

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 7

NUMBER 1

January 2021

Editor's Note: Crunching the Numbers Victoria Prussen Spears	1
DOJ's False Claims Act Recoveries in Fiscal Years 2020 and 2019 Joseph R. Berger, Thomas O. Mason, and Sarah M. Hall	3
Life Sciences Enforcement Trends in 2020 and Outlook for 2021 Sarah K. diFrancesca and Courtney M. White	12
OMB Issues Extensive Revisions to the Uniform Guidance Christian B. Nagel, Kara M. Ward, and Kelsey M. Hayes	20
U.S. Supreme Court Asked to Resolve Circuit Split Over the Scope of the False Claims Act David DiBari, Glen Donath, Joshua Berman, Steve Nickelsburg, Michelle Williams, and Doug Tomlinson	25
Where Are We Going With Section 889 Part B? Justin A. Chiarodo, Merle M. DeLancey, Jr., and Robyn N. Burrows	31

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

DOJ's False Claims Act Recoveries in Fiscal Years 2020 and 2019

By Joseph R. Berger, Thomas O. Mason, and Sarah M. Hall*

The U.S. Department of Justice's total False Claims Act recoveries in fiscal year 2020 appear lower than the Department's recoveries in fiscal year 2019, and lower than the average over the past decade. As in most years, recoveries in health care were significantly higher than in contract and grant cases. Although recoveries may be lower in fiscal year 2020, enforcement may rise as new government priorities and oversight entities focus on the pandemic, stimulus funding, and related allegations of fraud. The authors of this article examine the civil settlements in these two fiscal years, with a focus on the government contract and grant context.

As of the close of fiscal year ("FY") 2020, recoveries and settlements by the U.S. Department of Justice ("DOJ") in civil False Claims Act ("FCA") cases appear lower in FY 2020 than FY 2019, but enforcement may rise dramatically as it follows spending related to the pandemic recovery and federal stimulus efforts. In January 2020, DOJ announced that it had recovered more than \$3 billion from settlements and judgments in FCA cases in FY 2019, with the majority in health care, but also including a significant amount in procurement and grant related cases. Recoveries in FY 2020 appear to be lower than the prior year, and significantly lower than the average recoveries during the last decade.

At the close of FY 2020, health care FCA recoveries appear lower than the previous year but remain significant, with several blockbuster settlements announced in July. In FY 2020, government contract related FCA recoveries also appear lower than the prior year, which may be a result of a temporary shift in enforcement priorities and resources during the pandemic. To the extent that overall FCA recoveries are lower in FY 2020, they may well rise in future years as current enforcement efforts initiate new investigations and cases relating to the pandemic and follow billions in new stimulus spending with the assistance of new oversight entities.

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DOJ's FCA recoveries in civil cases experienced a historic surge beginning in FY 2009, after which annual recoveries were well above \$2 billion each year, and in most years above \$3 billion. At the time of writing of this article, DOJ's final numbers for FY 2020 are not yet available, although it appears that the total FCA civil recoveries may be lower than any year since FY 2009 or before. If so, a lower total amount may reflect a shift in priorities during the pandemic, as well as checks and balances in DOJ enforcement and settlement posture, but current enforcement actions may soon increase with a rise in total government spending resulting from the pandemic.

Since March 2020, DOJ enforcement efforts have included immediate actions related to health care, the pandemic response and funding under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). These efforts included a DOJ task force focused on price gouging and hoarding of personal protective equipment ("PPE"), DOJ's direction to U.S. Attorneys' offices to prioritize and prosecute criminal conduct related to the pandemic, and initial enforcement actions relating to the CARES Act's Paycheck Protection Program.

The CARES Act created additional oversight authority residing with the Special Inspector General for Pandemic Recovery ("SIGPR") and the Pandemic Response Accountability Committee ("PRAC") composed of federal Offices of Inspector General. These new enforcement entities will provide additional oversight of federal funds to prevent and detect fraud, waste, abuse, and mismanagement, which in turn may lead to additional enforcement actions by DOJ.

On the last day of the Fiscal Year, September 30, 2020, DOJ's Criminal Division, Fraud Section's Health Care Fraud ("HCF") Unit announced a historic nationwide enforcement action, charging 345 defendants across 51 federal districts, including more than 100 doctors, nurses and licensed medical professionals. DOJ's wide-ranging health care fraud action was its largest after the pandemic began in March 2020, alleging criminal fraud schemes implicating more than \$6 billion in allegedly false and fraudulent claims to federal health care programs and private insurers, including more than \$4.5 billion connected to telemedicine. While the summary below concerns primarily civil settlements, DOJ's massive criminal enforcement action at the close of the fiscal year is another indication that civil enforcement actions may also be poised to rise.

DOJ'S FCA HEALTH CARE RECOVERIES IN FY 2020

DOJ's FCA recoveries in FY 2020 continued, as in recent years, to be based primarily in the health care field. Several of the year's largest settlements were announced in July 2020, as stated by DOJ:

- A pharmaceutical company agreed to pay more than \$642 million in settlements, resolving claims that it violated the FCA regarding the company's alleged illegal use of foundations as conduits to pay the copayments of Medicare patients, and alleged payments of kickbacks to doctors, according to a July 1 DOJ announcement.
- A health care company and its parent companies agreed to pay a total of \$600 million to resolve criminal and civil liability associated with the marketing of an opioid-addiction-treatment drug, according to a July 24 DOJ announcement.
- A major health services company and related care centers agreed to pay \$122 million to resolve allegations of billing for medically unnecessary inpatient behavioral health services and paying illegal inducements to federal health care beneficiaries, according to a July 10 DOJ announcement.
- A specialty hospital in Oklahoma and a related management company and physician group agreed to pay \$72.3 million to resolve allegations of improper relationships between the hospital and the physicians group, in violation of the Stark Law or "physician self-referral law," resulting in violations of the FCA, according to a July 8 DOJ announcement.

DOJ announced additional multimillion-dollar settlements in the health care field throughout the year. For example, on September 9, 2020, DOJ announced that a West Virginia hospital agreed to pay \$50 million to resolve allegations concerning the Stark Law and Anti-Kickback Statute. On September 23, 2020, a major drug company agreed to pay \$97 million to resolve allegations of kickbacks. And, in April, two testing laboratories agreed to pay \$43 million and \$41 million respectively to resolve allegations of medically unnecessary tests.

DOJ also reached settlements in the nursing home industry, which will face new scrutiny relating to the pandemic response as well as pre-existing DOJ initiatives. On July 13, 2020, DOJ announced that a nursing home management company and 27 affiliated facilities had agreed to pay \$16.7 million to resolve allegations that they submitted false claims to Medicare for rehabilitation therapy services that were not reasonable or necessary. In April and February, health services companies agreed to pay \$10 million and \$9.5 million respectively, to resolve similar allegations.

This year's health care-related settlements illustrated the active and pre-existing government enforcement efforts relating to health care spending that will continue during and following the pandemic crisis. The government's response to the pandemic and the related economic stimulus measures have led to increased government spending in the health care field, as well as contracting and grants, and increased oversight and enforcement to track that spending.

DOJ'S FCA GOVERNMENT CONTRACT AND GRANT RECOVERIES IN FY 2020

While FY 2020's settlements relating to government contracts appear lower than the prior year in total, they continue to illustrate the many enforcement perils to companies that are alleged to violate laws or regulations during their performance of government contracts or related government programs. For example:

Bribery Allegations

On September 15, 2020, DOJ announced that a defense contractor headquartered in Virginia had agreed to resolve civil claims arising from allegations that it engaged in a bribery scheme to steer government contracts for training simulators to the company, as part of a broader settlement that included a guilty plea by the company. As part of the plea agreement, the company agreed to pay \$37.7 million in restitution, which would also resolve the company's civil FCA liability. The company owner and CEO also paid \$500,000 to resolve his personal FCA liability.

The United States alleged that the company formed a corrupt relationship with a U.S. Air Force contracting official who provided procurement-sensitive information during the pre- and post-award phases of the contract. The DOJ contended that, as a result of this scheme, the company caused a prime contractor to submit false invoices to the government, demonstrating that the FCA can apply equally to a subcontractor.

International Trade

On September 25, 2020, DOJ announced that a global engineering company and its U.S. subsidiary agreed to pay more than \$22.2 million to resolve allegations that the companies violated the FCA by knowingly making false statements on customs declarations to avoid paying duties owed on the companies' imports. DOJ noted that:

To enter goods into the United States, an importer must declare, among other things, the country of origin of the goods, the value of the goods, whether the goods are covered by antidumping or countervailing duties, and the amount of duties owed. U.S. Customs and Border Protection (CBP) relies on these representations to determine the correct amount of any duties owed. It is the importer's affirmative duty to use "reasonable care" to make sure that such information is accurate so that CBP can assess the proper duties.

The United States alleged that the company avoided duties by "misrepresenting the nature, classification, and valuation of imported merchandise, as

well as the applicability of free trade agreements.” This settlement points to increased enforcement of international trade obligations under the FCA, which is likely to continue.

Contract Specifications and Substandard Materials

On June 16, 2020, DOJ announced that a company had paid \$10.9 million to resolve allegations it had sold substandard steel components for use by other contractors on U.S. Navy vessels and that a company employee had falsified test results for the components.

On September 10, 2020, DOJ announced that an asphalt contractor had agreed to pay \$4.5 million to settle claims that it violated the FCA by misrepresenting the materials in the asphalt mix that it was using to pave federally funded roads in Indiana.

These settlements illustrate the potential application of the federal FCA when substandard materials are provided in the federal supply chain, or whenever federal funds are involved.

Disaster Recovery

Enforcement efforts relating to disaster relief, and government actions in response to the current pandemic, may be expected based on similar enforcement that has followed past disaster recovery funding. On June 3, 2020, DOJ announced that it had intervened in a whistleblower lawsuit against an engineering company and certain disaster relief applicants, alleging that they submitted false claims to the Federal Emergency Management Agency (“FEMA”) for the repair or replacement of facilities damaged by Hurricane Katrina. DOJ announced that a university in Louisiana had agreed to pay \$12 million to resolve related allegations.

Grants

Although contract settlements have been more frequent in recent years, grants are equally subject to the FCA. On September 11, 2020, DOJ announced that a prominent research institute had agreed to pay \$10 million to settle claims that it had improperly charged National Institutes of Health (“NIH”)-funded research grants for time spent by researchers on non-grant related activities, including new grant applications, teaching, and other administrative activities.

Contracting in Health Care

DOJ enforcement efforts also have focused on government contracts in the health care field. On April 6, 2020, DOJ announced that a biopharmaceutical company based in Georgia that manufactures human tissue grafts would pay

\$6.5 million to resolve allegations that it submitted false commercial pricing disclosures to the U.S. Department of Veterans Affairs (“VA”). On March 12, 2020, DOJ announced that a Cincinnati-based company would pay \$1.85 million to resolve allegations that it failed to schedule veterans’ medical appointments in a timely manner at two outpatient clinics, resulting in the submission of false claims to the VA.

Small Business Contracting

DOJ settlements each year also illustrate the perils to companies that are alleged to violate small business contracting rules. On June 2, 2020, DOJ announced that a Tulsa, Oklahoma-based construction contractor had agreed to pay \$2.8 million to settle allegations that it had improperly obtained federal set-aside contracts reserved for disadvantaged small businesses. And, on May 27, 2020, DOJ announced that an Illinois construction company had agreed to pay \$1 million to resolve allegations that it had misrepresented its use of a small, disadvantaged business to obtain a federally-funded construction contract.

Antitrust

DOJ settlements also illustrate new enforcement initiatives in legal areas overlapping with the FCA such as antitrust. On April 8, 2020, DOJ announced that a South Korea-based company had agreed to pay \$2 million to settle civil antitrust and FCA violations for involvement in a bid-rigging conspiracy that involved contracts to supply fuel to U.S. military bases in South Korea. DOJ had previously reached civil settlements totaling over \$205 million relating to the conspiracy. According to DOJ, these settlements reflect “the important role of both . . . the Clayton Act and the False Claims Act to ensure that the United States is compensated when it is the victim of anticompetitive conduct.”

Also relating to antitrust issues, in January 2020, several companies agreed to pay \$29 million to resolve allegations that they violated the FCA by colluding to rig the bidding of an auction to purchase a U.S. Department of Energy’s non-performing loan. The government alleged that the defendants exerted pressure on the two other competing bidders to suppress their bids during the live auction.

Commercial Sales

DOJ’s FCA enforcement efforts have also encompassed commercial item sales under government contracts. In December 2019, DOJ announced that it had intervened in a whistleblower suit filed against a major government contractor that manufactured armored vehicles for the U.S. military. The suit alleged the company violated the FCA by submitting fraudulent invoices to support inflated prices for commercial parts under its contract.

Foreign Military Sales

DOJ enforcement efforts have also encompassed foreign military sales (“FMS”) as these sales have increased in recent years. In November 2019, a company agreed to pay \$2.8 million and give up \$16 million in potential administrative claims to settle allegations that it violated the FCA by fraudulently obtaining a foreign military sales contract reserved for American companies. The settlement resolved allegations that the company presented false claims to the government certifying that it was performing work as the prime contractor when, in fact, the work was performed by its parent company, which was a foreign company.

DOJ’S FCA RECOVERIES IN FY 2019

According to DOJ’s January 2020 press release summarizing FY 2019, FCA recoveries since 1986 had by then totaled more than \$62 billion. DOJ’s FCA cases are driven each year primarily by whistleblower filings, although DOJ has recently taken a more proactive approach to dismissing certain relator filings. In January 2020, DOJ reported that of the \$3 billion in recoveries in FCA cases in FY 2019, more than \$2.1 billion were from lawsuits filed by relators under the FCA’s *qui tam* provisions, and during the same period, the government paid out \$265 million to whistleblowers. DOJ reported that 633 *qui tam* suits were filed in FY 2019, averaging more than 12 new cases per week.

As has usually been the case in the last decade, most recoveries were in the health care field. Of the more than \$3 billion in total recoveries in FY 2019, \$2.6 billion related to the health care industry, encompassing drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians.

DOJ’s January 2020 release stated that in addition to combating health care fraud, the FCA:

helps to protect our military and first responders by ensuring that government contractors provide equipment that is safe, effective, and cost efficient; to protect American businesses and workers by promoting compliance with customs laws, trade agreements, visa requirements, and small business protections; and to protect other critical government programs ranging from the provision of disaster relief funds to farming subsidies.

DOJ’S RECOVERIES IN PROCUREMENT AND GRANT RELATED CASES IN FY 2019

In its January 2020 press release, DOJ detailed more than \$380 million in recoveries from procurement and grant related cases in FY 2019. DOJ also reported more than \$250 million in recoveries relating to the Department of

Defense (“DoD”), the highest level since 2015. The cases in FY 2019 relating to procurements and grants included cases involving:

- Antitrust violations;
- Defective products;
- Labor mischarging;
- Mail delivery times;
- Negotiations with General Services Administration (“GSA”);
- Misrepresentations in small business eligibility; and
- Grant applications.

DOJ detailed the following procurement fraud and grant settlements in FY 2019:

Antitrust and Collusion

Five South Korea-based companies that supplied fuel to the U.S. military in South Korea “agreed to resolve allegations that they engaged in anticompetitive conduct targeting contracts to supply fuel” and “made false statements to the government in connection with their agreement not to compete.” DOJ announced the five companies paid over \$162 million as part of the FCA settlements. These cases, among others, led DOJ to form the new inter-agency Procurement Collusion Strike Force.

Contract Specifications

An aluminum manufacturer entered into a \$34.6 million settlement with DOJ to resolve its civil liability for “causing a government contractor to invoice NASA and the Department of Defense’s Missile Defense Agency (“MDA”) for aluminum extrusions that did not comply with contract specifications.” According to DOJ, several of the rockets used by NASA crashed and the payloads they carried were lost. The company also resolved related criminal claims arising from the same conduct.

Labor Hours

A government contractor paid more than \$27 million to resolve allegations related to the billing of labor hours on communications contracts with the U.S. Air Force.

Mail Delivery

Two airlines reached settlements with DOJ for \$22 million and \$5.8 million respectively to resolve allegations that they falsely reported the times they transferred possession of U.S. mail to foreign postal administrators and other recipients, under contracts with the U.S. Postal Service.

GSA and Commercial Sales

A software development company paid \$21.57 million to resolve allegations that it provided misleading information about its commercial sales practices during contract negotiations with the GSA. The company “allegedly provided false information concerning its commercial discounting practices for its products and services to resellers, who then used that false information in negotiations with GSA for government-wide contracts.”

Small Business Contracting

The majority owner and former CEO of a Virginia-based defense contractor paid \$20 million to settle “allegations that he fraudulently obtained federal set-aside contracts reserved for small businesses that his company was ineligible to receive.” DOJ noted that in order to qualify as a small business, “companies must satisfy defined eligibility criteria, including requirements concerning size, ownership, and operational control.” DOJ alleged that the CEO caused the company to falsely represent that it qualified as a small business concern. DOJ had previously resolved related claims against the company itself for \$16 million.

Grants

DOJ also highlighted cases relating to grants. A major university paid \$112.5 million to resolve “allegations that it submitted applications and progress reports that contained falsified research on federal grants to the National Institutes of Health (NIH) and to the Environmental Protection Agency (EPA).”

THE VALUE OF CORPORATE COMPLIANCE

DOJ’s settlements each year highlight the value, from both a law enforcement and a corporation’s perspective, of a robust corporate compliance program, which may be viewed as a mandatory requirement and best practice for government contracting, grants, health care and management of federal funds in general.

DOJ’s settlements in FY 2020 and 2019, as well as its annual recovery statistics, serve as additional reminders that FCA enforcement is constant, and that corporations must take proactive measures to ensure that their compliance efforts also remain constant, robust, and effective.