Today's
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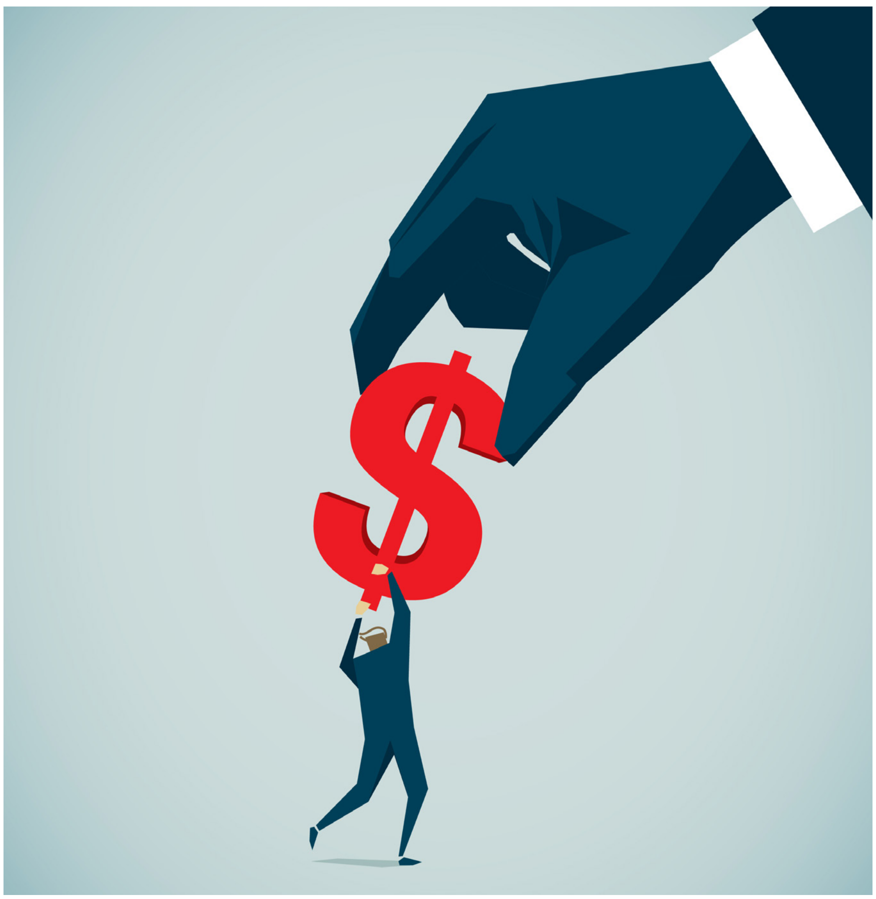
COMPLIANCE

Trends in False Claims Act Enforcement

By **DAVID I. KELCH AND CARA L. BRACK**



Thirty-five years after Congress ushered in the modern era of False Claims Act (FCA) enforcement with statutory amendments, the FCA remains the government's principal fraud enforcement tool. There are multiple areas of FCA-related action that continue to receive heightened government interest, including healthcare, cybersecurity and Covid-19 relief.

FCA-related government enforcement heightened in 2020 and remained high in 2021. The Department of Justice initiated 203 cases in 2021. Although 203 government initiated cases is a slight decrease from 2020, it is the second highest number of government initiated cases in the last 25 years. Since government initiated cases and those in which the government intervenes account for 90 percent of all FCA recoveries, recoveries likely are to remain high in 2022. A well-designed internal investigation and government enforcement response by outside counsel is key to avoiding government involvement in FCA cases and substantially decreases the likelihood of recovery.

HEALTHCARE SCRUTINY WILL CONTINUE, BUT WITH NEW FOCUS

It is certain that *qui tam* relators and the government will continue to focus on healthcare FCA recovery. Late in 2021, the DOJ announced that its primary areas of enforcement in healthcare are opioid abuse, Medicare Advantage (Part C) fraud, kickbacks, telemedicine and provision of medically unnecessary services. Opioids, kickbacks and provision of unnecessary services are familiar entries on the list of top enforcement areas for healthcare FCA recovery, but the focus on Medicare Advantage fraud is a new development.

Medicare Advantage pays a capitated amount for each patient enrolled in the program based on different risk factors associated with the patient. Under the capitated payment model, the financial risk for delivering healthcare services is transferred from Medicare to a private health plan. No matter how much care is delivered to a patient enrolled in a Medicare Advantage plan, payment to the plan from the Medicare program will not exceed or fall below the per-member amount. The DOJ has pursued healthcare providers that submitted unsupported diagnosis codes to make their patients appear sicker than they actually were to obtain more money under the program. Pursuit of these cases is just beginning to result in recoveries for the government.

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Another emerging area of FCA focus is telehealth- and telemedicine-related enforcement. Due to the pandemic, the use of telehealth services greatly exceeded normal rates of delivery, increasing the prevalence of billing fraud and mistakes. The DOJ announced that it has recently obtained significant telehealth-related FCA settlements, and it will be an ongoing area of focus.

HEIGHTENED SCRUTINY OF HEALTHCARE PRIVATE EQUITY

Private equity investment in healthcare has become popular in recent years. Because of their deep pockets to pay damages and penalties, private equity firms investing in healthcare have become attractive FCA enforcement targets. The DOJ takes the view that such firms have a duty to enforce compliance norms and correct otherwise non-compliant activity. For example, in one case in 2021, a court refused to grant summary judgement to a private equity investor of a mental health facility alleged to have violated the FCA by having unlicensed employees rendering claims for services not payable. The court noted the private equity firm should have known that the healthcare facility was subject to Medicaid regulations.

In another case in July 2021, a settlement agreement was entered into with a private equity investor that invested in a supplier of EEG tests. The supplier was providing unlawful kickbacks to physicians for providing referrals for the tests. The government argued that the private equity investor was liable because it should have learned of the company's fraud during due diligence, and allowed the conduct to continue after investing. As a result, private equity investors should include a review for potential FCA violations during their due diligence process and continue to monitor companies to ensure they do not run afoul of the FCA.

In October 2021, the DOJ announced the formation of the Civil Cyber-Fraud Initiative to utilize the FCA to pursue cybersecurity-related false claims by government contractors and grant recipients. This year, the DOJ has begun to pursue FCA enforcement against entities that knowingly misrepresent their cybersecurity protocols or violate cybersecurity protocols required by the government. The DOJ encourages whistleblowers to come forward with cybersecurity-related cases. Government contractors and grant recipients should review cybersecurity requirements in their government-related contracts and grants to ensure compliance.

COVID-19 RELIEF PROGRAMS ENFORCEMENT

Additionally, in 2021 the DOJ announced the Covid-19 Fraud Enforcement Task Force. This task force focuses on ensuring proper use of the massive amount of funds that the government made available during the pandemic under the CARES Act.

At the forefront of Covid-19-related enforcement are recipients of the Small Business Administration's Paycheck Protection Program (PPP) loans. In 2021, the government settled several cases related to false statements on applications for PPP loans or misappropriation of funds received through PPP loans. The DOJ flagged over 70,000 potentially fraudulent loans, which continue to be a prime area for investigations and settlements. If they have not already done so, small to mid-size businesses may want to review their use of PPP loan funds to ensure compliance with government requirements. Misstatements on either applications for the loans or for forgiveness of the loans could lead to FCA liability.

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