

THE FALSE CLAIMS ACT AND HEALTH CARE: 2022 RECOVERIES AND 2023 OUTLOOK

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US Health Care Fraud and Abuse Alert

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On 7 February 2023, the US Department of Justice (DOJ) publicly reported the statistics for federal civil fraud recoveries in Fiscal Year (FY) 2022.¹ While the DOJ emphasized in its accompanying press release that “the government and whistleblowers were party to 351 settlements and judgments” which comprised “the second-highest number of settlements and judgments in a single year,”² the numbers illustrate that FY 2022 continues a years-long trend—FY 2021 aside³—of diminishing False Claims Act⁴ (FCA) civil fraud recoveries.⁵ Indeed, FY 2022’s US\$2.2 billion in total recoveries was the lowest total in 14 years.⁶ Fascinatingly, for the first time since the DOJ began tracking FCA statistics in FY 1987, aggregate recoveries in non-intervened qui tam actions outpaced that in qui tam matters in which the DOJ intervened or otherwise pursued recovery.⁷ This held true both for health care matters and overall.⁸

At US\$1.8 billion, the health care industry again accounted for the lion’s share of recoveries in FY 2022 (80% of the aggregate total).⁹ However, this was the lowest amount for health care-related¹⁰ recoveries since FY 2009.¹¹ As in the past, the government pursued a wide array of health industry entities and providers with its civil fraud enforcement efforts in FY 2022. Over the course of the year, it targeted pharmaceutical manufacturers,¹² health plans,¹³ nursing homes and long-term care management companies,¹⁴ home health companies,¹⁵ hospices,¹⁶ health care systems,¹⁷ hospitals,¹⁸ durable medical equipment companies,¹⁹ pharmacies,²⁰ individual practitioners,²¹ physician groups,²² and clinical laboratories,²³ to name a few. As predicted last year,²⁴ Medicare Advantage-related enforcement proved a governmental focus in FY 2022, as evidenced by the DOJ’s announced intervention in one such case²⁵ and continued participation in several others.²⁶ The government also highlighted its enforcement priorities in Medicaid program FCA cases and COVID-19-related fraud,²⁷ among other areas. The DOJ signaled its intent to continue pursuing health care fraud wherever it may be found, emphasizing yet again its view that “enforcement of the [FCA] deters others who might try to cheat the system for their own gain, and in many cases, also protects patients from medically unnecessary or potentially harmful actions.”²⁸

In this article, K&L Gates highlights three areas worthy of the health care industry’s attention in the year ahead and beyond. First, all eyes are on the Supreme Court of the United States (SCOTUS) as it addresses two hotly contested FCA issues: (1) the contours of the government’s dismissal authority in non-intervened cases, and (2) the extent to which defendants can escape FCA liability by relying on objectively reasonable interpretations of governing regulations (even where they subjectively doubt those interpretations). Second, providers should pay close attention to the government’s growing use of the “High Risk – Heightened Scrutiny” list, which the government has demonstrated an increased willingness to use for providers the government does not wish to exclude from the federal health care programs, but who refuse to enter into Corporate Integrity Agreements

(CIAs) despite signing an FCA settlement agreement. Lastly, COVID-19-related fraud enforcement will likely gain momentum as the government devotes resources toward investigating and prosecuting fraud stemming from the pandemic. This article will analyze these topics in depth, but will first delve into the FY 2022 statistics in detail.

To read the full alert, [click here](#).

FOOTNOTES

¹ U.S. DEP'T OF JUST., FRAUD STATISTICS OVERVIEW (Feb. 7, 2023), <https://www.justice.gov/opa/press-release/file/1567691/download>. This sum reflects only federal recoveries; Medicaid recoveries are not accounted for in this figure. *Id.*

² Press Release, U.S. Dep't of Just., False Claims Act Settlements and Judgments Exceed \$2 Billion in Fiscal Year 2022 (Feb. 7, 2023), <https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022>

³ See John H. Lawrence et. al, *The False Claims Act and Health Care: 2021 Recoveries and 2022 Outlook*, K&L GATES (Apr. 7, 2022), <https://www.klgates.com/The-False-Claims-Act-and-Health-Care-2021-Recoveries-and-2022-Outlook-4-7-2022> (“The US\$5.6 billion in recoveries reported by the United States Department of Justice (DOJ) in its 1 February 2022 press release is more than double the US\$2.2 billion recovered in FY 2020, and is the second largest total recovery ever recorded.”).

⁴ 31 U.S.C. §§ 3729-33.

⁵ Setting aside FY 2021, civil fraud recoveries have dropped from US\$5 billion in FY 2016 to US\$2.2 billion in FY 2022. U.S. DEP'T OF JUST., FRAUD STATISTICS OVERVIEW, *supra* note 1

⁶ In FY 2008, recoveries totaled US\$1.4 billion. *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See *id.*

¹⁰ References herein to “health care-related” statistics refer to those matters in which the Department of Health and Human Services (HHS) was the primary government agency benefitting from a fraud settlement/recovery. See *id.* Those statistics are reported in the DOJ's “Fraud Statistics Overview.” *Id.* at 4-6.

¹¹ *Id.*

¹² See, e.g., Press Release, U.S. Dep't of Just., Mallinckrodt Agrees to Pay \$260 Million to Settle Lawsuits Alleging Underpayments of Medicaid Drug Rebates and Payment of Illegal Kickbacks (Mar. 7, 2022), <https://www.justice.gov/opa/pr/mallinckrodt-agrees-pay-260-million-settle-lawsuits-alleging-underpayments-medicaid-drug#:~:text=The%20settlement%20provides%20for%20Mallinckrodt's,to%20resolve%20the%20kickback%20allegations>.

¹³ See, e.g., Press Release, U.S. Dep't of Just., California County Organized Health System and Three Health Care Providers Agree to Pay \$70.7 Million for Alleged False Claims to California's Medicaid Program (Aug. 18,

2022), <https://www.justice.gov/opa/pr/california-county-organized-health-system-and-three-health-care-providers-agree-pay-707>.

¹⁴ See, e.g., Press Release, U.S. Dep't of Just., Justice Department Sues American Health Foundation and Its Affiliates for Providing Grossly Substandard Nursing Home Services (June 15, 2022), <https://www.justice.gov/opa/pr/justice-department-sues-american-health-foundation-and-its-affiliates-providing-grossly>

¹⁵ See, e.g., Press Release, U.S. Att'y's Off., W. Dist. Ky., Home Health Company Operating in Florida Pays \$2.1 Million to Resolve False Claims Allegations (May 5, 2022), <https://www.justice.gov/usao-wdky/pr/home-health-company-operating-florida-pays-21-million-resolve-false-claims-allegations>.

¹⁶ See, e.g., Press Release, U.S. Dep't of Just., Crossroads Hospice Agrees to Pay \$5.5 Million to Settle False Claims Act Liability (Nov. 23, 2021), <https://www.justice.gov/opa/pr/crossroads-hospice-agrees-pay-55-million-settle-false-claims-act-liability>.

¹⁷ See, e.g., Press Release, U.S. Att'y's Off., E. Dist. Wash., Providence Health & Services Agrees to Pay \$22.7 Million to Resolve Liability From Medically Unnecessary Neurosurgery Procedures at Providence St. Mary's Medical Center (Apr. 12, 2022), <https://www.justice.gov/usao-edwa/pr/providence-health-services-agrees-pay-227-million-resolve-liability-medically>.

¹⁸ See, e.g., Press Release, U.S. Dep't of Just., Flower Mound Hospital to Pay \$18.2 Million to Settle Federal and State False Claims Act Allegations Arising from Improper Inducements to Referring Physicians (Dec. 2, 2021), <https://www.justice.gov/opa/pr/flower-mound-hospital-pay-182-million-settle-federal-and-state-false-claims-act-allegations>.

¹⁹ See, e.g., Press Release, U.S. Dep't of Just., Hearing Aid Company Eargo Inc. Agrees to Pay \$34.37 Million to Settle Common Law and False Claims Act Allegations for Unsupported Diagnosis Codes (Apr. 29, 2022), <https://www.justice.gov/opa/pr/hearing-aid-company-eargo-inc-agrees-pay-3437-million-settle-common-law-and-false-claims-act>.

²⁰ See, e.g., Press Release, U.S. Atty's Office, E.D. Wis., Milwaukee Pharmacy Chain to Pay Over \$2 Million to Resolve Allegations It Violated the False Claims Act (Jan. 28, 2022), <https://www.justice.gov/usao-edwi/pr/milwaukee-pharmacy-chain-pay-over-2-million-resolve-allegations-it-violated-false>.

²¹ See, e.g., Press Release, U.S. Dep't of Just., United States Files False Claims Act Complaint Against Chiropractor, Modern Vascular Office-Based Labs and Modern Vascular Corporate Entities (Dec. 13, 2022), <https://www.justice.gov/opa/pr/united-states-files-false-claims-act-complaint-against-chiropractor-modern-vascular-office>. See also Press Release, U.S. Dep't of Just., Fifteen Texas Doctors Agree to Pay over \$2.8 Million to Settle Kickback Allegations (June 28, 2022), <https://www.justice.gov/opa/pr/fifteen-texas-doctors-agree-pay-over-28-million-settle-kickback-allegations>.

²² See, e.g., Press Release, U.S. Dep't of Just., Physician Partners of America to Pay \$24.5 Million to Settle Allegations of Unnecessary Testing, Improper Remuneration to Physicians and a False Statement in Connection with COVID-19 Relief Funds (Apr. 12, 2022), <https://www.justice.gov/opa/pr/physician-partners-america-pay-245-million-settle-allegations-unnecessary-testing-improper>.

²³ See, e.g., Press Release, U.S. Att'y's Off., D. Mass., MD Labs and its Co-Founders Agree to Pay Up to \$16

Million to Resolve Allegations of Fraudulent Billing (Oct. 20, 2021), <https://www.justice.gov/usao-ma/pr/md-labs-and-its-co-founders-agree-pay-16-million-resolve-allegations-fraudulent-billing>. See also Press Release, U.S. Att'y's Off., D. Mass., Radeas LLC Agrees to Pay \$11.6 Million to Resolve Allegations of Fraudulent Billing (Mar. 31, 2022), <https://www.justice.gov/usao-ma/pr/radeas-llc-agrees-pay-116-million-resolve-allegations-fraudulent-billing>.

²⁴ See *Lawrence*, *supra* note 3 (“[I]ndustry participants should expect the DOJ to accelerate its pursuit of fraud in the Medicare Advantage arena against both insurers and providers.”).

²⁵ See, e.g., Press Release, U.S. Att’y’s Off., S. Dist. N.Y., United States Files Civil Fraud Lawsuit Against Cigna For Artificially Inflating Its Medicare Advantage Payments (Oct. 17, 2022), <https://www.justice.gov/usao-sdny/pr/united-states-files-civil-fraud-lawsuit-against-cigna-artificially-inflating-its>.

²⁶ U.S. Dep’t of Just., False Claims Act Settlements, *supra* note 2 (“This past year, the department . . . continued to litigate a number of other cases, including actions against [several Medicare Advantage insurers].”).

²⁷ See *id.* (highlighting efforts to combat “Fraud and Abuse in the Medicaid Program” and “COVID-Related Fraud”).

²⁸ *Id.*

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