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DOJ Boast on Record FCA Recoveries Is Not as It Seems

By Michael Waldman and Ralph Mayrell

March 16, 2022, 4:00 AM

Robbins Russell attorneys Michael Waldman and Ralph Mayrell break down the data from fiscal year 2021 False Claim Act settlements, which the DOJ has touted as over \$5.6 billion and the second largest total for a year ever. They explain that, removing a single questionable settlement from the 2021 figures, it appears that overall DOJ recoveries, as well as qui tam recoveries and the number of filed qui tam lawsuits, are on a downward trend.

Another year, another Justice Department press release trumpeting billions in recoveries from the False Claims Act—more than \$5.6 billion for 2021. But as always, while this top-line number makes for great chest thumping and back patting by the DOJ and relators' attorneys, you have to look at the data the DOJ attaches to the press release to understand what's really going on.

Examining this data, we have four observations about the direction of FCA enforcement, all of which point to FCA qui tam activity having leveled off, if not declined, while the DOJ has become more active generating its own cases.

Reported Increase Is Illusory

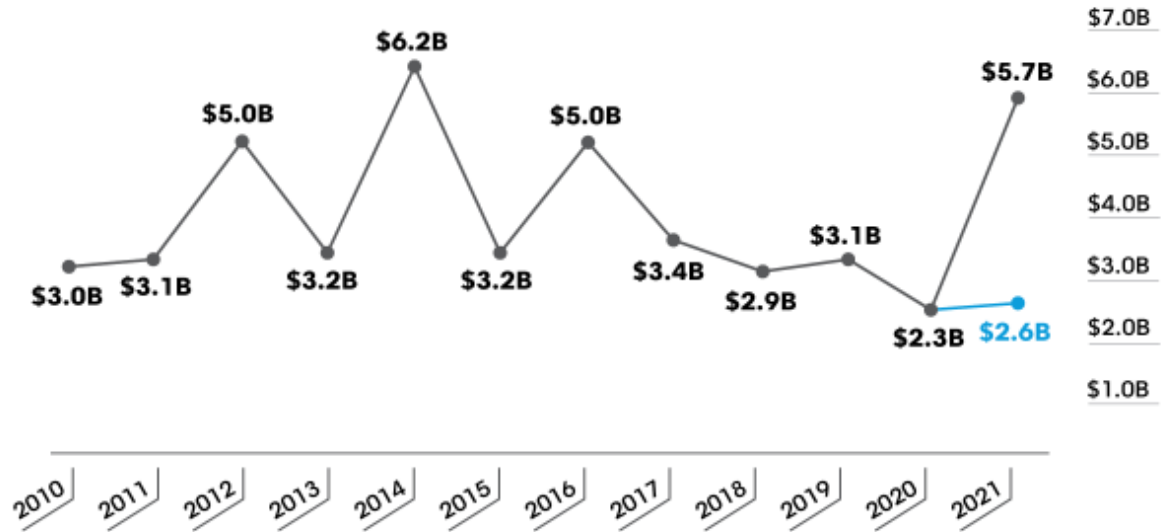
The DOJ proclaimed 2021 as the “second largest annual total” in FCA history, and the “largest since 2014.” True, to a point, but the big numbers each year are driven by a handful of blockbuster cases. That's true this year, too.

Over half of the DOJ's \$5.65 billion for 2021 results from a one-off supersized \$3 billion combined settlement with Purdue Pharma and the Sacklers related to opioids. And it is not even certain that the government will receive the money, given that it only has an unsecured claim in a bankruptcy proceeding where the confirmation plan has been tossed by the district court.

By dropping this uncertain Purdue/Sacklers settlement out of the totals, the DOJ's recovery in 2021 is lower than it has been since 2009 (\$2.47 billion), and there is a continuing downward trend.

Total FCA Recoveries

— Without Purdue & Sackler Settlements



Source: Robbins, Russell, Englert, Orseck & Untereiner

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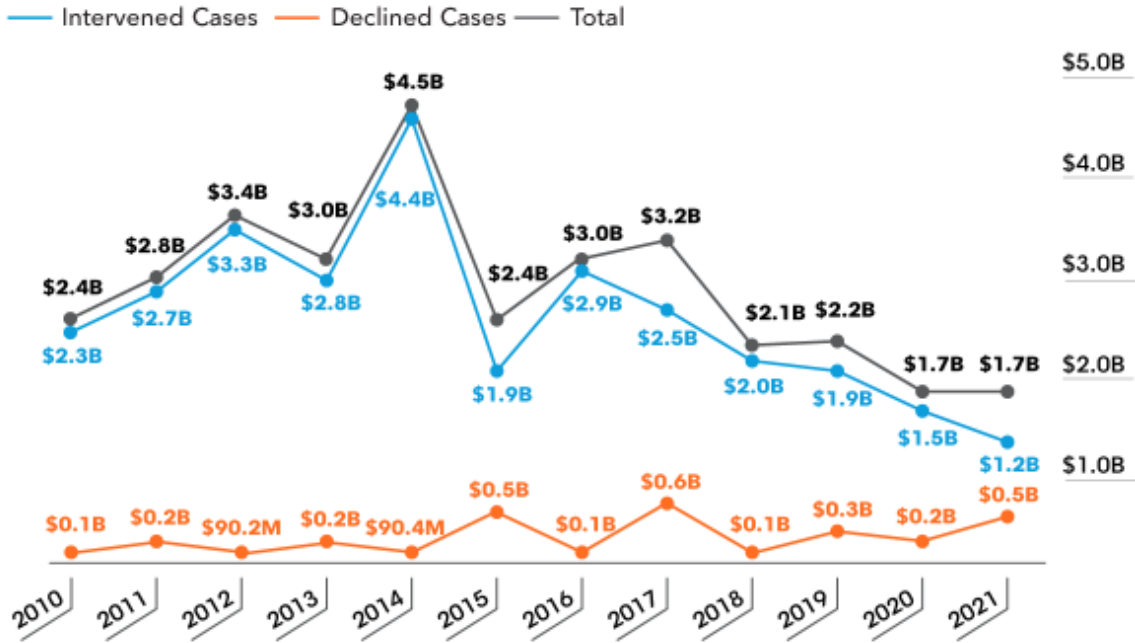
Qui Tam Recoveries Continue to Decline

Cases brought on behalf of the U.S. by private whistleblowers, called qui tam cases, hit their high-water mark in 2014, netting the government \$4.5 billion in recoveries. Since then, recoveries by whistleblowers have largely been on a downward trajectory.

In both 2020 and 2021, recoveries in qui tam cases were about \$1.7 billion, which is the lowest qui tam recovery since 2008 (\$1.1 billion). This is driven principally by a decline in recoveries in cases where the DOJ chooses to intervene, which is surprising because we know from other analyses that the DOJ has been intervening more often.

Recoveries in declined cases have stayed mostly low and flat, and so have not made up for the decrease in recoveries in intervened cases.

Qui Tam Recoveries



Source: Robbins, Russell, Englert, Orseck & Untereiner

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No Pandemic Surge in Qui Tam Cases, But DOJ Was on the Move

With the influx of cash from the CARES Act and other Covid-19 relief, we expected a surge of pandemic qui tam cases to follow. That’s not happened, at least not yet.

Instead, the number of newly filed qui tam cases has continued its general decline from a high-point of 757 new qui tam cases filed in 2013 to 598 new cases in 2021, the lowest since 2010.

The DOJ, however, has upped its activity.

In 2020, the number of new FCA cases brought directly by the DOJ increased by 75% from 150 new cases in 2019 to 259 new cases in 2020. The pace slacked to 203 new cases in 2021, but that is still the highest number of new cases brought directly by the DOJ since 1995.

We will have to wait to see if these direct cases pay off for the DOJ. Historically, when the DOJ brought direct cases, it almost always won. However, under the Trump administration, we saw the department’s win rate, according to our research, in direct FCA cases fall to as low as 43% in 2019.

Health Care Still Predominates

Health-care providers have long known that they are the prime target of qui tam whistleblowers. Over the past decade, qui tam recoveries have predominantly come from health-care cases. That's solidified even more clearly in recent years: Since 2018, according to our research, health care has never been less than 86% of the dollars recovered in qui tam cases.

In that same time frame, health-care recoveries have also come to dominate direct cases to a greater degree than since 2011. This likely reflects a drop-off in direct cases related to banking and mortgages coming out of the 2008 recession and the winding down of contracting related to the Iraq War.

Interestingly, while health care's share of recoveries has increased—and dramatically for direct cases—its share of new cases filed has not matched that. As a share of new qui tam cases filed, health-care cases have not increased, and as a share of direct cases, the increase has been modest.

This suggests that the government and relators continue to file non-health-care cases in about the same proportion as they always have, but their recovery rate in non-health-care cases has worsened compared to health-care cases (or they have gotten better at recovering in health-care cases). This is consistent with our analyses showing that there is a huge disparity in the return on investment between health-care and non-health-care cases.

Bottom Line

The takeaway from this data is that the sky is not falling for the typical government contractor or health-care provider concerned about FCA liability. To the contrary, FCA enforcement activity seems to have leveled off, with relators slowing down while the DOJ picks up some of the slack.

And, at least for non-health-care contractors, it seems that the DOJ and relators are struggling to connect their punches in these other sectors.

That said, this is no reason to relax compliance efforts to avoid potential FCA liability. Much of the decline in FCA recoveries in the defense and procurement areas can be attributable to improvements in the compliance measures undertaken by those industries. No large company wants to become the next DOJ blockbuster FCA case, and it does not take anything close to a blockbuster to knock down a smaller business or health-care provider. Even the costs of defending the investigation and litigation can be prohibitive.

The lesson for general counsel and senior leadership: Remain vigilant, and we can keep these numbers down.

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