

DOJ Reveals One Of FCA's Smallest Hauls In Many Years

By Jeff Overley

Law360 (February 7, 2023, 11:15 PM EST) -- The most recent year of False Claims Act litigation produced \$2.2 billion in settlements and judgments, among the smallest tallies for the FCA during the past two decades, according to statistics the U.S. Department of Justice released late Tuesday.

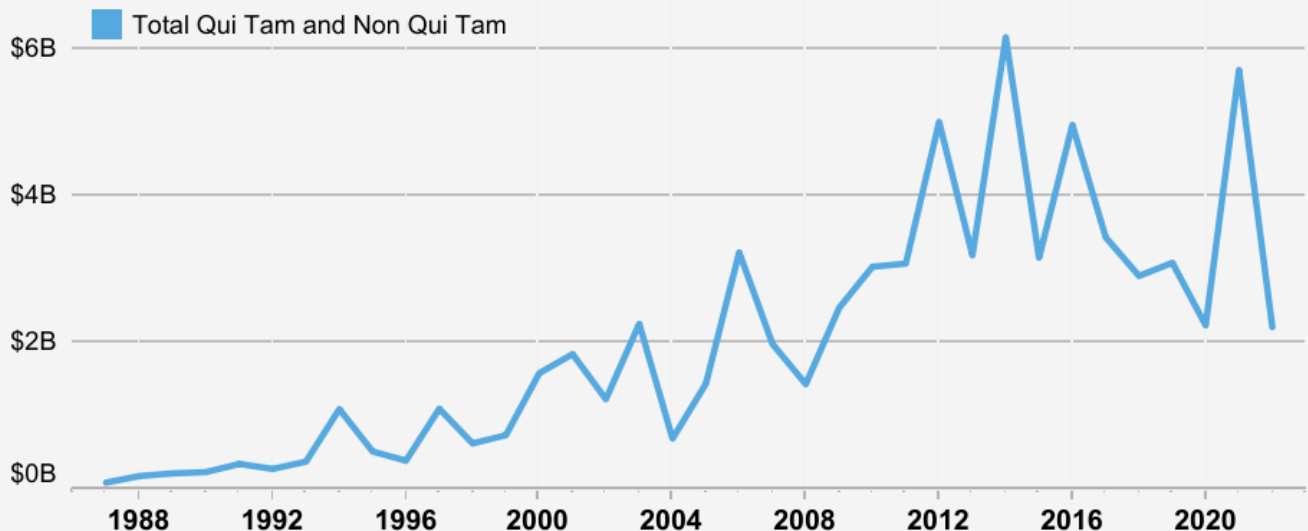
Total FCA recoveries for fiscal year 2022 ended up at the lowest level since 2008 and dropped precipitously from the prior year, when the anti-fraud law **generated roughly \$5.7 billion**, Tuesday's statistics showed. That is true even before adjusting for inflation, which would make the 2022 results even less impressive.

In an announcement on Tuesday, the DOJ evinced no disappointment and instead sought to spotlight more than just dollars and cents. In the second sentence of its announcement, for example, the DOJ noted that "the government and whistleblowers were party to 351 settlements and judgments, the second-highest number of settlements and judgments in a single year."

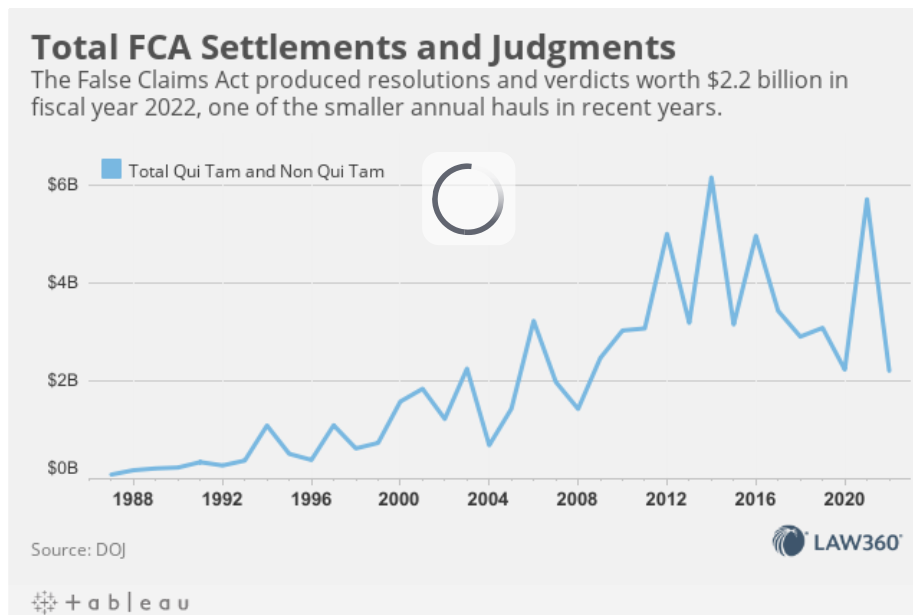
"The large number of settlements and judgments this past year demonstrates that the False Claims Act remains one of the most important tools for ensuring that public funds are spent properly and advance the public interest," Brian M. Boynton, head of the DOJ's Civil Division, said in a statement accompanying the statistics.

Total FCA Settlements and Judgments

The False Claims Act produced resolutions and verdicts worth \$2.2 billion in fiscal year 2022, one of the smaller annual hauls in recent years.



Source: DOJ



Nichols Liu LLP partner Bob Rhoad, a defense lawyer who closely tracks FCA statistics, told Law360 on Tuesday night that "the lack of any acknowledgment of [the] sharp decline in DOJ's press release is conspicuous and ignores the elephant in the room."

Tuesday's announcement didn't explain in detail why there were so many settlements and judgments. But since the COVID-19 pandemic began, the number of FCA cases initiated by government lawyers has spiked, and that remained true in 2022, when there were 296 new matters — one of the highest numbers since the FCA's modernization in 1986.

Most of the pandemic enforcement thus far has involved relatively modest cases tied to the Paycheck Protection Program and allegations that ineligible entities obtained PPP loans from the U.S. Small Business Administration. In Tuesday's announcement, the DOJ said it struck 35 such deals in fiscal 2022, recovering "over \$6.8 million and avoiding more than \$1.5 million in losses for SBA tied to federal guarantees on improper loans."

Much of last year's overall FCA performance reflected a **\$900 million deal** with the drugmaker Biogen Inc., which **cemented the nine-figure accord** in late September — just days before the end of the fiscal year. Biogen's payout resolved allegations that the drugmaker juiced product sales by disguising kickbacks as fees for services it didn't need or use. The settlement also led to a record-breaking whistleblower award of **\$266 million** for a former Biogen sales representative who brought the case and soldiered on after the DOJ declined to intervene.

DOJ leadership on Tuesday applauded whistleblowers generally, observing that their cases — sometimes with the DOJ's active involvement — produced nearly \$2 billion of the \$2.2 billion. That equates to a share of roughly 90%, a very sizable portion by historical standards.

There were also nearly \$500 million in rewards for whistleblowers, known as "relators" in FCA parlance. Last year, about 650 new whistleblower cases emerged, which averaged out to more than 12 new suits each week and was similar to the number of new suits filed annually over the past decade or so.

"We are grateful for the hard work and courage of those private citizens who bring evidence of fraud to the department's attention, often putting at risk their careers and reputations," Boynton said.

Money from individuals and entities overseen by the U.S. Department of Health and Human Services constituted 80%, or almost \$1.8 billion, of the total amount. That was in line with the category's average contribution in recent years, but down from **the 90% milestone** set a year earlier; that milestone stirred some controversy about the heavy emphasis on health care, which includes drugmakers, medical device manufacturers and other life sciences companies.

The nearly \$1.8 billion from health care settlements does not include FCA proceeds for states in Medicaid cases. Those proceeds can be considerable; in Biogen's \$900 million settlement, for example, the federal share was \$844 million and the states' share was \$56 million.

The government on Tuesday called attention to other areas, singling out settlements involving the defense industry, COVID-19 and cybersecurity, with the latter area the focus of **a relatively new FCA initiative**. The DOJ also emphasized deals involving airlines, a wireless carrier and a restaurant supplier, saying that the agreements "reflect the diversity of fraud recoveries and enforcement efforts arising under the False Claims Act."

The restaurant supplier, TriMark USA LLC, **paid \$48.5 million** because its subsidiaries allegedly "manipulated federal small business set-aside contracts," and its payout "constitutes the largest False Claims Act recovery based on allegations of small business contracting fraud," according to the government.

The timing of Tuesday's announcement was noteworthy, appearing only a few hours before President Joe Biden's State of the Union address, which dominated coverage in most media outlets.

"Somehow, I don't think the president will be touting FCA recoveries among his administration's achievements," Rhoad told Law360 early Tuesday evening, while adding that the Biogen deal was "truly superlative" and could inspire new whistleblowers.

Tuesday's announcement occurred more than four months after the end of the 2022 fiscal year. A Law360 analysis indicates that the government's annual FCA announcement has rarely taken so long to produce since it became a highly anticipated event for the FCA bar nearly 20 years ago. In the mid-to-late 2000s, the statistics usually came out in November, but in the 2010s, they usually slipped to December. In the past few years, they didn't emerge until January or early February.

It's not entirely clear why the statistics are appearing later. One factor could simply be that the proliferation of whistleblower cases in recent years means that number-crunching takes more time. It's also possible that announcements are sometimes delayed by significant settlements

that occur right at the end of a fiscal year. In any event, when announcements have taken a long time, they have sometimes still ended up showing blockbuster hauls. That's what happened in fiscal 2021, when numbers weren't divulged until Feb. 1, 2022, but showed the second-highest FCA haul in history.

--Editing by Jay Jackson Jr. and Emily Kokoll.

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