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Lawyer Insights

Policyholder Win Highlights Key Issues to Maximize Coverage for False Claims Act Settlements

By Geoffrey B. Fehling
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While total False Claims Act recoveries decreased in 2020, FCA litigation and investigations are expected to continue to rise under the Biden administration, driven in part by the DOJ opening 250 new FCA investigations and actions in 2020, which is the highest number of new matters since 1994. As recent decisions show, the good news is that companies incurring legal fees defending against government investigations or negotiating settlements with regulators to resolve FCA claims may be able to look to D&O coverage to mitigate those losses. One such company recently prevailed in its $10 million claim against an excess D&O insurer following the insurer's improper refused to contribute its policy limits to an FCA settlement with the DOJ. The Illinois federal court decision, *Astellas US Holdings, Inc. v. Starr Indemnity & Liability Co.*, No. 17-cv-08220 (E.D. Ill. Oct. 8, 2021), which focuses on whether $50 million of Astellas's settlement payment to the DOJ was covered "Loss" under the D&O policy, provides useful guidance for companies facing potential FCA exposures.

Background

In March 2016, the DOJ issued a subpoena to Astellas in connection with an investigation into alleged "Federal healthcare offenses" arising out of the company's charitable contributions. The DOJ and Astellas ultimately settled for $100 million, including a $50 million payment described in the settlement agreement as "restitution to the United States." Astellas demanded coverage for the full amount of the settlement from its D&O insurers, including Federal Insurance Co. under its $10 million excess policy. Federal denied coverage on the grounds that the settlement was uninsurable restitution or disgorgement, which was excluded from the policy's definition of "Loss."

The parties moved for summary judgment. Astellas argued that at least $50 million of its settlement payment to the DOJ constituted "Loss" as defined by the policy and that no exclusions applied, so Federal was obligated to contribute its full $10 million limits. The court agreed and granted summary judgment in Astellas's favor.

Discussion

The court's lengthy and well-reasoned opinion is worth a full read, but several key takeaways are highlighted below for companies to consider, both in evaluating potential D&O coverage for FCA exposures and in structuring FCA settlements and understanding what evidence may be relevant to demonstrating a right to coverage for those settlements.

The Insurer Bears the Burden On Exceptions to the Definition of "Loss." The *Astellas* court held that the insurer, not the policyholder, should bear the burden of proof where it seeks to avoid coverage for

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settlement payments based on the definition of "loss," even where language is not contained in an express policy exclusion. In reaching that conclusion, the court recognized that the location of language within the policy does not control which party bears the burden of proof and that an "exception" to the definition of loss is akin to an exclusion where the insurer relied on it to attempt to avoid coverage. While the *Astellas* decision is in line with Illinois and many other states' laws requiring insurers to establish that any limitation or exclusionary language clearly and unambiguously applies to bar coverage for a particular claim, even if the language is not found in the policy's "exclusions" section, the ruling shows how the burden-shifting framework should be applied in FCA matters.

Labels in FCA Settlement Agreements Are Not Controlling. The court rejected Federal's argument that the label of "restitution" in the settlement agreement was "persuasive evidence" that Astellas's payment was, in fact, restitution paid to the government. First, it noted that the dictionary definition of "restitution" includes both "disgorgement" and "compensation," which Federal did not dispute.

Second, the court looked to the purpose of the parties' use of the "restitution" label in the settlement agreement. In analyzing the parties' intent, the court relied on statements from Astellas's lead counsel in the DOJ investigation that the government informed him during negotiations that the sole purpose of identifying $50 million as restitution was to comply with the Tax Cuts and Jobs Act of 2017 (TCJA). Because the policyholder demonstrated that the purpose of the restitution label was to classify certain payments for tax reasons under the TCJA and Federal offered no evidence contradicting the attorney affidavit, the portion of the settlement agreement referencing "restitution" did not support a finding that the government sought disgorgement of profits from Astellas excluded under the Federal policy.

FCA Remedies Do Not Include Uninsurable Disgorgement. In rebutting Federal's defense that the settlement payment is uninsurable, the court concluded that the FCA *does not even allow* for "restitution in the form of disgorgement of the violator's unjust gains." Rather, it allows only civil penalties and compensatory damages. This critical distinction between compensatory and punitive relief is noteworthy for policyholders looking to recover for FCA exposures.

Not All FCA Matters Are "Net Benefits" Cases. Federal argued that, irrespective of any labels, the "intent" of the settlement was to divest Astellas of the "net benefits" of its alleged unlawful scheme as a result of the fraud it perpetrated on the government. Distinguishing Judge Posner's oft-cited *Level 3* decision and other so-called "net benefit" cases, the court correctly differentiated between the company's alleged fraudulent intent and the actual damages sought by the government and agreed upon in the settlement agreement. Those damages were primarily (if not solely) compensatory damages under the FCA to cover the government's own losses, as opposed to returning Astellas's profits from the alleged wrongdoing to which it was not entitled. Careful consideration of the nature of the relief in FCA matters and the numerous decisions showing the narrow application of "net benefits" cases can maximize recovery for FCA-related losses.

Alleged Fraud Is Insurable. Where fraudulent conduct is "only alleged" and there are no admissions of wrongdoing or liability in the settlement agreement evidencing intentional or willful misconduct, the court found that Illinois public policy showed that parties are free to contract for coverage based on an insured's allegedly fraudulent conduct. Again, the court distinguished between coverage for recovery of *proceeds* of fraud and for *damages* like those at issue in the settlement agreement. Federal failed to cite, and the court could not locate, any authority showing that "it is against Illinois public policy to insure the payment of *damages* to a third party resulting from an insured's fraudulent conduct."

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Settlements Are Not Final Adjudications. It was undisputed that Astellas's settlement with the DOJ was not a "final adjudication" of the government's claims to trigger the policy's conduct exclusion, but the exclusion nevertheless informed the court's analysis about the parties' intend and whether Federal's public policy concerns outweighed the principle of upholding the parties' contract as written.

Looking to the Delaware Supreme Court's landmark decision in *Murdock* (previously discussed here and here) showing that fraud-based claims are insurable under D&O policies under materially identical policy terms, it again distinguished the Seventh Circuit's precedent in *Level 3*, which cited a single *New York* case, as not accurately setting forth *Illinois* law on insurability of fraud. Because Federal cited no cases holding that allegations of fraud or other arguably uninsurable acts that settle before trial are uninsurable under Illinois law, the court was bound to follow clear Illinois public policy upholding the parties' freedom to contract.

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Policyholders facing actual or potential FCA exposures through investigations, enforcement actions, or otherwise should consider the issues discussed above in handling both the underlying defense and related insurance claims. The policyholder in *Astellas* has ample evidence to support its claims under the policy and rebut the insurer's defenses based on policy interpretation and public policy grounds. Involving experienced coverage counsel at the outset of a claim to coordinate insurance issues with underlying defense counsel can help mitigate risks of uninsured losses and maximize recover under D&O policies.

Geoffrey B. Fehling *is Counsel in the firm's Insurance Coverage group in the firm's Boston office. Geoff represents corporate policyholders and their officers and directors in insurance coverage disputes involving directors' and officers' (D&O), errors and omissions (E&O), and other professional liability claims, cybersecurity and data breaches, representations and warranties, employee theft and fidelity claims, government investigations, breach of fiduciary duty, environmental liabilities, and property damage. He can be reached at +1 (202) 955-1944 or gfehling@HuntonAK.com.*

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