



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

## FCA's Epic Run In 2010s Will Be Hard To Match In 2020s

By Jeff Overley

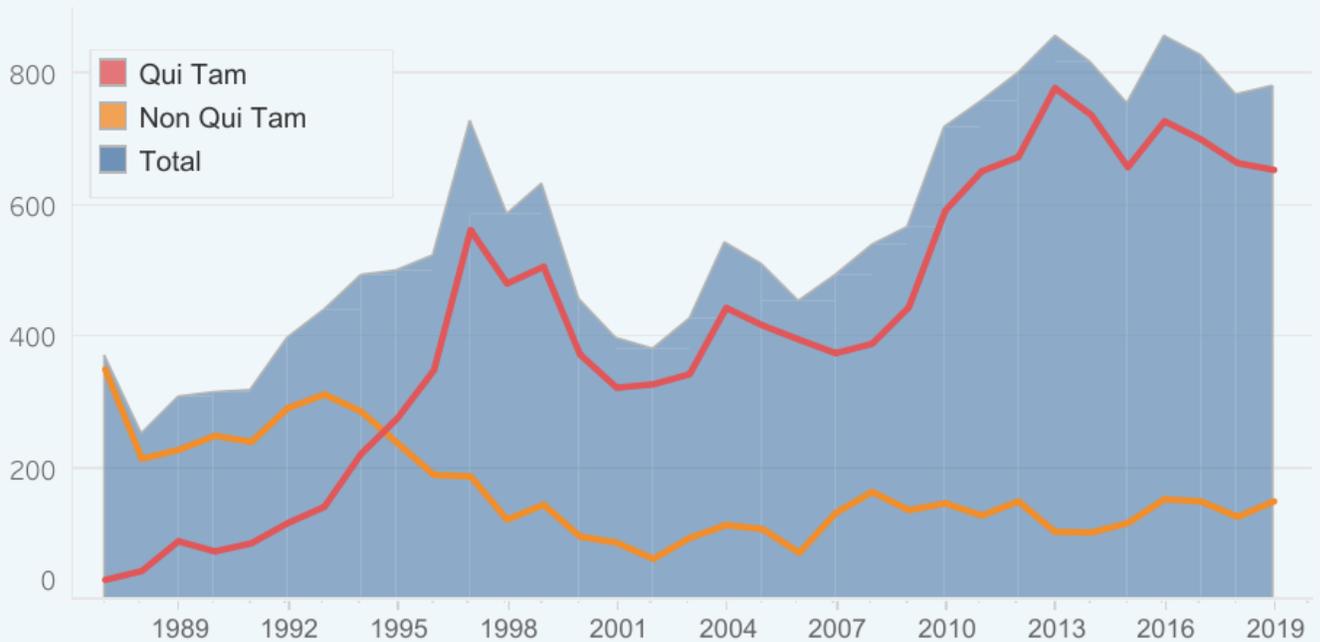
Law360 (January 24, 2020, 6:32 PM EST) -- After soaring to unprecedented prominence during the 2010s, the False Claims Act is flying into the 2020s against new headwinds, including executive branch actions to curtail cases, diminished litigation fodder and nettlesome decisions by the U.S. Supreme Court.

The FCA's dazzling decade generated \$38 billion for taxpayers, more than double the \$18 billion collected in the prior 10 years. The eye-popping amount came on the heels of **statutory changes in 2009 and 2010** that widened the fraud law's reach and strengthened the ability of whistleblowers — crucial engines of FCA enforcement — to pursue cases.

"We saw an immediate uptick of filings," Ropes & Gray LLP partner Kirsten Mayer told Law360 in a recent interview. "They were very significant changes, and the whistleblower bar responded."

### Genesis Of FCA Cases In Flux

Whistleblower suits rose sharply after the FCA's modernization in 1986 and further statutory changes in 2009 and 2010, but they've declined a bit in recent years.



[Click to view interactive version](#)

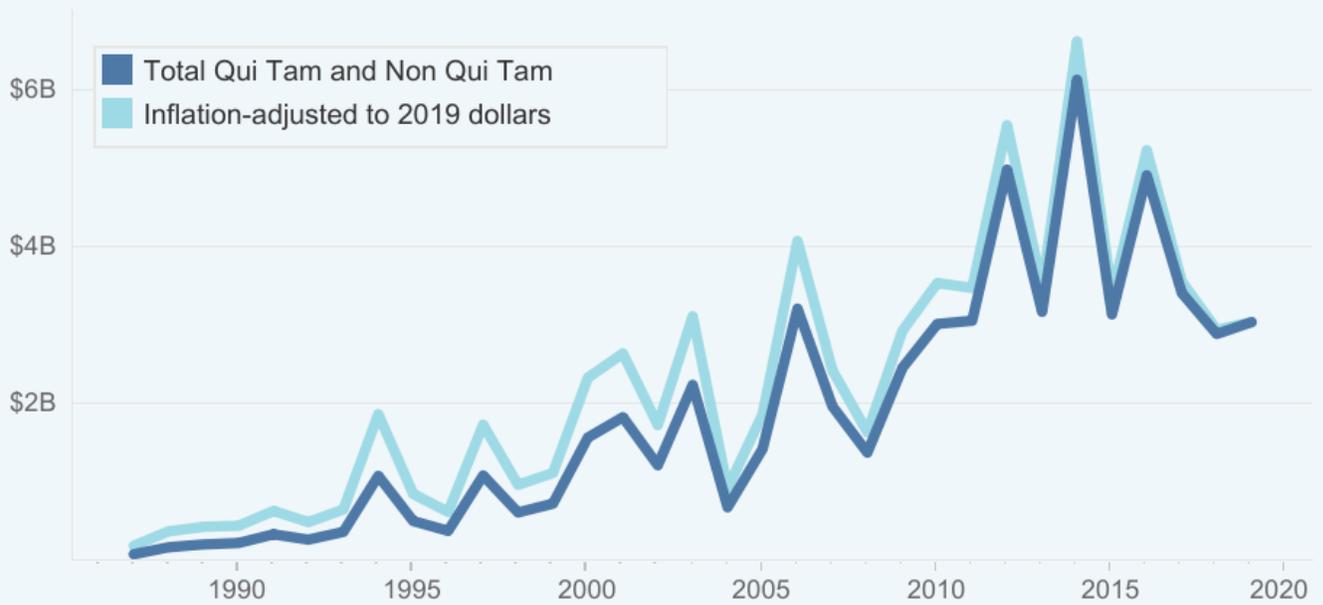


But as the 2010s wrapped up, recoveries leveled off far below the record heights reached earlier in the decade. Newly released statistics show that **last year's tally** was \$3.05 billion — just the ninth-biggest annual figure since Congress modernized the FCA in 1986 and only the 11th-biggest figure after adjusting for inflation.

"I don't think the numbers [last year] are surprising or notable in any way," Holland & Knight LLP partner Megan Jeschke said.

## Inflation-Adjusted FCA Recoveries

When historical FCA recoveries are shown in 2019 dollars, it becomes clearer that the enforcement surge of the 2010s was preceded by some impressive annual recoveries starting in the mid-1990s.



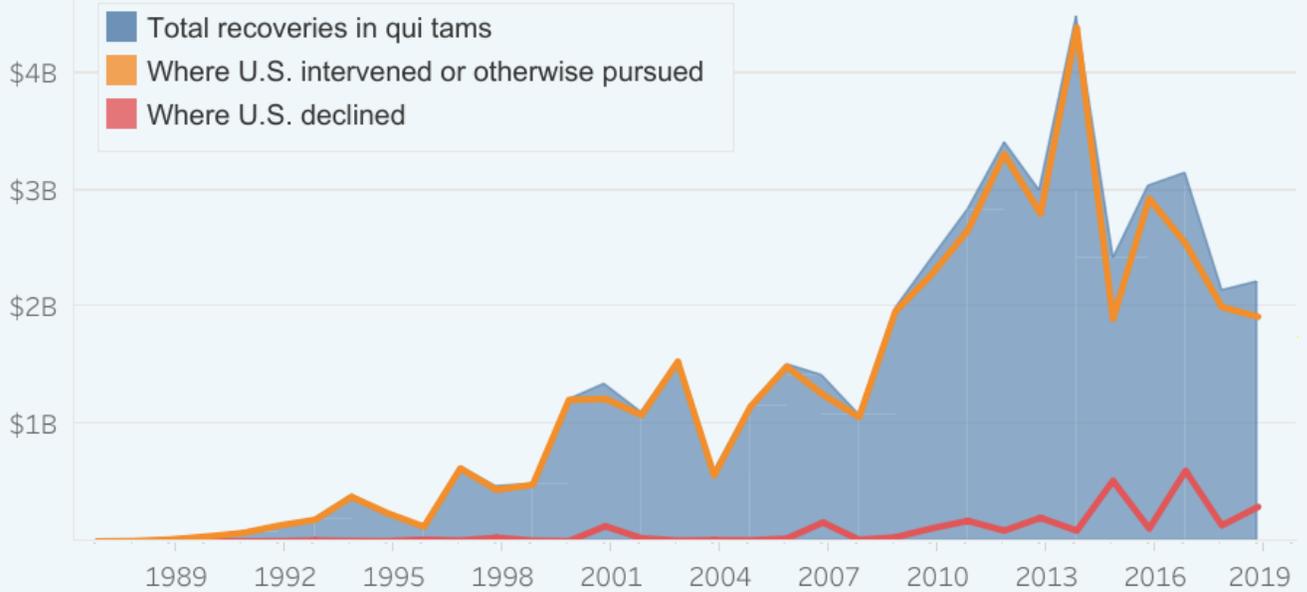
[Click to view interactive version](#)



In a bright spot for the plaintiffs bar, it's no longer a kiss of death when the U.S. Department of Justice declines to join a whistleblower case. Almost every year during the 2010s saw nine-figure recoveries overall in declined qui tams, a dramatic improvement compared to earlier years.

## Plaintiffs Bar Finds Solo Success

It used to be a kiss of death for whistleblower suits if the U.S. declined to intervene. But an increasingly confident plaintiffs bar in recent years has recovered big sums of money without the government's help.



[Click to view interactive version](#)



But at the dawn of a new decade, lawyers see clouds on the horizon threatening to darken the FCA's future prospects.

That's partly because of **recently proposed safe harbors** — which could be finalized in 2020 — that would shield certain arrangements among doctors and hospitals from the Anti-Kickback Statute and the Stark Law, both of which cover financial conflicts of interest and often trigger FCA cases.

Rick Morgan, an FCA plaintiffs lawyer at Morgan Verkamp LLC, told Law360 that the safe harbor initiative "certainly worries us" and "no doubt" will shelter some previously actionable conduct in the decade ahead.

Plaintiffs attorneys are also chafing at the so-called Granston memo, a DOJ directive for government lawyers to more aggressively wield their power to sink disfavored suits filed by whistleblowers, also known as relators.

Since the memo emerged in January 2018, the DOJ has fired torpedoes at several dozen whistleblower suits, including cases seeking massive payouts from deep-pocketed corporations in the pharmaceutical, military and banking sectors.

"At some point, that starts to bump up against the congressional mandate [that] relators be allowed to litigate False Claims Act cases where the government does not intervene," Morgan said.

Whistleblower cases were already ebbing before the Granston memo came out, and they've subsided a bit further in the ensuing two years. After the high-water mark of 757 new suits from whistleblowers in 2013, there were 681 new suits in 2017, 646 suits in 2018 and 636 suits in 2019.

The memo might make plaintiffs attorneys in the 2020s **think twice about rolling the dice** on whistleblower cases, which frequently fail to recoup one red cent after years of pricey litigation. But some defense attorneys contend that Granston dismissals will mostly discourage flimsy cases that wouldn't have clawed back much money anyway.

"Any decrease in filings will not affect recoveries down the road," Larry Freedman, a member at Mintz Levin Cohn Ferris Glovsky and Popeo PC, told Law360. "There would have been cases without fraud that would have wasted government resources to investigate."

Two decisions by the Supreme Court in recent years are also threatening to make the lives of FCA plaintiffs more difficult during the 2020s. One of those decisions came last year in *Azar v. Allina Health Services*, where the justices vacated a Medicare policy affecting billions of dollars in reimbursement because regulators failed to seek public comments.

In the aftermath, top attorneys at the U.S. Department of Health and Human Services concluded that certain enforcement actions involving improper billing **would be "restricted" or even "unsupportable"** because of skipped notice-and-comment in various areas.

In addition, the Supreme Court's 2016 ruling in *Universal Health Services v. Escobar* outlined a "demanding" test for whether regulatory violations are "material" to government reimbursement and therefore actionable under the FCA.

Although courts have interpreted *Escobar* in divergent ways, the ruling has directly led to the nullification of **a \$350 million verdict** involving nursing home care and **a nearly \$665 million verdict** involving allegedly defective guardrails.

"*Escobar* is a significant challenge for DOJ, and it certainly is impacting significant numbers of cases that DOJ is bringing," said Jacob Elberg, a Seton Hall University School of Law associate professor who previously handled FCA cases at the U.S. Attorney's Office for the District of New Jersey.

In the three full fiscal years after *Escobar*, annual FCA recoveries have hovered around \$3 billion — not too shabby by historical standards, but down steeply from the halcyon hauls of 2012, 2014 and 2016, when recoveries ranged approximately from \$5 billion to \$6 billion.

## Annual FCA Hauls Hit Plateau

Yearly recoveries soared to \$5 billion or more several times in the 2010s, but they hovered around \$3 billion as the decade ended, and plaintiffs in the 2020s might be hard-pressed to again hit the peak numbers.



[Click to view interactive version](#)



Elberg downplayed the dip, positing that it stems largely from transitory factors, such as a new presidential administration that needed time to find its footing or is simply pursuing some enforcement actions, including prosecution of opioid cases, under different laws.

"To the extent the decrease in FCA recoveries over the last few years is anything more than a blip or the typical slowdown whenever there's an administrative transition, it is more likely attributable to this administration's priorities than to permanent changes in the FCA landscape," Elberg told Law360.

But even the most diligent campaign to capture more FCA dollars will need a deep well of defendants in order to succeed. And while health fraud cases show few signs of abating, other types of cases show few signs of reliably producing blockbuster settlements or verdicts.

"I think we're going to continue to see health care at the forefront of DOJ's enforcement recoveries, and I don't foresee other industries contributing to that overall amount in any significant way," Matt Curley, a Bass Berry & Sims PLC member, told Law360.

During each of the past two years, health care cases generated more than 85% of FCA greenbacks. Comparable contributions from health fraud cases also occurred earlier in the 2010s, when annual recoveries were buoyed by **10-figure settlements** involving off-label drug

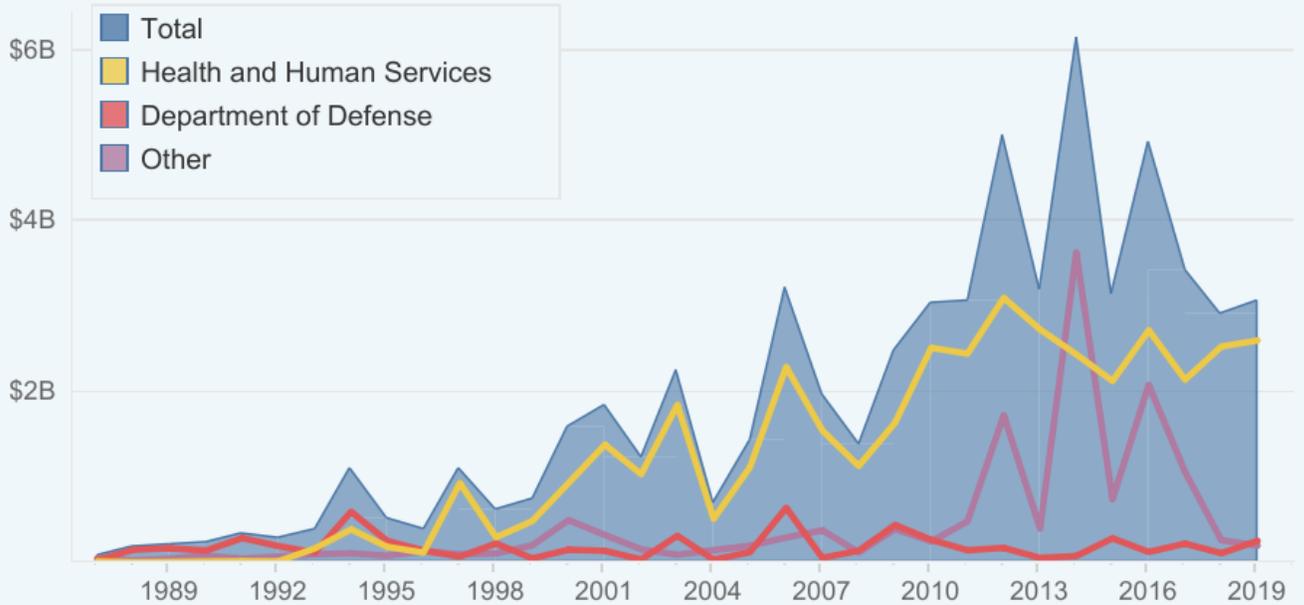
promotion — an FCA theory that appears to have largely run its course.

Although the health care industry is gigantic, some observers are skeptical it can contribute a great deal more to the DOJ's annual anti-fraud numbers.

"The government, to the extent it's going to expand upon its False Claims Act recoveries, needs to look broader than just health care," Jeschke said.

## Health Care Still Anti-Fraud Cash Cow

Although the Great Recession produced some big payouts from the financial industry, it's the health care industry that generates most FCA dollars, and observers expect that to continue in the 2020s.



[Click to view interactive version](#)



But it's not clear where else the government can set its sights. The financial industry during the 2010s **inked massive settlements** involving mortgage fraud, but as the 2020s get going, that type of misconduct appears to be largely in the FCA's rearview mirror.

It's possible that more cash could come from the defense industry — the only industry besides health care for which the federal government breaks out FCA statistics. But recoveries linked to military spending constituted less than 5% of FCA dollars in the 2010s. And there have been relatively few whistleblower cases targeting defense contractors — about 450 in the last decade, compared to about 4,500 targeting health care companies.

"If you look historically at the defense recoveries, it's been largely static," Jeschke said. "The number of whistleblowers relative to the number of whistleblowers in the health care space is significantly dwarfed."

Even if the coming decade of FCA recoveries is looking a bit more subdued, there are some important wildcards that could quickly scramble the litigation picture. For one thing, circuit splits over various aspects of the Escobar decision could develop and prompt the Supreme Court to step in.

"Many questions need to be answered," Squire Patton Boggs LLP senior associate Rebecca Worthington said of **ongoing disputes** surrounding Escobar.

In addition, Seton Hall's Elberg noted that there is "lots of discussion now publicly about opioid cases that DOJ is involved in." The investigations could spark FCA cases in addition to **possible indictments**.

That said, it may be that the stars aligned perfectly in the 2010s for FCA enforcement — statutory amendments strengthened the law, Wall Street shenanigans fueled cases, and colossal settlements emanated from drug marketing lawsuits that were already in the pipeline when the decade began.

Viewed in that way, the heftiest yearly recoveries of the 2010s may have been aberrations, and the numbers of the last few years might reflect more typical annual recoveries going forward.

"Maybe there's a certain plateau at this point," Freedman said. "But I don't think it will contract."

--Additional reporting by Jonathan Hayter and Jacqueline Bell. Editing by Philip Shea and Emily Kokoll.

---

All Content © 2003-2020, Portfolio Media, Inc.