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False Claim Act Matters Today: Best Practices for Protecting Providers and Securing Insurance Coverage

Insurance Coverage Considerations for False Claims Act Matters

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I. Overview: Evaluating Insurance From the Outset

False Claims Act ("FCA") investigations and claims can be very expensive to defend. Lawsuits filed under the *qui tam* provisions of the FCA can be even more expensive when factoring in the potential for large settlements and recoveries.[2]

Insurance should be the first place for policyholders to look to secure payment of their defense of these matters, and possibly payment of indemnity costs as well. Unfortunately, securing coverage for these claims is fraught with potential pitfalls that can snag unsuspecting policyholders and defeat coverage that otherwise would have been available. This is true whether looking at investigation costs or costs arising from whistleblower suits. Thus, as soon as there is any indication of a government investigation or

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[2] The False Claims Act, 31 U.S.C. § 3729 *et seq*., includes a "*qui tam*" provision (from a Latin phrase meaning "he who brings a case on behalf of our lord the King, as well as for himself"), which permits a private person – also known as a whistleblower or a relator – to file a suit under seal on behalf of the United States where the defendant is believed to have knowingly submitted or caused the submission of false or fraudulent claims to the United States. The complaint (and all other filings in the case) remains under seal for a period of at least 60 days. For an overview of litigation under the False Claims Act, *see* http://www.justice.gov/usao/pae/Civil_Division/InternetWhistleblower%20update.pdf.

subpoena, or any claims made against an entity – even if they are still sealed -- it is important to be thinking about insurance coverage.

Below are some of the top issues for policyholders to work through to obtain coverage for FCA claims.

II. Top Considerations for Coverage

Potential Insurance Coverage

Evaluating the potential insurance policies that may provide coverage is the first step towards obtaining coverage for an FCA claim. Policyholders should review Commercial General Liability Policy ("CGL"), Professional Liability, Errors & Omissions ("E&O"), Directors & Officers ("D&O"), and Employment Practices Liability Insurance ("EPLI) Policies. Depending on the facts, other coverages such as Crime and Cyber liability may also be implicated. Once the policies are located, the next step for policyholders is to determine which of these policies may provide coverage.

Determining Whether There May Be a Claim

Under many kinds of policies, the first question to be addressed is whether there has been a "Claim" as that term is defined in the policies. "Claims" typically include such things as lawsuits, written demands for money or other type of relief, subpoenas, and formal governmental investigations. In the FCA context, a claim could include a formal event, such as the filing of a complaint or a sealed whistleblower suit, or less formal events, such as the initiation of an investigation, service of a subpoena, or even a phone call from DOJ or other governmental authority.

The issue, however, is far from straightforward, as the definition of "Claim" varies from policy to policy. Examples of how a "Claim" may be defined include:

- Example 1: "Formal or informal administrative or regulatory **proceeding or inquiry** commenced by the filing of a **notice of charges**, formal or informal **investigative order or similar document**";[3]

- Example 2 – "Regulatory … **proceeding for monetary, non-monetary or injunctive relief** commenced by … the filing of a notice of charges, formal investigative order or similar document";[4] and

- Example 3 – "Any written notice received by an Insured that any person or entity intends to hold any Insured responsible for a Wrongful Act".

The breadth of insurance coverage for pre-claim inquiries from governmental enforcement agencies – to include interviews or meetings -- is often important. Courts have found coverage for subpoenas and formal or informal government investigations, not just suits. For example, in *MBIA*, 652 F.3d at 160, the Court held that the D&O policy at issue covered costs arising from a subpoena, because it is a "similar document" to a formal or informal investigative order. Additionally, the insurance covered informal SEC investigation and oral request for documents where MBIA has asked SEC if it could comply voluntarily to avoid adverse publicity of a subpoena.[5]

[3] *See*, *e.g.*, *MBIA Inc. v. Federal Insurance Co*., 652 F.3d 152, 159 (2d Cir. 2011) (D&O Policy); *Employers' Fire Insurance Co. v. Promedica Health System, Inc.*, No. 3:11-CV-923, 2011 WL 6937488, at *6 (N.D. Ohio Dec. 31, 2011).

[4] *See, e.g., Protection Strategies, Inc. v. Starr Indem. & Liability Co*., Civil Action No. 1:13-CV-00763, 2014 WL 1655370 (E.D. Va. Apr. 23, 2014) (referencing nearly identical claim language cited in September 10, 2013 Order denying Defendant's partial motion to dismiss and granting Plaintiff's motion for partial summary judgment, Document 29).

[5] *See also Promedica Health System*, 2011 WL 6937488, at *6 (finding that FTC investigation was covered under a D&O Policy and "triggered notice because the [] Policy specifically included a "formal investigative order" under its definition of a Claim."); *Protection Strategies, Inc. v. Starr Indem. & Liability Co*., 2014 WL 1655370, at **3-6, 9 (referencing holding in September 10, 2013 Order denying Defendant's partial motion to dismiss and granting Plaintiff's motion for partial summary judgment, Document No. 29) (finding that, after the Court previously found that a search warrant, subpoena, and related investigation by NASA and U.S. Attorney regarding allegations of defrauding NASA constituted claims under D&O policy, because company officers pled guilty, the insurer was entitled to recoupment).

At times, courts may even look beyond the policy language to find that an event is a claim. For example, in *Polychron v. Crum & Forster Ins. Cos.*, 916 F.2d 461 (8th Cir. 1990), where coverage was sought under D&O policy for grand jury subpoena, a "claim" was not defined in the policy. However, because "the function of a subpoena is to command a party to produce certain documents and therefore constitutes a 'claim' against a party," there was coverage. *Id*. at 463.[6]

Further, policyholders may be able to take advantage of recent positions taken by insurers in other cases to successfully argue that certain events are deemed claims. For example, some insurers have taken the position in certain cases that "early" events, such as investigations and subpoenas, constitute claims – all in an effort to argue that the insured at issue in those cases failed to provide early and timely notice as required for coverage. One recent instance of this type of insurer argument is set forth in *BioChemics, Inc., et al. v. Axis Reinsurance Co., et al.*, Case No. 1:13-cv-10691, 2015 WL 71493, at *2-3 (D. Mass. Jan. 6, 2015). There, a federal district court adopted the insurer's position that the SEC's formal order and related subpoenas regarding a pharmaceutical company and alleged fraudulent scheme constituted a claim even before the SEC began its enforcement action. As a result, because the policy period began after the formal order, this meant that the claim was "first made" before the policy period, and therefore not covered under the D&O Policy in

[6] *See also Dan Nelson Automotive Group, Inc. v. Universal Underwriters Group*, No. CIV 05-4044, 2008 WL 170084, at *5 (D.S.D. Jan. 15, 2008) (finding that auto dealer's claim for coverage under E&O Policy for government investigation under the Iowa Consumer Fraud Act functions to "command the Plaintiffs to produce documents… and therefore constitutes a claim" even though claim is undefined).

question.[7] 2015 WL 71493, at *3. Although these cases have resulted in no coverage for the specific insured at issue, the practical effect of this development is that it may be easier for policyholders to secure coverage for pre-suit events than before, or at least easier in certain jurisdictions. Used effectively, these decisions can be helpful to policyholders.

Pursuing insurance coverage without careful consideration of a policyholder's full insurance program, and the changing landscape of insurance coverage for FCA claims, creates risks.[8] As *BioChemics* illustrates, it is critical to engage coverage counsel at the onset of any governmental investigation to avoid risking forfeiture of coverage. *See, e.g.,* 2015 WL 71493, at *3.

HIPAA Subpoenas

One of the actions that the government may take as part of its health care investigation is to issue a subpoena under the 1996 Health Insurance Portability and Accountability Act ("HIPAA"). The government is authorized to make such "investigative

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[7] *See also Promedica Health System*, 2011 WL 6937488 (court agreeing with D&O insurer's argument that it could avoid any coverage obligations because an FTC investigation was a claim that first made in an earlier policy period).

[8] For example, the positions taken by insurers in certain cases that billing practices are not professional in nature, and therefore not covered under professional liability coverage, make coverage under D&O policies more favorable for policyholders. *See Health Care Industry Liability Insurance Program v. Momence Meadows Nursing Center, Inc.,* 566 F.3d 689, 695-97 (7th Cir. 2009) (finding no coverage for *qui tam* suit with alleged violations under FCA and a state whistleblower statute based on former nursing home employees' exposure of Medicare and Medicaid fraud regarding failures to provide adequate services); *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 921-22 (10th Cir. 2008) (finding no professional services coverage for defense of government's claim of false and fraudulent claims for reimbursement of care not provided); *Hampton Med. Group, P.A. v. Princeton Ins. C*o., 840 A.2d 915, 921-24 (N.J. Super. Ct. App. Div. 2004); (finding professional liability insurer had no duty to defend psychiatrists against a lawsuit alleging billings for services not provided).

demands to obtain records for investigations relating to Federal criminal health care fraud offenses."[9]

For purposes of insurance coverage, a company served with a subpoena issued under HIPAA should treat it like any other government investigation. Moreover, policyholders should not confuse a HIPAA subpoena with the privacy of medical records that is the subject of underlying HIPAA law. Policyholders should be focused on assessing all insurance policies -- and not just its HIPAA-specific coverage – to determine whether the subpoena may be deemed a claim that triggers coverage and corresponding notice obligations under all potential insurance policies.

Further, insurance coverage geared towards HIPAA claims may not necessarily provide insurance for this type of investigation. For example, HIPAA-specific policies may provide coverage for "penalties," but only those that are "HIPAA" penalties. The investigation itself may be covered elsewhere, such as under an entity's D&O insurance policies. Additionally, although some HIPAA-specific policies may cover "investigation costs," they often limit such coverage to a HIPAA "regulatory" or "administrative" proceeding, and costs arising from investigation events that are not clearly related to HIPAA might be excluded from coverage under these HIPAA-specific policies. Another consideration is that sublimits of liability for HIPAA under these HIPAA-specific policies may be far lower than other coverages available, such as under D&O policies.[10]

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[9] *See* The U.S. Attorneys' Manual, describing the government's authority to issue subpoenas under 18 U.S.C. § 3486 (http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/44mcrm.htm).

[10] For example, in *Millennium Laboratories, Inc. v. Allied World Assurance Company (U.S.), Inc*., Case No. 3-12-cv-02280-BAS-KSC (S.D. Cal.), in a matter that is still pending, the insurer has sought to avoid any obligation to cover more than $100,000 of a company's defense costs stemming from a health care

Close coordination between defense counsel and coverage counsel will enable the policyholder to make the best decision on how to obtain coverage for a HIPAA subpoena.

Notice

Providing prompt and timely notice is critical for purposes of coverage. The timing of when notice must be provided varies as a result of the specific policy language, the specific type of policy, the specific jurisdiction, and, of course, the facts.

Failure to provide timely notice could result in a waiver of coverage.[11] The issue is particularly complex in the FCA environment where there are often multiple investigations or claims filed at different times by different parties, or where the insured may not even be aware of a complaint until long after it has been filed.

The notice issue is also complicated by the fact that many policies afford the policyholder the opportunity to provide notice of actual claims and notice of potential claims. In either situation, notice pins coverage under the policy period in which notice is given. Confusing things more, notice of potential claims may or may not be mandatory under the policies.

With FCA claims under D&O and E&O policies, it is particularly important to understand specific policy notice provisions under policies. This is because, under certain types of policies, a policyholder may have more time to provide notice of a claim; or,

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fraud investigation (which included use of HIPAA subpoenas) of its drug-testing business, arguing that claims for regulatory acts are subject to a $100,000 sublimit of liability.

[11] *See, e.g., XL Specialty Insurance Co. v. Bollinger Shipyards Inc., et al.*, Civil Action No. 12-2071, 2014 WL 5524407, at *25 (E.D. La. Oct. 31. 2014), concerning coverage of an FCA suit regarding alleged false statements for a ship rebuilding project following the ship's failure to meet performance specifications. The Court found a breach of the policy notice provision because the insured had not informed the insurer of the ship's failure despite being aware that a civil FCA claim was possible, as evidenced by its act of entering into a tolling agreement with the government to delay any such claims.

alternatively, a policyholder may be covered despite providing late notice of a claim so long as the insurer has not been prejudiced as a result. This distinction matters, in particular, with regards to D&O and E&O policies – the type of policies under which FCA claims are frequently made – and whether the policies are "claims-made" or "claims-made-and-reported" policies. A claims-made policy covers claims which are made during the policy period (typically a one-year period), regardless of when the events which caused the claim transpired. In contrast, claims-made-and-reported policies typically have the added requirement that claims are not only made during the policy period, but also that they be reported within the policy period.[12]

The practical effect of these policy distinctions on coverage under D&O and E&O policies is that a policyholder seeking coverage for an FCA claim may have longer to provide notice if the policy is a claims-made policy. Whereas in a claims-made policy, the policyholder only must give notice to the insurer "as soon as practicable," – i.e., not within a fixed time period -- in a clams-made-and-reported policy, the policyholder must provide notice of the claim during the same policy period or within a specific number of days thereafter. In other words, coverage is excluded after a specified date. *Prodigy Communications Corp. v. Agricultural Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 380 (Tex. 2009). Thus, only with a claims-made policy can an insured argue that it is entitled to

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[12] *See, e.g., Pension Trust Fund for Operating Engineers v. Federal Ins. Co.*, 307 F.3d 944, 956 (9th Cir. 2002).

coverage so long as the insurer has not been prejudiced by the delay. *See, e.g. Pension Trust Fund for Operating Engineers*, 307 F.3d at 956.[13]

The intersection of policy notice provisions with typical FCA claims scenarios can yield unusual and unfair results if notice is not timely. For example, in *AmerisourceBergen Corp. v. Ace Am. Ins. Co.*, 100 A.3d 283, 284-86 (Pa. 2014), a *qui tam* FCA action was filed under seal in 2006 against a group of businesses providing services to healthcare providers and pharmaceutical companies, alleging they conspired with medical providers to submit false Medicare claims relating to a certain drug. The complaint was kept under seal and not served on the policyholder until midway through the 2009-10 policy period. The policyholder claimed that it learned of the qui tam case in March 2008 when it learned that there was a federal investigation. In 2009, DOJ finally provided notification that it was reviewing the allegations, issued a subpoena to the policyholder, and provided a redacted copy of the complaint. Only then did the policyholder send its insurer formal notice of a potential claim with a copy of the redacted complaint, seeking coverage under the 2009-10 primary coverage policy. *Id*. at 286.

Notably, the policy in *AmerisourceBergen Corp* contained a "prior or pending litigation" exclusion where a claim was:

> alleging, based on, arising out of, or attributable to any prior or pending litigation, claims, demands, arbitration, administrative or regulatory proceeding or investigation filed or commenced on or before the earlier of the effective date of this policy or the effective date of any policy issued by

[13] *See also Oakland-Alameda County Coliseum, Inc. v. National Union Fire Ins. Co.*, 480 F. Supp. 1182 (N.D. Cal. 2007) (holding that policyholder can argue for coverage if insurer was not prejudiced by late notice under a general claims-made policy); *Maynard v. Westport Ins. Corp.*, 208 F. Supp. 2d 568 (D. Md. 2002) (concluding that insured can argue that it has coverage because insurer was not prejudiced despite late notice under pure claims-made policy); *Jones v. Lexington Manor Nursing*, 480 F. Supp. 2d 865 (S.D. Ms. 2006) (same).

> [insurer] of which this policy is a continuous renewal or a replacement, or alleging or derived from the same or substantially the same fact, circumstance or situation underlying or alleged therein."

100 A.3d at 288 (emphasis included). Because of that exclusion, and the fact that the litigation was "filed" at the time the suit was filed in 2006 (even though it was filed under seal and the policyholder did not learn of the suit until years later) notice was late, and coverage was denied. *Id*. at 288.

With FCA claims, perhaps more than any other area of coverage, a policyholder's ability to obtain coverage rests on adequately understanding notice provisions from the outset. Events related to any investigation need to be closely evaluated to determine if they are suits or claims. The more that earlier events in time are deemed claims, the earlier that an insured's notice obligations may arise. The flip side to this is that sometimes policyholders may not be fully aware of claims when those claims need to be reported. If unreported, insurers will argue that there are no coverage obligations under later noticed policies because notice was untimely. Insurers have successfully argued in recent cases that an event such as a subpoena or investigation before the suit in question was a claim for which notice was never provided, and thus there is no coverage. *See, e.g., BioChemics*, 2015 WL 71493, at *2-3 (finding that a formal demand and subpoena from before the policy period constituted a claim, and therefore there was no coverage).[14]

The practical effect of these decisions in the context of FCA claims is that, for insurance purposes, there may be an event that constitutes a claim even before the

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[14] *See also Promedica Health System*, 2011 WL 6937488 (court agreeing with insurer's argument that an FTC investigation was a claim under a D&O Policy and therefore it had no coverage obligation because the claim was first made in an earlier policy period).

government initiates a formal investigation or an action is filed in court. Policyholders must consider all these events for purposes of filing notice.

Interrelated Claims

The relationship between claims also may come into play in the FCA context. Many policies contain "interrelated claims" provisions that state that multiple claim will be deemed a single claim if they arise out of a common nexus of facts. The reason for this provision is to protect the insurance company from suffering losses on multiple policy periods. The provision, however, often has unusual implications with respect to coverage. For example, there may be an earlier investigation that is covered, and then a later qui tam suit sufficiently connected to the earlier claim to bring that later lawsuit into coverage under a previously-noticed policy. Conversely, if the first claim is not covered, for any reason, such as if a first-filed sealed complaint contains claims that are determined to be excluded from coverage, then a later-initiated claim might be construed as related or connected, and thus not covered.

A frequent circumstance in *qui tam* claims that may raise the relatedness issue is where there are retaliation allegations brought into an FCA suit or a separate case. For example, in *Eisai Inc. v. Zurich American Ins. Co*., Case no. 2:12-cv-07208 (D.N.J. Jun. 30, 2014), an insured pharmaceutical company was successful in obtaining a Court order affirming its right to defense coverage of a *qui tam* action because of related and connected claims. There, a former employee of a pharmaceutical company initially brought suit in state court alleging a violation of the state Whistleblower Act.[15] He claimed that the company instructed its sales staff to illegally market a drug for off-label uses, and that he was

[15] Notably, on January 8, 2015, the Court entered an Order denying insurer's motion for entry of final judgment and/or interlocutory certification, filed to overturn the Court's determination regarding the insurer's duty to defend.

eventually fired for failing to engage in illegal marketing and for warning another employee about the illegal marketing. Zurich, the insurer, defended the state court suit and funded its settlement. *Id.*, slip op. 4-5. That position on coverage remained relevant when the same former employee later filed a *qui tam* suit against the company with FCA claims and allegations similar to those in the state court suit. The company sought coverage for its defense under an EPLI Policy, claiming that the *qui tam* action was a "claim" for a "wrongful employment act." *Id.*, slip op. at 1. Zurich denied coverage, contending that because the qui tam suit contained allegations that the company violated FCA provisions by causing health care providers to submit false claims for reimbursement for off-label uses, and not for any "Wrongful Employment Act" purpose, the action was not within the scope of EPLI coverage. *Id.*, slip op. at 10-11. However, the Court ultimately found that the allegations arose from the same facts and circumstances that were covered, and the allegations were "allegedly committed … ***in connection with*** any of the employment acts (*see id.* at 9) [and "illegal retaliatory treatment of employees" (*see id.* at 19)(emphasis added). Thus, these were potentially covered claims and Zurich was obligated to defend the action**.** *See Id.* at 9-19.

What was particularly important to the *Eisai* Court was its reliance on the insurer's broad defense obligations. The EPLI policy at issue contained a broad "duty to defend" clause for these "Wrongful Employment Acts": "Underwriter shall have the right and duty to defend Claims against the Insureds, even if the allegations in the Claim are groundless, false or fraudulent." *Id.*, slip op. at 2. The Court noted that in New Jersey, as is true in many other jurisdictions, once a "complaint raises allegations that fall within a risk covered by the insurance contract, the insurer has a duty to defend." *Id.*, slip op. at 12 (citing *Vorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1259 (N.J. 1992)). Moreover, once "[a]n insurer is

contractually obligated to provide the insured with a defense [, it is obligated to defend] against **all** actions covered by the insurance policy." *Id*., slip op. at 12 (citing *Abouzaid v. Mansard Gardens Assocs., LLC*, 23 A.3d 338, 346 and n.7 (N.J. 2011)) (finding that "potentially coverable claims require a defense") (emphasis added). Thus, the Court found that Zurich was obligated to cover all of the company's defense fees and costs for the *qui tam* suit. *Id*., slip op. at 11-21.

Moreover, the *Eisai* case highlights the principle that coverage is not likely excluded just because the plaintiff in a *qui tam* action is the government rather than an individual. *Id*., slip op. at 20. It does not matter whether the policyholder is the plaintiff, or the so-called "real" party in interest, unless specifically required by the Policy. Compare *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 916 (10th Cir. 2008) (claims brought by the government), with *Horizon West Inc. v. St. Paul Fire and Marine Insurance Co.,* 214 F.Supp.2d 1074, 1077 (E.D. Cal. 2002) (*qui tam* action brought by a private party).

Fraud Exclusions

Coverage for claims brought under the FCA often raises issues regarding the potential for coverage to be excluded under a "fraud exclusion." A number of issues are raised with respect to fraud exclusions, including, whether fraud exclusions apply to defense obligations, and whether allegations trigger the exclusion.

Typically, fraud exclusions do not apply to defense of an FCA claim because they are triggered only by a final adjudication finding wrongful or illegal conduct. Until such final adjudication is rendered, coverage for defense must be provided.

Moreover, FCA claims may not allege the appropriate level of fraud to trigger the exclusion in the first instance. Although the FCA prohibits the "knowing" submission of

false claims to obtain government funds, civil causes of action also can be brought under the FCA based on gross negligence. Many insurance policies preclude coverage for claims involving fraud, but not necessarily for allegations of "deliberate ignorance" or "reckless disregard" regarding the truth or falsity of claims submitted to the government. Accordingly, the specific policy language, as compared to the underlying allegations, will inform whether or not there might be a possibility of coverage.

For example, in *MSO Washington, Inc. v. RSUI Grp., Inc.*, No. C12-6090 RJB, 2013 WL 1914482, at *8 (W.D. Wash. May 8, 2013), a claim for coverage for FCA claims that included allegations of fraud was brought under an E&O Policy. The Policy provided for damages and associated claim expenses arising out of a "negligent act, error or omission ... in the rendering of or failure to render professional services ...." However, the Policy also contained a Dishonest Acts Exclusion, excluding coverage for "dishonest, fraudulent, criminal or intentional acts, errors or omissions committed by or at the direction of the insured." 2013 WL 1914482, at *9. The Court found that the exclusion applied, precluding coverage.

Settlement Considerations

If the opportunity to settle FCA claims arises, the best possible outcome is that the insurer will fund some or all of that settlement. Here, as well, policyholder can unknowingly impact coverage in a negative way if issues are not fully understood ahead of time.

Critical issues to consider as the possibility of settlement approaches include:

- <u>Coordinate Defense Strategy with Coverage Counsel</u>. This will enable coverage counsel and defense counsel to coordinate as they proceed to avoid taking actions that may preclude coverage. For example, where there are FCA claims brought on multiple fronts, counsel will need to assess whether to negotiate for a global settlement versus conducting separate negotiations with

the various individual and governmental entities, all of which may affect coverage.[16]

- Provide Notice of Any Settlement Demands to Insurer As Early As Possible. Failure to do so may provide the insurer with a new argument that a condition precedent has not been fulfilled for coverage.

- Many Kinds of Damages May be Covered Under the Policies. For example, while fines and penalties may not be covered in some jurisdictions, such damages may be covered, depending on applicable state law, for vicarious liability of an employee's wrongful conduct. Moreover, even if fines and penalties are excluded, other kinds of damages may be recoverable.[17] Additionally, the FCA's treble damages "do not equate with classic punitive damages" because they "have a compensatory side, serving remedial purposes in addition to punitive objectives."[18]

- Evaluate Allocation Provisions. In order to resolve FCA suits, insurers may try to require policyholders to allocate settlements between covered and uncovered (or excluded) claims. These provisions, however, should not implicate covered damages. For example, even with an allocation provision, attorneys' fees or other types of damages should be covered.

- Obtain the Insurer's Written Consent to Settle (or Waiver of Consent). At a minimum, insurers should provide a written waiver of the voluntary payments provision of the policy.

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[16] *See, e.g.*, *Eisai*, Case No. 2:12-cv-07208.

[17] For example, in *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876 (8th Cir. 2005), the court analyzed whether required payments under the Telephone Consumer Protection Act ("TCPA") (imposing fines and penalties for sending prohibited unsolicited fax advertisements) constituted damages because the garage liability policy at issue specifically excluded coverage for fines and penalties. The court found that because the TCPA was meant to be both punitive and remedial, and the payments at issue contained some remedial nature, they were not "penalties," it would grant coverage for the defense costs.

[18] *See Cook County v. U.S.*, 538 U.S. 119, 131-32 (2003). This *qui tam* action brought under the FCA concerned a hospital's allegedly fraudulent submissions to obtain grants regarding research from the federal government. The Court found that "[t]he most obvious indication that the treble damages ceiling has a remedial place … is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator who began the action." *See also Alea London Ltd. V. American Home Services, Inc.*, 638 F.3d 768, 777 (11th Cir. 2011), *cert. denied*, 132, S.Ct. 553 (2011) ("treble damages statutes defy easy categorization as compensatory or punitive in nature").

These are broad points of consideration provide a starting point for companies seeking to obtain insurance coverage for settlement payments.

III. Conclusion

FCA claims, at virtually every stage, raise complex and difficult issues for policyholders to navigate. By their nature, FCA claims raise numerous complex issues relating to the existence of Claims, the obligation to provide notice, when and how to provide that notice, which policies are triggered, and how claims should be navigated and settled. Given the complexity and potential pitfalls to coverage, this is an area where expert insurance counsel can make the difference between recovering funds for a covered claim, or forfeiting that coverage.