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False Claims Act Settlements

COMPANIES THAT INCUR LEGAL FEES TO RESOLVE FCA CLAIMS MAY HAVE COVERAGE FOR THESE COSTS UNDER THEIR D&O POLICIES.

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While total False Claims Act (FCA) recoveries decreased in 2020, litigation and investigations are expected to continue to rise under the Biden Administration, driven in part by the U.S. Justice Department's (DOJ) move to open 250 new investigations and actions in 2020.

The good news is that companies that incur legal fees defending against government investigations or negotiating settlements with regulators to resolve FCA claims may be able to look to directors and officers (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 carrier's improper refusal to contribute its policy limits to an FCA settlement.

The Illinois federal court decision in *Astellas U.S. Holdings, Inc. v. Starr Indemnity* & *Liability Co.* focused on whether $50 million of Astellas's settlement payment to the DOJ was a covered loss under the insured's D&O policy.

DISPUTED SETTLEMENT

In March 2016, the DOJ issued a subpoena to Astellas in connection with an investigation into alleged federal health care offenses arising from 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.

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The parties moved for summary judgment. Astellas argued that at least $50 million of its settlement payment to the DOJ constituted a loss as defined by the policy. The court agreed and granted summary judgment in Astellas' favor.

KEY TAKEAWAYS

Astellas held that the insurer, not the policyholder, should bear the burden of proof where it seeks to avoid coverage for 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

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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 in an attempt to avoid coverage.

While the Astellas decision is in line with Illinois and many other state 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.

Also, 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' payment was, in fact, restitution paid to the government.

Next, 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' 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). The policyholder demonstrated that the purpose of the restitution label was to classify certain payments for tax reasons under the TCJA.

Investigations and Enforcement Actions Policyholders facing actual or potential FCA exposures should consider the is- sues discussed here when han- dling both the underlying de- fense and related insurance claims. The policyholder in Astellas had ample evidence to support its claims under the policy and rebut the insurer's de- fenses based on policy interpreta- tion and public policy grounds. Involving expe- rienced coverage counsel at the outset of a claim to coordinate insurance issues with underlying defense counsel can help mitigate risks of unin- sured losses and maximize re- cover under D&O policies.

Another takeaway: 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.

What's more, not all FCA matters are "net benefits" cases. Federal argued that the intent of the settlement was to divest Astellas of the "net benefits" of its allegedly unlawful scheme as a result of the fraud it perpetrated on the government. The court correctly differenti- ated 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. 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.

And finally: 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.

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