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The False Conception That FCA Claims Are Not Covered

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By Kami E. Quinn and Gabriel Le Chevallier

In 2013, the United States Department of Justice recovered $3.8 billion under the False Claims Act ("FCA"), bringing the total amount secured by the Justice Department since 2009 to $17 billion. Whistleblowers recovered another $345 million last year. These recoveries came in a wide variety of circumstances and from companies in multiple industries, including pharmaceutical companies accused of improper off-label marketing and/or sale of adulterated drugs, meatpacking companies that allegedly sold meat from mistreated cattle, hospitals that allegedly overbilled the government, and mortgage companies that allegedly falsified applications to secure federally-funded insurance. Companies and their insurers often assume that there is no coverage for FCA claims. Those companies may be making a costly mistake.

Directors and Officers ("D&O") insurance is one potential source of funding the defense and settlement of FCA claims. Many D&O policies – particularly policies issued to privately-held companies – may offer broad coverage for amounts that the company must pay for its own alleged conduct, not just the conduct of its directors and officers. Indeed, in several recent decisions, courts have rejected the insurers' attempts to avoid coverage under their D&O policies for FCA claims. *See Carolina Cas. Ins. v. Omeros Corp.*, 2013 WL 5530588 (W.D. Wa. March 11, 2013); *Community Heath Ctr. of Buffalo, Inc. v. RSUI Indem. Co.*, 2012 WL 713305 (W.D.N.Y. March 5, 2012).

D&O policies are an attractive funding source for several reasons. First, these policies typically offer comprehensive coverage for "claims" alleging "wrongful acts." The policies often broadly define "claims" to include not just the lawsuit but the government's investigation of potential claims. In the FCA context, this could include the government's investigation of whether to involve itself with a whistleblower's suit. Similarly, D&O policies often broadly define "wrongful acts" to cover any "act" – including allegedly fraudulent acts – and not just negligent acts.

Second, D&O policies often cover the defense and settlement of fraud-based claims, like FCA claims, notwithstanding the presence of the fraud exclusion. This is because that exclusion, along with other intent-based exclusions, typically do not apply until there is a "final determination" in the underlying proceeding that establishes the company's intent. In the FCA context, a company may have an incentive to settle early to avoid costly litigation. Where a company settles without admitting intent or a finding of fraud, there could be coverage for that settlement, regardless of the severity of the underlying allegations. Importantly, insurers often are not permitted to re-litigate a company's intent in subsequent coverage litigation. Moreover, D&O policies usually require the insurer to advance defense costs for potentially covered claims. Thus, if there is the potential that an exclusion will not apply, as with the fraud exclusion, the insurer must advance defense costs.

Errors and Omissions ("E&O") insurance, which covers losses arising from a company's "professional services," also may cover FCA claims. The likelihood of obtaining coverage under E&O policies, however, greatly depends on the nature of the FCA allegations and the types of services performed by the company.

First, there is a greater likelihood of recovery where a company can show that the FCA claim concerns the adequacy of the services provided. This is because courts are reluctant to allow a company to profit from billing the government for services that were not performed. Insurers, however, seek to capitalize on this reluctance by grouping both overbilling and inadequate services claims together and characterizing them as "billing disputes." Indeed, insurers have had some success with this characterization for FCA claims against medical service providers. *See e.g., Horizon West, Inc. v. St. Paul Fire & Marine Ins. Co.*, 45 Fed. Appx. 752 (9th Cir. 2002); *Zurich Am. Ins. Co. v. O'Hara Regional Ctr. For Rehabilitation*, 529 F.3d 916 (10th Cir. 2008).

Similarly, there is a greater likelihood of recovery to the extent a company can show that the FCA claim seeks damages beyond the return of amounts paid by the government. If so, a company can avoid the "return of fees" exclusion. *See Continental Cas. Co. v. Physicians Weight Loss Ctrs. Of Am., Inc.*, 61 Fed. Appx. 841 (4th Cir. 2003) (finding coverage for non-FCA claim where the claimant sought the return of amounts paid for a product).

Second, a company that engages in non-traditional professional services (services other than law and medicine) may have a greater likelihood of recovery under its E&O policy. "Professional Services" policies have been issued to attorneys and doctors for a long time, and notions of what constitute "professional services" in those settings are more crystalized. Simply, there is more room to argue that the company's conduct occurred in the performance of its professional services in other industries because the law is not well developed. *See PMI Mortgage Ins. Co. v. Am. Inter'l Specialty Lines Ins. Co.*, 394 F.3d 761 (9th Cir. 2005) (noting that E&O policies' coverage for "professional services" may be broader for a mortgage company than a doctor).

On a final note, a company can take steps to maximize its coverage well before an insurance dispute has matured. Most importantly, a company should make sure its insurance covers FCA claims. Many companies that do significant business with the government may not appropriately insure against the risk of FCA claims. A company can save time and money in the long run if it has coverage counsel review its insurance portfolio to identify out potential issues with the coverage and assist the risk manager in negotiating some of the terms of the policy.

Similarly, coverage counsel can help a company maximize its coverage claim by consulting with defense counsel. There are many decisions made during the defense of an FCA claim that have insurance implication, from drafting settlement agreements, to billing time appropriate, to determining whether to dismiss certain FCA allegations. Consulting coverage counsel during the defense of an FCA claim can help save the company a lot of money in the long run.