

## Department of Justice Recovers \$3.7 Billion in False Claims Act Cases

On December 21, 2017, the *U.S. Department of Justice* (DOJ) announced their recovery of more than \$3.7 billion in settlements and judgments from civil cases involving fraud and false claims for *fiscal year* (FY) 2017.<sup>1</sup> This amount is the fourth largest recovery in thirty years,<sup>2</sup> and the eighth consecutive year in which healthcare fraud settlements exceeded \$2 billion.<sup>3</sup> Approximately \$2.4 billion was recouped from the healthcare industry for federal losses alone, and included recoveries from drug companies, hospitals, pharmacies, laboratories, and physicians.<sup>4</sup> This figure, almost 65 percent of the total recovery amount, is much higher than the \$220 million recovered from defense contractor companies and the \$1 billion obtained from other industries such as banking, higher education, and energy.<sup>5</sup> In addition to the \$2.4 billion recovered for federal losses, the DOJ recovered millions of dollars for state and Medicaid programs for FY 2017.<sup>6</sup>

Over \$900 million of the settlements and judgments were obtained from the drug and medical device industry (approximately 37.5 percent of all healthcare-related recoupments), making this the sector with the largest amount of recoveries.<sup>7</sup> One of the largest settlements within this sector involved Shire Pharmaceuticals LLC, which, in conjunction with Advanced BioHealing, paid \$350 million to resolve kickback and fraud allegations that the companies were bribing physicians and clinics to overuse their bioengineered human skin substitute.<sup>8</sup> Additionally, drug manufacturer Mylan Inc. paid approximately \$465 million to resolve allegations that it had misclassified their brand name drug, the *EpiPen*, as a generic to avoid paying higher rebates under the *Medicaid Drug Rebate Program*.<sup>9</sup> Despite the price of the *EpiPen* increasing by approximately 400 percent between the years 2010 and 2016, Mylan only paid a fixed 13 percent rebate to Medicaid.<sup>10</sup>

Additional legal actions were brought by the DOJ against several other sectors within the healthcare industry during FY 2017, including the *skilled nursing facility*

(SNF) and the *health information technology* (HIT) industries, resulting in large recoupments. For example, Life Care Centers of American Inc., a company that owns and operates over 220 SNFs, paid \$145 million to settle allegations that it had submitted false claims for medically unnecessary services performed in their affiliated SNFs.<sup>11</sup> This was the largest civil settlement involving a SNF in the 154-year history of the *False Claims Act* (FCA).<sup>12</sup> In another instance, eClinicalWorks, one of the nation's largest *electronic health records* (EHR) software vendors, paid \$155 million to resolve allegations that it had misrepresented the capabilities of its software to a certifying entity to gain certification, when in fact the software did not meet the requirements for EHR certification.<sup>13</sup>

Money recovered by the DOJ through healthcare fraud enforcement is crucial in returning assets back to federally funded programs such as Medicare, Medicaid, and TRICARE.<sup>14</sup> According to the DOJ's press release, the recoveries made in 2017 are "*a message to those who do business with the government that fraud and dishonesty will not be tolerated.*"<sup>15</sup> Further, Daniel R. Levinson, Inspector General of the *U.S. Department of Health and Human Services* (HHS), noted that "[l]arge health care recoveries benefit vulnerable Medicare and Medicaid beneficiaries as well as the taxpayers who support these programs."<sup>16</sup> Since 1986, recoveries made under civil FCA suits total more than \$56 billion.<sup>17</sup> Over the past five years, there has been a significant number of FCA suits brought on by both *whistleblowers* (also known as *qui tam* lawsuits) and the DOJ, with 674 *qui tam* cases and 125 non *qui tam* cases initiated in FY 2017 alone.<sup>18</sup> Despite the Trump Administration's actions to deregulate the healthcare industry throughout 2017,<sup>19</sup> the number of new cases in 2017 enforcing healthcare fraud and abuse laws appears to be on par, if not greater than, figures from previous years, suggesting that FCA enforcement will remain high in subsequent years.<sup>20</sup>

1 "Justice Department Recovers Over \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017" Department of Justice, Office of Public Affairs, Press Release, December 21, 2017, <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017> (Accessed 1/3/18).

2 "DOJ Reports \$3.7B Haul in FY 2017 FCA Recoveries" By Brian Tully McLaughlin, Laura M. Kidd Cordova, and Jason M. Crawford, Crowell Moring, December 26, 2017,

<https://www.crowell.com/NewsEvents/AlertsNewsletters/all/DOJ-Reports-37B-Haul-in-FY-2017-FCA-Recoveries> (Accessed 1/3/18).

3 Department of Justice, Office of Public Affairs, Press Release, December 21, 2017.

4 *Ibid.*

5 Brian Tully McLaughlin, Laura M. Kidd Cordova, and Jason M. Crawford, Crowell Moring, December 26, 2017.

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- 6 Department of Justice, Office of Public Affairs, Press Release, December 21, 2017.
- 7 *Ibid.*
- 8 “Shire PLC Subsidiaries to Pay \$350 Million to Settle False Claims Act Allegations” Department of Justice, Office of Public Affairs, Press Release, January 11, 2017, <https://www.justice.gov/opa/pr/shire-plc-subsidiaries-pay-350-million-settle-false-claims-act-allegations> (Accessed 1/3/18); Department of Justice, Office of Public Affairs, Press Release, December 21, 2017.
- 9 “Mylan Agrees to Pay \$465 Million to Resolve False Claims Act Liability for Underpaying EpiPen Rebates” Department of Justice, Office of Public Affairs, Press Release, August 17, 2017, <https://www.justice.gov/opa/pr/mylan-agrees-pay-465-million-resolve-false-claims-act-liability-underpaying-epipen-rebates> (Accessed 1/3/18); Department of Justice, Office of Public Affairs, Press Release, December 21, 2017.
- 10 *Ibid.*
- 11 “Life Care Centers of America Inc. Agrees to Pay \$145 Million to Resolve False Claims Act Allegations Relating to the Provision of Medically Unnecessary Rehabilitation Therapy Services” Department of Justice, Office of Public Affairs, Press Release, October 24, 2016, <https://www.justice.gov/opa/pr/life-care-centers-america-inc-agrees-pay-145-million-resolve-false-claims-act-allegations> (Accessed 1/3/18).
- 12 The False Claims Act was passed in 1863. For more information, see: “False Claims” 31 U.S.C. § 3729(a)(1) (2013); “Life Care Centers of America Inc. Agrees to Pay \$145 Million to Resolve False Claims Act Allegations Relating to the Provision of Medically Unnecessary Rehabilitation Therapy Services” Department of Justice, Office of Public Affairs, Press Release, October 24, 2016, <https://www.justice.gov/opa/pr/life-care-centers-america-inc-agrees-pay-145-million-resolve-false-claims-act-allegations> (Accessed 1/3/18).
- 13 “Electronic Health Records Vendor to Pay \$155 Million to Settle False Claims Act Allegations” Department of Justice, Office of Public Affairs, Press Release, May 31, 2017, <https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-155-million-settle-false-claims-act-allegations> (Accessed 1/3/18).
- 14 Department of Justice, Office of Public Affairs, Press Release, December 21, 2017.
- 15 *Ibid.*
- 16 *Ibid.*
- 17 *Ibid.*
- 18 “Fraud Statistics: Overview – October 1, 1986 – September 30, 2017” U.S. Department of Justice, Civil Division, <https://www.justice.gov/opa/press-release/file/1020126/download> (Accessed 1/4/18), p. 2; “Brian Tully McLaughlin, Laura M. Kidd Cordova, and Jason M. Crawford, Crowell Moring, December 26, 2017.
- 19 “How the Trump administration is reshaping health care – without Congress” By Adam Cancryn, Politico, November 13, 2017, <https://www.politico.com/story/2017/09/13/trump-obama-health-care-legacy-242683> (Accessed 1/4/18).
- 20 “DOJ Recovers \$3.7 Billion in False Claims Act Cases in FY 2017; Total Recoveries Exceed \$3 Billion Each Year Since 2010” By Joe Berger, et al., Thompson Hine LLP, Lexology, December 29, 2017, <https://www.lexology.com/library/detail.aspx?g=d47b0c45-6350-4a81-81e1-fb2d3a67e797> (Accessed 1/3/18).



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