981.4064 ? wcamden@williamsmullen.com
- Lauren E. Fussell ? 919.981.4307 ? lfussell@williamsmullen.com
- Charles E. "Chuck" James, Jr. ? 804.420.6529 ? cjames@williamsmullen.com
- Caitlin M. Poe ? 919.981.4085 ? cpoe@williamsmullen.com

Related Services

- False Claims and Internal Investigations
- White Collar and Investigations
- Government Contracts
- Litigation