

New FCA Stats Fuel Debate Over Health Enforcement Fixation

By Jeff Overley

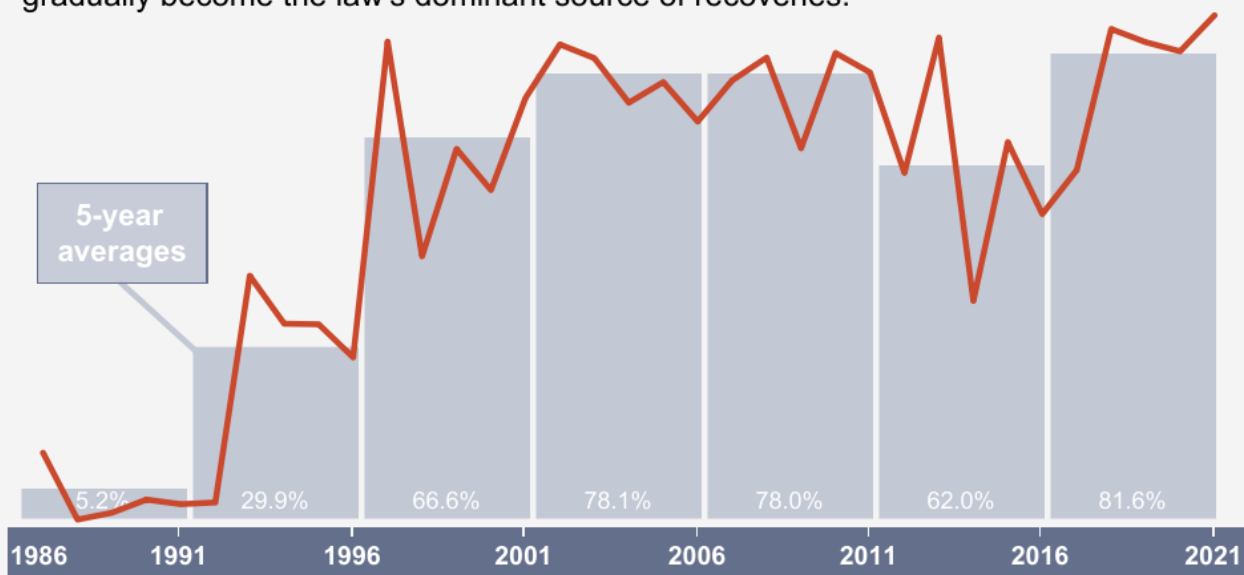
Law360 (February 8, 2022, 10:39 PM EST) -- The U.S. Department of Justice's latest False Claims Act statistics show health care cases netting an unprecedented share of total recoveries last year, raising fresh questions about the intense focus on a single area of federal spending.

Some 90% of all FCA recoveries in 2021 — more than \$5 billion of the roughly \$5.6 billion — came from industries overseen by the U.S. Department of Health and Human Services, including the hospital and pharmaceutical sectors, according to statistics the DOJ made public last week.

It's the first time in the anti-fraud law's 35-year modern history that health care — or any other industry — has so thoroughly saturated the annual enforcement haul. And the new high-water mark isn't an anomaly or merely symbolic. Instead, it's the result of a health care enforcement surge that has been building for years and shows few signs of cresting, much less receding.

Health Hegemony

A record 90% of FCA proceeds last year involved health spending, which has gradually become the law's dominant source of recoveries.



Source: U.S. Department of Justice

For some defense counsel, it seems like the government is pouring most of its FCA energy into dousing health fraud, never mind the billing misconduct that may need extinguishing elsewhere in the U.S. economy.

"It just looks like one industry is a convenient target for noncompliance," Morgan Lewis & Bockius LLP partner Katie McDermott, a former DOJ health fraud attorney, told Law360. "The data tell you that they can't possibly be focusing in any significant way on the other industries."

Health fraud settlements and judgments have frequently composed 75% or more of annual FCA recoveries during the past two decades, and a \$2.8 billion deal with OxyContin seller Purdue Pharma LP helped drive up the percentage of FCA recoveries attributable to health care in 2021. That context arguably makes the 9-to-1 ratio between health care and other industries look less remarkable.

"It's fluctuated a bit, but [2021's] ratio is not out of line too much with past years," Nichols Liu LLP partner Robert Rhoad told Law360.

The DOJ did not respond to a request for comment for this article. But its FCA announcement last week extensively discussed the government's health enforcement motivations, including the desire to protect patients and safeguard the precarious finances of Medicare and Medicaid.

"It's clear that from the government perspective, it makes a lot of sense to be devoting real resources to issues of health care fraud," Jacob Elberg, a Seton Hall University School of Law associate professor and former DOJ lawyer on the Purdue FCA case, said in an interview with Law360.

It's nonetheless clear from the health industry's perspective that the focus is becoming counterproductive. After last week's FCA announcement, Law360 asked representatives of the American Hospital Association whether the group is concerned about health care contributing 90 cents of every FCA dollar.

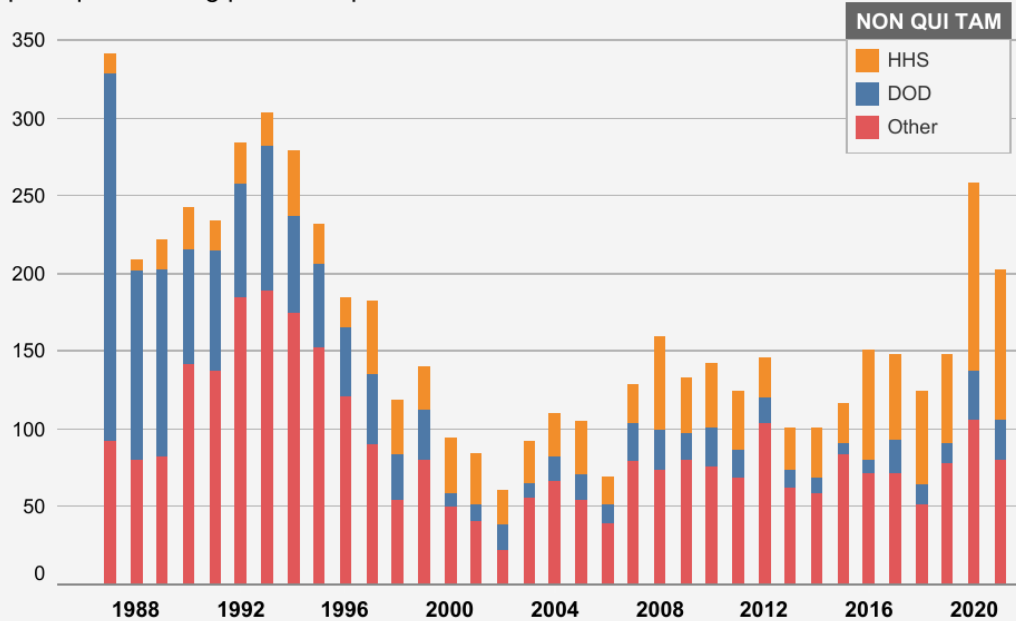
"Yes, the AHA has concerns," spokesperson Colin Milligan replied, pointing to two amicus briefs in which the AHA warned the U.S. Supreme Court of inordinate FCA enforcement.

"Hospitals face a disproportionate amount of FCA litigation," and "questionable and meritless FCA cases divert enormous resources away from providers' core responsibility: caring for patients," according to a brief in 2020 from the AHA, the Federation of American Hospitals and other groups in *UPMC v. Bookwalter*.

The other brief, filed last year in *William Beaumont Hospital v. Felten*, aired similar grievances, averring that a Sixth Circuit ruling threatened "almost-unbounded FCA-related litigation" and was especially alarming because "hospitals already suffer from a disproportionate amount of costly, meritless FCA-related litigation."

DOJ Health Suits Stay High

The DOJ in 2021 opened far more health care cases than any year except 2020, perhaps reflecting pandemic probes.



Source: U.S. Department of Justice



That litigation is partly a result of HHS being a massive agency that spends more than \$800 billion annually just on Medicare. But the U.S. Department of Defense is also a massive agency with budget authority approaching the same amount. And yet, as HHS cases generated 90% of recoveries in 2021, DOD cases garnered just 2%, or roughly \$120 million.

"We have trillions spent on defense, and that's a very low number when you think about it," said McDermott, the Morgan Lewis partner.

Nonetheless, the newly released statistics offer little reason to expect a major shift anytime soon. The figures show that DOJ shattered prior records by launching almost 125 new FCA cases involving health care in 2020 and almost 100 cases in 2021 amid the coronavirus pandemic.

More cases don't necessarily mean more recoveries, but the government might very well have abundant new fodder for sizable health settlements. Given how long FCA cases typically take, settlements from those new cases could be announced soon, and for years to come.

"It wouldn't be shocking if we started seeing things now. But it also wouldn't be surprising if it's a few years from now," Seton Hall's Elberg said of significant FCA settlements involving the pandemic. "When you look at some of the conduct that is resolved, it's not uncommon that DOJ recoveries are based on conduct that's five years old or more."

--Editing by Jill Coffey and Michael Watanabe.
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