U.S. Department of Justice Recovered More Than $4.7 Billion From Civil False Claims Act Cases in 2016

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On December 14, 2016 the United States Department of Justice made its annual announcement of the amount of money recovered in civil False Claims Act settlements and judgments in Fiscal Year 2016. (Read the Government's press release here.) This year the Department reported collections of more than $4.7 billion from individuals and businesses accused of false claims in conjunction with Government programs and contracts. And as it prepares to leave False Claims litigation in the hands of a new Administration, the Obama Justice Department also touted its $31.3 billion in aggregate recoveries since Fiscal Year 2009. This year's report marks the fifth year in a row where recoveries have exceeded $3.5 billion and continues a number of trends we discussed in our review last year.

The False Claims Act is the Federal Government's primary tool to address fraudulent claims for government funds and program benefits. As he did last year, Principal Deputy Assistant Attorney General Benjamin C. Mizer touted the False Claims Act as an extremely "effective tool against false and fraudulent claims against federal programs."

Under the Act, civil litigation can be commenced by the Government itself or may be initiated by qui tam relators, also known as whistleblowers. Where a whistleblower brings the matter, the Government may join in the action, or it may leave the whistleblower "naked" to proceed alone. If a whistleblower suit is successful, the whistleblower is entitled to up to 30% of the recovery.

For the second year in a row the number of whistleblower actions far exceeded those begun by the Government alone. In Fiscal Year 2016 whistleblowers filed 702 qui tam suits, and the Department of Justice recovered $2.9 billion in these and in previously filed suits that were resolved during this fiscal year. As the result of their efforts, whistleblowers collected $519 million.

Target Industries

The Justice Department's press release identified the industries involved in the most significant recoveries. Not surprisingly, the health care industry was the primary focus of False Claims litigation, as in past years. Since 2009, according to the Government, recoveries from health care fraud claims have

totaled $19.3 billion, or more than 50% of the total 8-year take.

Within the health care sector, the largest recoveries came from drug and medical device companies. These companies paid the Justice Department more than $1.2 billion, about 25 percent of the total. These companies were accused of a range of offenses including fraudulent pricing, failing to alert the Government about available discounts for products, and kickbacks to pharmacies. Hospitals and outpatient clinics came in second at $360 million. These claims involved kickbacks for patient referrals as well as issues related to coding of Medicare and Medicaid claims. Indeed, fraudulent billing to Medicare and Medicaid was the basis for a large number of the health care industry suits.

Curiously, the defense industry, which consistently has been a leading target for the Justice Department and whistleblowers, was accountable for only a relatively small portion of the $4.7 billion in recoveries. The Department also recovered substantial amounts from a range of other industries including the home mortgage industry ($1.6 billion).

Role of Whistleblowers

The growing role of whistleblowers continues to be an important emerging trend. Last year the Government reported a dramatic shift in the number of qui tam relator suits and, more significantly, a huge increase in the results achieved by these actions. Prior to FY 2015 those suits had yielded only about $130 million in the aggregate for relators where the Justice Department chose not to intervene. In other words, leaving the relator "naked" dramatically reduced the relator's chance of success. By contrast, during those same years (2009-2014) relators collected nearly $400 million annually when the Government joined the suit.

In FY 2015 a serious new trend appeared to be developing. Last December the Government reported that it had collected some $3.5 billion in False Claims litigation. And, for the first time, a majority of the funds – about $2.9 billion – was secured in qui tam actions. Of that amount, more than $1.1 billion was produced in cases in which the Government left the qui tam relator naked. Not surprisingly, this dramatically increased the awards made to relators.

The trend continued in FY 2016. In its December 14 press release the Government noted that "[m]ost false claims actions are filed under those whistleblower, or qui tam provisions." In FY 2016 the Department recovered $2.9 billion (thus, the number held firm), and whistleblowers were awarded $519 million during the same period.

Many lawsuits involving the federal government take more than a fiscal year to resolve. Thus, the Department's reported numbers very likely include recovery from suits filed in previous years. However, the sustained level of qui tam relator suits as one of the major factors driving False Claims litigation, and the growth in relator recoveries, suggests that (1) whistleblowers will continue to be a major source of information and evidence for False Claims litigation; and (2) the growth in qui tam relator recovery will continue to spur whistleblowers to report suspected wrongdoing, to the Government directly or in the form of qui tam suits because of the financial benefit to the relator.

Yates Memorandum

In September of 2015 the Justice Department issued guidance to its prosecutors substantially altering some long-held policies and practices in federal investigations and prosecutions generally. Although there were several very specific directives, in general the memorandum, dubbed the Yates Memo, placed much greater emphasis on the targeting of individual decision-makers within a corporation under investigation and conditioned significant settlement benefits on a corporation's willingness to turn state's evidence against the corporation's own people.

Since issuance of the Yates Memorandum, lawyers around the country have been left wondering whether the Department of Justice has actually been following its terms. And, frankly, as with most policies, its application has been uneven across the Department itself, across the 94 United States Attorney's Offices, and from prosecutor to prosecutor. But, while we still have no hard data as to the effect of the new rules, the Department's False Claims recovery announcement took great care to highlight prosecutions and settlements involving individual wrongdoers that it (the Department) attributed to the application of the Yates principles.

In its press release the Department highlighted 10 individuals – all related to the health care industry – who were held personally liable for misconduct under the False Claims Act in conjunction with the investigation and prosecution of their business organizations. Recoveries from these individuals averaged more than $8.5 million, and they were offered as examples of the Department's continued commitment to the principles of the Yates Memo.

Projections for the Future

It is always risky to make projections and especially so when trying to guess the future actions of the United States Justice Department, particularly in a Presidential transition year. However, several things seem clear:

- First, False Claims Act litigation has a long history dating back to the Civil War era and is unlikely to disappear as a tool for federal criminal and civil enforcement. Likewise, as many states have modeled their own false claims statutes on the federal law, the body of statutory law is growing.
- Second, the growing recovery levels likely mean that federal prosecutors, regardless of which party occupies the White House, will continue to see False Claims Act litigation as an effective tool for addressing fraud in government programs and contractual relationships.
- Third, the dramatic increase in qui tam relator suits is tied to the increased recovery levels. So long as qui tam relator litigation is lucrative and produces high recovery levels for the relator and his/her lawyer, there is strong incentive to continue to bring and pursue those actions with or without Government intervention. In fact, as the qui tam relator bar continues to develop, it is likely that we will see more of these suits with growing recoveries.
- Fourth, the future of the Yates Memorandum and its principles remains cloudy at this point. As we pointed out in our Yates discussion last September, the Memorandum was the latest guidance to prosecutors and was built upon a long line of memoranda issued by successive Administrations in

the names of their respective Deputy Attorneys General. Each subsequent memorandum built upon or tore down policy priorities of a preceding Administration. The Yates Memorandum was a significant departure from past practice as it limited prosecutorial discretion and tied corporate settlement benefits to a decision to turn on the corporation's own employees. It seems possible that the incoming Administration may take more of a macro-management approach to prosecutions and enforcement and may return some case settlement authority to the Department's litigating divisions and the United States Attorney's Office. If it does, there may be more flexibility to settle matters without an adversarial relationship between the business organization and its officers. But, if the Department leaves the Yates Memorandum in place, organizational leaders will continue to find themselves in the cross-hairs in order to obtain settlement benefits for the businesses they lead.

How to Protect Your Business

Many will counsel a "sky is falling" approach to the future of False Claims litigation. And we share the view that the False Claims Act and the trends discussed above pose significant risks and challenges for corporations, organizations and individuals doing business or accessing programmatic benefits from the federal or state governments. If you are a repeat player in these programs, you may be well-advised to assume that you will come under scrutiny at some point. However, there are some basic and important steps you can take to minimize your exposure to investigation or to better ensure a good outcome if the investigation comes your way:

Address compliance issues proactively: Whether required by law or by good corporate management, you should have an active compliance program that involves the proper training of your people, ensures procedures to discover mistakes or wrongdoing, deters wrongdoing, discloses problems to corporate leadership and to the Government where required by law or good practice, and quickly moves to remediate the mistaken or bad conduct.

- You must develop and nurture a culture of compliance that starts at the top, applies to every employee and is company and industry-specific.
- Your corporate culture must encourage the reporting of problems and issues and must ensure that they are addressed on a timely basis. It is important to treat whistleblowers properly and within the bounds of the federal and state laws that protect them and that may dramatically increase corporate punishment when not followed.
- You should develop appropriate points of contact for the investigation and evaluation of potential False Claims issues, and you should empower individuals to take action to correct found problems, assess appropriate penalties, and voluntarily disclose the issue to appropriate officials.
- You should develop an action plan for what to do when the Government arrives with a subpoena and/or shows up at your door with a search warrant. There are steps that should be taken immediately.

For a more detailed online discussion of the risks you face under the False Claims Act and how to think

strategically as we head into 2017, please listen to our webinar discussion that can be found here.

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