



Private Equity – The Newest Face at the FCA Table

Mar 04, 2022

Categories:

[Blogs](#)

[Health Law Matters](#)

[Private Equity Industry](#)

[Blog](#)

Authors:

[Derek R. Staub](#)

The False Claims Act (FCA) has long been a powerful tool for the federal government to generate large recoveries from government contractors, including companies in the healthcare industry. In the fiscal year 2021, the U.S. Department of Justice (DOJ) [recovered](#) more than \$5.6 billion in settlements and judgments in civil cases brought under the FCA.

We are living in a health care industry boom and Private Equity (PE) investment in health care continues to outpace the broader industry.^[1] PE activity has exploded in the last decade; from 2015 to 2019, the number of PE deals increased by 50 percent, with deal value doubling from under \$40 billion in 2015 to nearly \$80 billion in 2019.^[2] During the pandemic, PE activity rose to record levels with a 21% increase in the number of deals from 2019 to 2020.^[3] The government's continued focus on aggressive FCA enforcement will not go away anytime soon.

The FCA, specifically 31 U.S.C. §§ 3729–3733, provides that *any person* who knowingly submits or causes false claims to be submitted to the government, or makes a false record or statement to get a claim paid by the government, is liable for triple the government's actual damages plus a penalty for each claim, which is linked to inflation, *i.e.*, anywhere from \$11,665 to \$23,331. When PE companies and/or their managers originate or perpetuate growth in healthcare or other highly regulated companies, or receive credit for growing revenues or values, through non-compliant conduct, these activities create liability under the FCA.

Recent FCA settlements and pending litigation are a shot across the bow to PE firms. PE firms and managers should understand that they are no longer immune from DOJ scrutiny or from liability for their portfolio companies. On June 26, 2020, Deputy Assistant Attorney General Ethan P. Davis, the former head of DOJ's Civil Division, specifically highlighted potential enforcement efforts to include PE firms that invest in companies receiving government funds, including CARES Act funds, when appropriate.^[4] He also

noted PE firms investing in highly-regulated spaces, including health care or life sciences, should be aware of the laws and regulations designed to prevent fraud and warned any firm that takes an active role in illegal conduct by an acquired company can expose itself to FCA liability.^[5]

United States ex rel. Medrano and Lopez v. Diabetic Care Rx, LLC dba Patient Care America, et al., No. 15-CV-62617 (S.D. Fla.) is the perfect example of a PE firm coming under fire. Here, the DOJ intervened against portfolio company Diabetic Care Rx d/b/a Patient Care America (PCA) and PE owner Riordan, Lewis & Haden (RLH) for kickbacks PCA paid to outside marketing companies, resulting in medically unnecessary prescriptions for highly reimbursed pain creams. The DOJ focused on RLH's active management of PCA by placing two RLH partners on PCA's board, the firm's experience in the health care industry, and their incentives to management for increasing revenues and growth. RLH settled for \$21 million.

It is important for PE firms to conduct enhanced pre-investment due diligence by health care compliance counsel. Also, post-acquisition control is just as important as pre-investment due diligence. PE firms need to carefully consider the measure of control that they want to exert and continually monitor it. PE firms should establish best practices by creating a culture of compliance—periodically evaluating and staying abreast of practices, policies, and internal controls, ensuring that if any compliance issues are identified, they are fully documented, investigated, and remediated. PE firms should also seek and follow advice from their legal counsel at the due diligence stage, and continue throughout the ownership period.

For more information, contact [Derek Staub](#) or any attorney with Frost Brown Todd's [Private Equity](#) practice group.

^[1] Federal Bar Association CLE Presentation, February 24, 2022.

^[2] *Id.*

^[3] *Id.*

^[4] <https://www.justice.gov/civil/speech/principal-deputy->

assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims.

[5] *Id.*

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.