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'Wake-Up Call': FCA Attys Seek Answers As Fraud Fight Falters

By Jeff Overley

Law360 (February 13, 2023, 11:56 PM EST) -- The U.S. Department of Justice's latest yearly report on False Claims Act recoveries depicts a sustained slump that contrasts with the anti-fraud law's showstopping performance in the 2010s, fueling recriminations among DOJ critics but also reassurances among attorneys who see a bounceback on the horizon.

Newly released statistics show settlements and judgments in 2022 worth \$2.2 billion, **the smallest sum since 2008** and a further falloff from **record-setting heights** that the FCA reached in the not-too-distant past.

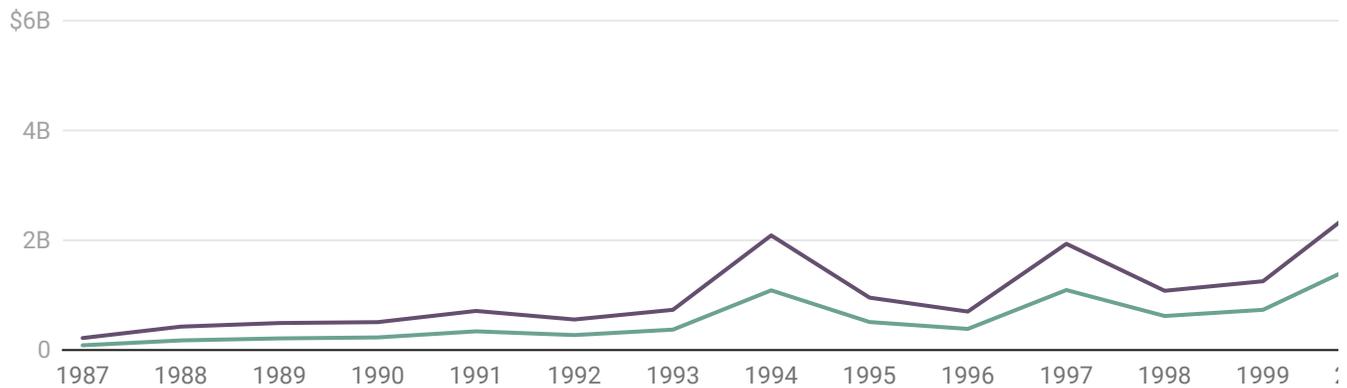
Taken at face value, it's possible to view the dip as a blip, rather than the continuation of a trend. But when historical numbers are adjusted for inflation, the downward trajectory becomes harder to overlook. And when the FCA's enormous haul in 2021 is digested with a grain of salt — because of an unusual deal valued at \$3 billion with bankrupt OxyContin maker Purdue Pharma — the decline appears even more obvious.

"There's something happening here, where the recoveries under the False Claims Act are decreasing slowly," Kramer Levin Naftalis & Frankel LLP associate Ralph C. Mayrell, who has intensively analyzed many years of FCA data, said in an interview.

Inflation-Adjusted FCA Recoveries

When recoveries are shown in 2022 dollars, it's clearer that recent FCA hauls have resembled those of the early 2000s, when the law was less powerful.

— Total — Total with inflation adjustments — Total without Purdue Pharma resolutions in 2021



Law360 spoke with attorneys on both sides of the FCA bar for assessments of the numerical figures and the litigation landscape ahead. Some were sanguine, noting that whistleblowers achieved

unprecedented success last year. Others acknowledged cause for concern, while also insisting that the pandemic and pending FCA cases at the U.S. Supreme Court have temporarily skewed the statistics.

In another camp, however, were those who balked at Pollyannaish perspectives. They accused the DOJ of putting a sunny spin on dreary data and actively undermining the FCA plaintiffs bar, among other things.

'Discernible Pattern' Stirs Alarm

Although the FCA originated during the Civil War and developed its modern statutory structure in the 1980s, the law's halcyon days happened very recently. Annual recoveries started climbing in the first year of the Obama administration — which supported amendments in 2009 and 2010 that strengthened the FCA — and ultimately averaged \$4.8 billion over eight years, after adjusting for inflation. Perhaps coincidentally, FCA proceeds began ticking down in the first year of the Trump administration, and they ultimately averaged \$3.3 billion over four years, after adjusting for inflation.

Although proceeds spiked to an inflation-adjusted \$6.1 billion in 2021, half of that money reflects resolutions involving Purdue Pharma. Experts have questioned whether taxpayers will ever see all the money owed by Purdue, which is bogged down in bankruptcy proceedings. And unlike many blockbuster settlements that reflect enduring theories of fraud, the accord with Purdue might be a one-off, as opioid-crisis litigation has generally been pursued under other statutes.

Now, with the latest year of FCA litigation generating only \$2.2 billion — much of it attributable to \$845 million from a deal with the drugmaker Biogen Inc. — some observers are sounding an alarm.

"These statistics are a wake-up call," David K. Colapinto, a whistleblower lawyer at Kohn Kohn & Colapinto LLP, told Law360. "There's going to be ups and downs in any program, that's for sure. But we're now seeing a discernible pattern."

When the DOJ announced those statistics, it said little about the \$2.2 billion, instead emphasizing that 2022 generated a near-record number of settlements and judgments. Brian M. Boynton, who runs the DOJ's Civil Division, said that the volume of resolutions and verdicts "demonstrates that the False Claims Act remains one of the most important tools" for safeguarding public funds.

But the government's emphasis struck some lawyers as sleight of hand. Nichols Liu LLP partner Bob Rhoad, a defense lawyer who has long analyzed the FCA's annual numbers, described the focus as "a seeming act of recalcitrance or obfuscation," telling Law360 that "even the dizzying spin of the DOJ press room couldn't turn statistical straw into gold this time around."

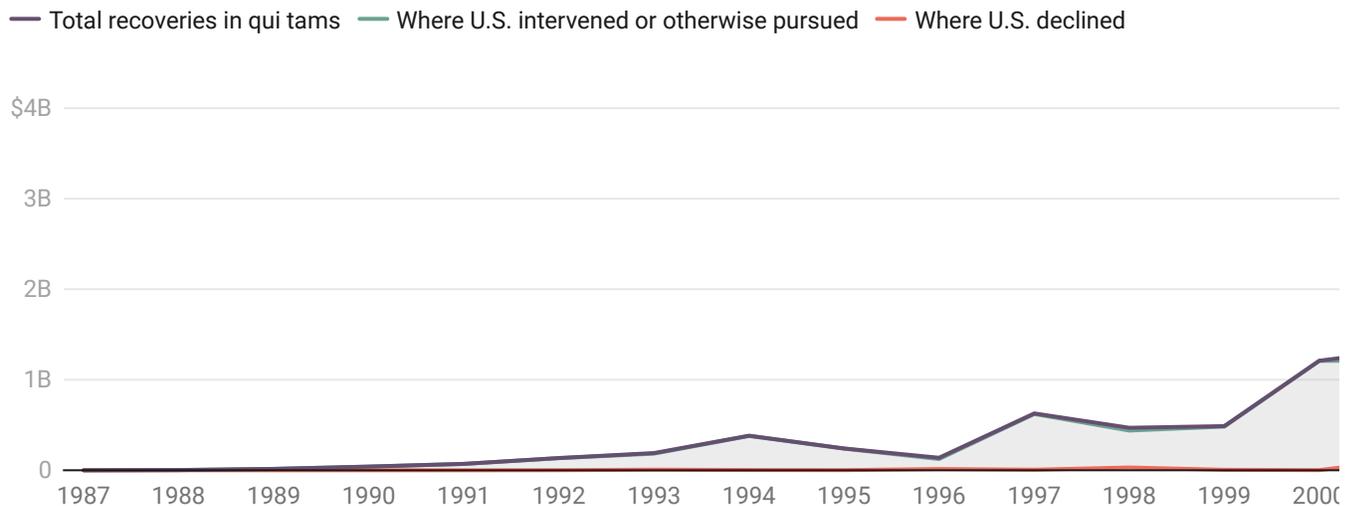
Rhoad added that the uptick in cases doesn't look great when viewed against the downturn in recoveries, because it suggests that per-case recoveries have been relatively low, casting doubt on whether the DOJ is concentrating sufficiently on serious fraud schemes.

"Its FCA enforcement goal ... shouldn't be about chasing numbers and stats to rack up bear pelts to nail to the wall," Rhoad said.

To the extent that total recoveries matter most, the fluctuations between administrations aren't necessarily because of who's in the White House. FCA cases are filed under seal and frequently take years to resolve, and resolutions that happen during one administration can actually be based largely on the DOJ's work during a different administration.

Plaintiffs Bar Finds Solo Success

In recent years, the plaintiffs bar has consistently recovered sizable sums in suits that the U.S. declined to jo



Source: U.S. Dept. of Justice • Created with [Datawrapper](#)

With that caveat, the Trump administration's leadership and policymaking often appeared less than ideal for anyone hoping to maximize FCA recoveries. Perhaps most visibly, the successful nomination of former Kirkland & Ellis LLP lawyer Bill Barr to serve as U.S. attorney general attracted scrutiny because Barr had forcefully and repeatedly criticized the FCA, calling its whistleblower provisions unconstitutional and an "**abomination.**"

Barr walked back those comments, but other challenges emerged, including issues involving health care, which has become the most lucrative target of FCA cases. For example, the U.S. Department of Health and Human Services created **an FCA working group** designed partly to **weed out flimsy whistleblower cases**, and HHS quickly **waved a white flag** regarding certain FCA cases after a U.S. Supreme Court decision on Medicare reimbursement.

At the DOJ, officials issued the **so-called Brand memo**, a later-rescinded document that applied to FCA cases and said the department "may not use its enforcement authority to effectively convert agency guidance documents into binding rules." Even more prominently, the DOJ in 2018 issued its **so-called Granston memo**, the controversial directive for all U.S. attorney offices to torpedo FCA cases that don't jibe with government prerogatives.

The Granston memo has stayed in place during the Biden administration. And in a pending Supreme Court case, *Polansky v. Executive Health Resources*, the DOJ has **continued to defend its right** to vaporize FCA cases unilaterally despite whistleblower protests.

"I don't think the DOJ should be devoting or prioritizing its resources to make it more difficult to bring a False Claims Act case. But that's what they were doing," Colapinto said. "And they've continued to do that," he added. "I think they've kind of gotten lost."

'Strong Pipeline' Seen in 2023

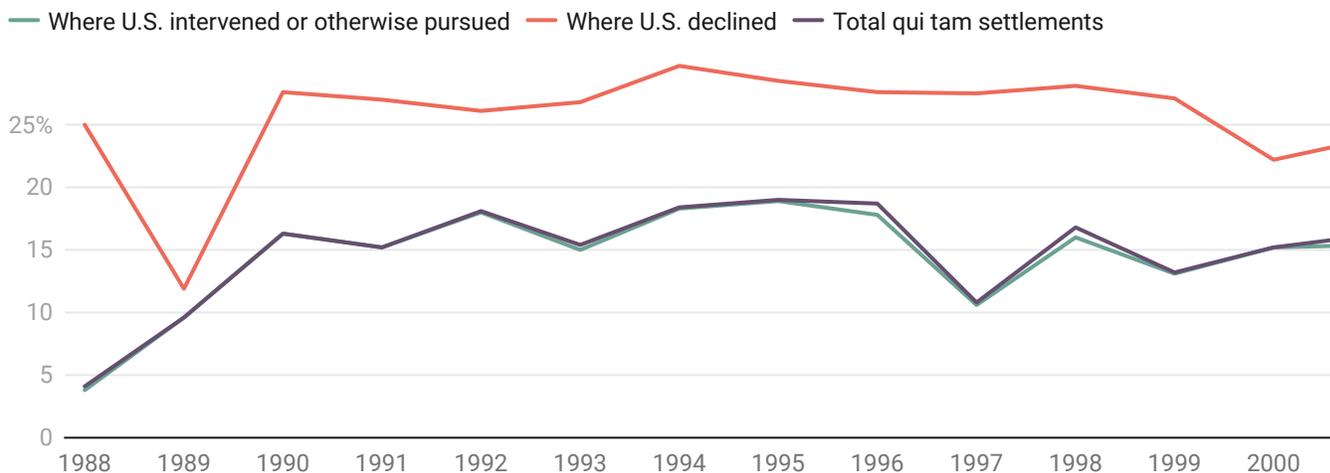
Many lawyers, however, say that the soaring case volume belies the characterization of DOJ dropping the ball. It's believed that the spike relates mainly to pandemic relief spending, and while most cases so far have been small, some observers insist they're a big deal.

Winston Y. Chan, co-chair of the FCA group at Gibson Dunn & Crutcher LLP, analogized the criticism of diminishing FCA recoveries to hypothetical criticism of criminal prosecutions based solely on prison sentences.

"[If] you had many, many, many cases being brought, you can't really say that criminal enforcement isn't happening just because you don't have a bunch of people getting the death penalty," Chan said.

Whistleblower Award Trends

The FCA incentivizes whistleblowing "relators" to bring cases by entitling them to shares of settlement proceeds.



Source: U.S. Dept. of Justice • Created with [Datawrapper](#)

"Volume may be a better measure of investigation and enforcement activity," Chan added. "To me, that suggests the DOJ remains as busy and committed as ever to FCA enforcement, and has a strong pipeline going into 2023."

Brett W. Johnson, a partner Snell & Wilmer LLP, shared a similar sentiment, telling Law360 that "especially in the health care space, I do think that the size and number [of FCA cases] are going to increase over the next few years."

Many cases are likely to revolve around allegations that suppliers of personal protective equipment and other pandemic products got massive sums of money and didn't deliver what they promised, Johnson said.

"Those [cases] are going to be quite large, because look at the amount of monies that were spent during COVID-19. It's just a matter of mathematics," he said.

It's also true that the pandemic took hold in the U.S. less than three years ago. That's a short time in the FCA context, and any FCA cases that involve COVID-19 relief funds might be based on newer theories of liability or noncompliance.

"It wouldn't be surprising if there's going to be more and larger pandemic-related cases coming out in the coming few years," Mayrell said. "You have to imagine that they're taking their time developing the larger cases."

Efforts to develop larger cases might take an especially long time if the DOJ is investigating a vast number of leads involving the hundreds of billions of dollars that Congress authorized amid the pandemic. Accountability matters, even if it doesn't generate a nine-figure FCA payout. But the trade-off might be that the biggest cases take more time, and that FCA statistics end up looking smaller than usual in the short term.

"There's only a certain number of prosecutors doing this full-time across the whole country," Chan said.

Even if the government had unlimited resources, some companies might not be willing to strike sizable settlements right now, because of a second Supreme Court case involving the FCA. The case is widely expected to produce a landmark decision with widespread relevance for suits involving purported regulatory violations. Although the high court only **recently accepted** the case, *Schutte v. SuperValu*, it's been on the radar of FCA attorneys for nearly a year, and the potential for a defense-friendly outcome may have stalled some settlement talks.

"If [you] have a very large FCA investigation ongoing, [and] the government is trying to settle, you might actually say, 'Well, you know what, I want to see what the Supreme Court says, because once I settle, I've settled — I don't get to go back and recoup that money,'" Johnson told Law360.

There's also the possibility that the FCA is increasingly a victim of its own success. As the law's enormous penalties and damages have become widely known, compliance culture has become widespread at big corporations, and so it's possible that diminishing returns are occurring because there's actually less fraud occurring.

"It seems certain that large, sophisticated companies, with sophisticated in-house counsel and outside counsel, recognize the litigation risks that come from the False Claims Act ... and have adjusted," Mayrell said.

In any event, the FCA's relatively small haul in 2022 still included some eye-catching milestones, including nearly \$1.2 billion in settlements from whistleblower cases in which the DOJ declined to intervene. Intervention used to be a make-or-break development for whistleblowers, but the \$1.2 billion result — nearly twice as much as the previous record for nonintervened cases — suggests that's no longer true.

Biogen's settlement of kickback allegations contributed roughly \$845 million to the nearly \$1.2 billion, and so even without the Biogen deal, nonintervened cases generated roughly \$340 million in 2022 — a sum exceeded by only a few prior years.

"Thus, 2022 was a banner year for declined-case recoveries, even without Biogen," Frederick M. Morgan Jr., who represents FCA whistleblowers at Morgan Verkamp LLC, told Law360.

Morgan conceded that the government should intervene more frequently. But he also defended the 2022 results — featuring less money from DOJ-led cases, and more money from whistleblower-led cases — by pointing to the U.S. Senate report that accompanied the FCA's 1986 modernization; the report declared that "only a coordinated effort of both the government and the citizenry will decrease this wave of defrauding public funds."

"[Last] year's statistics show, in my view, that the fulfillment of this goal is ever closer," Morgan said.

--Editing by Emily Kokoll and Jay Jackson Jr.