

What New Data On FCA Enforcement Tells Us

By **Ralph Mayrell, Jennifer Windom and Lee Turner Friedman**

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Lawyers and analysts have spilled much ink assessing how enforcement and litigation of False Claims Act cases may have changed in the transition from the Trump administration to the Biden administration. But what actually happened on the ground?

This article offers a perspective on FCA enforcement and litigation activity using data recently obtained from the U.S. Department of Justice through the Freedom of Information Act, which provides more information than can be gleaned from the DOJ's annual press releases.

For example, while DOJ press releases emphasize total recoveries for the government and one-off blockbuster settlements, the FOIA request data allows us to assess how often defendants win and what the typical defendant pays to settle.

The article focuses on data for FCA cases resolved during the Trump administration and the first eight months of the Biden administration — the most recent period for which data was available.

The key takeaways are:

1. The DOJ has dramatically increased the volume of recoveries in cases brought directly by the DOJ, but most of these recoveries are small recoveries of a few hundred thousand dollars.
2. After years of courts and parties cutting down on the time to resolve qui tam cases, the pace of resolution is again slowing, with qui tam cases remaining pending half a year longer than five years ago.
3. The DOJ appears to intervene more often, and cases where the DOJ intervenes nearly always end in recovery, while cases where the DOJ declines to intervene rarely end in recovery.



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The FCA Scorecard for the Biden Administration in Fiscal Year 2021 (Jan. 20, 2021 — Sept. 30, 2021)	
The Recoveries	\$300K median recovery in cases brought directly by DOJ \$1.4M median recovery in intervened qui tam cases \$2.5M median recovery in declined qui tam cases
The Wait	3.3 years pending before resolution of qui tam cases (median)
The Intervention Rate	36% of qui tam cases that reach election intervened in by DOJ
The Win-Loss Rate	99% of cases brought directly by DOJ ended in a recovery 91% of intervened qui tam cases ended in a recovery 13% of declined qui tam cases ended in a recovery

About the Data

The DOJ maintains a database of FCA cases, including cases brought directly by the DOJ and qui tam cases brought by relators. This data tracks individual cases from a relator's contact with the DOJ or the initiation of an investigation through dismissal or settlement. Subsets of this data can be obtained via a FOIA request.

The data the DOJ provided in response to the FOIA request includes only cases that have ended in a disposition — that is, in dismissal, settlement or a judgment by court. It does not include pending cases.

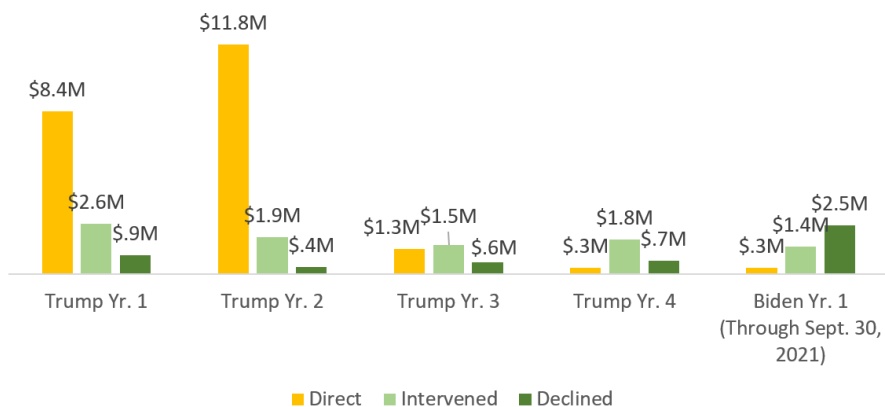
It also does not include investigations in non-qui tam direct cases that ended without a case being filed or a settlement.

Finally, the DOJ does not disclose the data in real time, thus its current disclosed data runs through the end of the DOJ's fiscal year in September 2021, which includes only the first eight months of the Biden administration.

The data is by no means perfect or complete, and it requires judgment calls to make it useable.[1] Thus, this analysis should be taken for what it is — useful context for litigators and in-house counsel, but not exact science.

The Recoveries: More, But Smaller, Settlements in Direct Cases

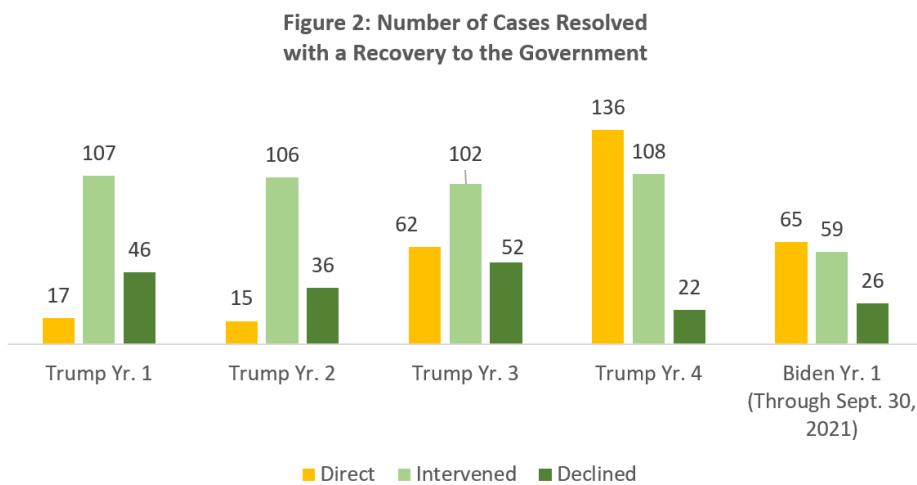
Figure 1: Median Recoveries



Earlier this year, the DOJ announced that more than \$5.6 billion was recovered through the FCA, more than in all but one previous fiscal year. But this headline number, while striking, does not say much about what the typical defendant pays to settle an FCA case. Historically, the typical defendant settles for a couple million dollars or less.

This pattern has held steady for qui tam cases where the DOJ elected to intervene, which make up the majority of cases ending in a recovery for the government. As can be seen in Figure 1 above, the median recovery in these cases continues to fall in the \$1.4 to \$2.6 million range with no clear trend.

And, as seen in Figure 2 below, the volume of these cases being resolved in settlement also appears steady — recognizing that the volume of recoveries by the Biden administration represents only the first eight months of that administration.



There have been more changes in the cases brought directly by the DOJ. The median recovery amount in direct cases, shown in Figure 1, fell from a peak of \$11.8 million in the second year of the Trump administration to a low of about \$300,000 in the last year of the Trump administration and the first eight months of the Biden administration.

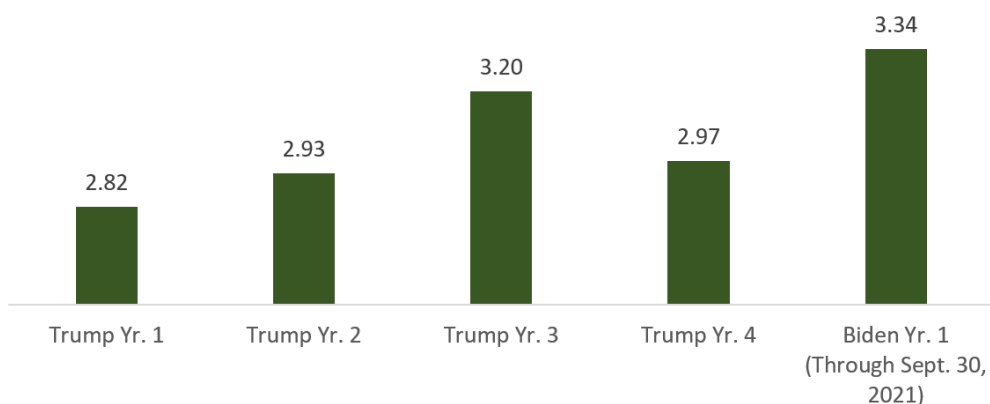
This does not reflect a slowdown in activity, however. Instead, it is the result of a switch in the direct cases from a handful of high-dollar settlements in the first two years of the Trump administration to a much larger number of low-dollar settlements starting in the third year of the Trump administration, as illustrated in Figure 2.

Turning to qui tam cases where the DOJ declined to intervene, superficially, Figure 1 shows a small upswing in the first eight months in the Biden administration, with the median recovery amount reaching \$2.5 million, greater than even the typical intervened qui tam case that year.

Only so much can be read into this, however, as Figure 2 shows the number of declined qui tam cases ending in recovery has shrunk, and when there are only a couple dozen settlements, the median recovery amount can swing widely.

The Wait: Cases Are Taking Longer

Figure 3: Years Pending from Filing to Resolution for Qui Tam Cases Litigated After Unsealing



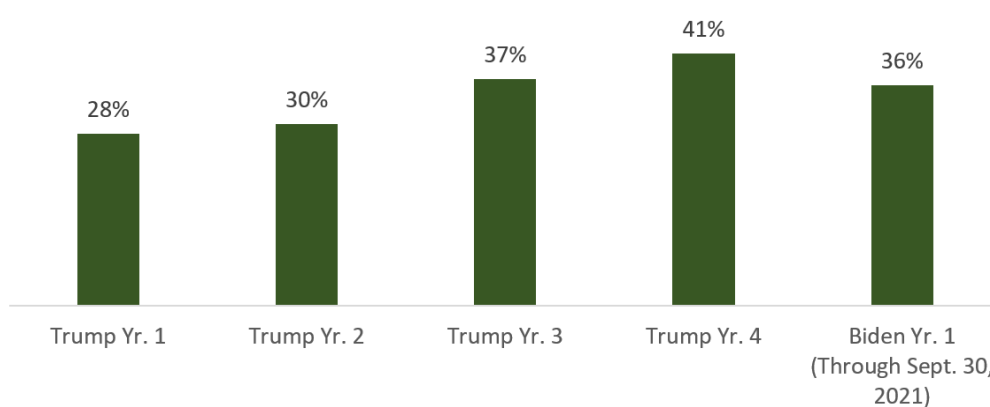
As shown in Figure 3, there has been an increase in how long qui tam cases remain pending prior to resolution.

The median time that passed between a qui tam case being filed and the case being finally resolved increased from 2.8 years during the first year of the Trump administration to 3.3 years in the first eight months of the Biden administration.

There was a short decrease in the median time pending for cases resolved in the last year of the Trump administration, perhaps reflecting a race to settlement before the changing of the guard.

The Intervention Rate: Increasing, But With a Caveat

Figure 4: Percentage of Qui Tam Cases Where DOJ Intervened Among Resolved Cases by Year of Intervention



Relators lose most cases where the DOJ declines to intervene, while defendants settle or otherwise lose most cases where the DOJ intervenes. Thus, the DOJ's rate of intervention is critical to all involved.

Figure 4 shows that there appears to be an upward trend in the DOJ's rate of intervention.

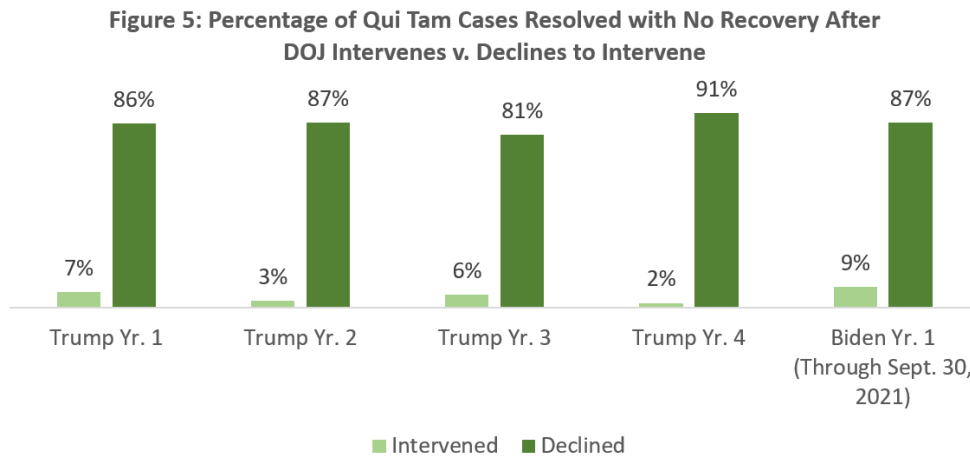
Among qui tam cases that made it to the point where the DOJ elected whether to intervene or decline to intervene — rather than the case being dismissed by the relator pre-election — the intervention rate increased from 28% in the first year of the Trump administration to 41% in the last year of the Trump

administration, and 36% in the first eight months of the Biden administration.

This comes with an important caveat: Because the data includes only cases that have been resolved, and intervened cases tend to be resolved somewhat more quickly than declined cases, these results may reflect that there are many more unreported and unresolved declined cases rather than a higher rate of intervention.

We won't know the answer until we obtain next year's data.

The Win-Loss Rate: Intervened Cases Win and Declined Cases Don't



Previous analyses have shown that when the DOJ intervenes, cases nearly always end in a recovery for the government, and when the DOJ declines to intervene, there is no recovery. That trend holds steady.[2]

Except for the third year of the Trump administration, in which 19% of declined qui tam cases ended in a recovery, between 86% and 91% of qui tam cases that make it past the government's election decision have ended in no recovery. By contrast, nearly all intervened cases — between 91% and 98% — ended in a recovery for the government.

As for cases brought directly by the DOJ, they are almost always successful, though as noted above, the recoveries are often very small.

A previous analysis suggested the DOJ's success rate plummeted in the last two years of the Trump administration, but the more recent data from the DOJ suggests that these earlier results were driven by the DOJ's inclusion in the previous data of closed investigations that never made it to the stage of a complaint being filed. The DOJ did not include these in the more recent data.[3]

Conclusions

For businesses exposed to the risk of FCA litigation, the DOJ's data reveals that FCA activity has continued to press forward with the change in administration. The DOJ appears to be particularly focused on and successful in obtaining recoveries in smaller-stakes cases that it brings directly.

Meanwhile, intervened qui tam cases continue to bring in the bulk of the recoveries with a high rate of

success, and the DOJ appears to be intervening more often than in the past.

In this environment, small businesses and medical practices should be particularly careful in their compliance efforts, as they appear to be on the DOJ's radar.

And all businesses targeted by the DOJ for an FCA investigation should put significant resources into persuading the DOJ to walk away and decline to intervene, as defendants are much more likely to prevail in cases where the DOJ is not involved.

That said, even if the DOJ walks away, many relators will continue to pursue their case, and these cases are taking longer to resolve, with the attendant increase in legal fees and other defense costs that must be anticipated by companies that do business with the government.

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[1] For example, the DOJ's data sometimes tracks individual defendants in a case separately, and in other instances defendants are combined into a single entry. To reconcile this difference, when there are multiple entries for a single case, this analysis consolidates the entries into a single entry for all defendants in the case. Another example is that the data received for the 2021 series appears to have included investigations in non-qui tam cases that did not result in a filing or settlement, but the updated dataset does not. There is no ready fix, so this article does not include some of the analyses of non-qui tam cases from last year.

[2] Digging Into FCA Stats: In-House Litigation Budget Insights, <https://www.law360.com/articles/1402438/-digging-into-fca-stats-in-house-litigation-budget-insights>; Digging Into FCA Stats: A Decade of Litigation Trends, <https://www.law360.com/articles/1402597/digging-into-fca-stats-a-decade-of-litigation-trends>; Digging Into FCA Stats: Litigation's Return On Investment, <https://www.law360.com/articles/1402618/digging-into-fca-stats-litigation-s-return-on-investment->.

[3] Id.