

Enforcement

DOJ's Health-Care Fraud Recoveries Dip to Under \$2.5B in FY2017

Pharmaceutical companies and other health-care entities paid more than \$2.47 billion in civil fraud settlements and judgments to the federal government in fiscal year 2017.

The Department of Justice Dec. 22 released figures for annual False Claims Act recoveries for FY 2017. The agency recovered a total of \$3.7 billion in FCA recoveries from all types of entities, a significant contraction from FY 2016's \$4.7 billion. Health-care represented the majority of all FCA recoveries, repeating a long-running pattern, though total health-care FCA recoveries were down from the over \$2.6 billion total in FY 2016.

FCA lawsuits filed by private whistleblowers once again accounted for almost all FCA recoveries in FY 2017 (98.7 percent), though the amount that whistleblowers received from FCA health-care recoveries tumbled to \$282.8 million. This is down significantly from FY 2016's \$457.3 million, and the lowest that the private FCA plaintiffs' bar has recovered for its health-care clients since FY 2009, which could reduce whistleblower incentives for coming forward with fraud allegations.

The total health-care fraud recoveries might seem large to a layperson, said Reuben A. Guttman, with Guttman, Buschner & Brooks PLLC in Washington, but it's "exponentially smaller than the loss the government has actually suffered." Guttman, who represents whistleblowers in FCA lawsuits, told Bloomberg Law Dec. 22 that it wasn't clear that the government is doing the statistical modeling needed "to get an actual fix on damages" in health-care fraud, though he said that effort was hampered by the fact that it requires assistance and data from the private sector.

Pharmaceuticals Top Settlement Size Pharmaceutical companies once again paid the largest health-care FCA settlements, led by a \$350 million settlement with Shire Pharmaceuticals for alleged kickbacks paid to physicians and clinics to boost its skin graft business, and

\$465 million paid by Mylan for allegedly misclassifying its EpiPen allergy treatment product to avoid paying government rebates.

One recent development that likely wasn't captured in the DOJ's data for whistleblower recoveries was the award of over \$72 million to the whistleblower in a \$259 million FCA settlement with drugmaker Celgene. The settlement was executed in July, though the DOJ, which didn't intervene in the case, disputed the proper amount that should go to whistleblower Beverly Brown under the FCA's whistleblower provision.

The U.S. District Court for the Central District of California awarded Brown 28 percent of the settlement total Dec. 15 (after the end of the fiscal year), slightly favoring Brown's request of 30 percent to the DOJ's argument that Brown be awarded the 25 percent minimum share in a nonintervened FCA lawsuit. Guttman represented Brown in the Celgene lawsuit.

"The pharmaceutical industry is a large source of fraud," said Guttman, "and is dependent on government dollars." Guttman said he believes providers are being more cooperative with pharmaceutical companies in taking kickbacks in the form of speaker fees and ghostwritten articles, "creating a standard of care that isn't evidence-based, and driving up utilization of services."

Overall, the number of both whistleblower and DOJ-initiated new FCA lawsuits filed in FY 2017 was 544, a bit fewer than the 572 from FY 2016. The DOJ also highlighted several FCA recoveries in which individuals were held jointly liable (in a \$155 million settlement with eClinicalWorks and a \$145 million settlement with Life Care Centers of America), as well as over \$60 million on FCA recoveries against individuals without a corporate defendant.

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The FY 2017 health-care FCA data is at <http://src.bna.com/vdu>.

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