

2017 Strong Year for False Claims Act Cases, Even as Many Relators Go It Alone

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In late December the U.S. Department of Justice (DOJ) released its False Claims Act (FCA) statistics for the fiscal year 2017, the numbers merit a closer look for healthcare industry professionals.

Overall, FCA recoveries have been trending upward

In all, the government recovered around \$3.7 billion in FCA settlements and judgments, approximately \$1.1 billion less than the collective 2016 recovery amount. However, analysis shows that FCA recoveries are at their highest (especially in the healthcare sector).

The False Claims Act statute underwent substantial changes nearly 32 years ago, changes that served to open the door to more litigation. Since 1986, around \$56.2 billion has been recouped in all. More than half of that amount, however, has been recovered just in the last seven years, and in each year since 2010, the total annual recovery figure has not dipped below \$3 billion.

Therefore, 2017's relatively lower recovery total doesn't tell the whole story; looking at some specifics behind the total can provide context.

Despite mortgage fraud cases, healthcare fraud still bulk of recoveries

The largest single fraud settlement in 2016 was a \$1.2 billion mortgage fraud settlement with Wells Fargo as the defendant, whereas 2017's largest settlement was the roughly \$344 million paid by Shire Pharmaceuticals LLC to settle allegations of improper labeling and kickbacks paid to providers for a particular product it manufactures (a bioengineered substitution for human skin).

Recent history has seen several mortgage fraud settlements. Most notably, 2014, which was the FCA's record recovery year, a total \$6.15 billion recouped, \$3.1 billion of that in mortgage fraud settlements linked to the 2008 financial crisis. Even one of those can dramatically resize yearly totals. But that doesn't mean healthcare billing fraud litigation is less likely to be brought, less likely to result in recovery for the government.

The bulk of last year's FCA recoveries was made up of healthcare fraud settlements and judgments...around \$2.48 billion. And there are some interesting trends to note within that whole.

Whistleblowers vital to healthcare billing fraud recoveries, even when gov't passes on case

The importance of whistleblowers themselves in leveling allegations of fraud is nothing new; what's worthy of note is how much of 2017's total recovery pie came from *qui tam* cases in which the government had decided not to intervene.

Roughly \$426 million of the \$3.7 billion recovered in 2017 came from FCA judgments and settlements resolving cases where relators did the proverbial heavy lifting and where the government opted for non-intervention. This includes the \$280 million

settlement with Celgene Corporation, where the whistleblower alleged improper off-label marketing practices.

Obviously confidence about the merits of a false claims billing fraud case when the government intervenes is stronger than when relators proceed alone, but 2017's \$426 million relator-only recovery total is the second-highest on record (the highest came in 2015, with around \$512 million recouped in cases the DOJ passed on), and these numbers might send potential whistleblowers the message that they might have the right stuff in assessing the merits of a *qui tam* case after all.

Some 2017 FCA cases entered uncharted territory

Quite often whistleblowers are employees (or former employees) of defendant organizations. However, 2017's FCA final tally is also notable in that regard: an FCA case brought against drugmaker Mylan — involving accusations that it deliberately misclassified its Epi-Pen as a generic product in order to get around owing high rebates — was not brought by a Mylan employee but by pharmaceutical competitor Sanofi-Aventis. Settling the allegations cost Mylan \$465 million in total (around half of it to satisfy federal claims).

Additionally, the noteworthiness of the 2017 FCA look back includes a landmark settlement involving allegations of false certification of electronic health records (EHRs). The case (the first of its kind) ended with the defendant, eClinicalWorks, paying a \$155 million settlement to resolve the allegations.

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