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7 Tips For Insurance Coverage For Whistleblower Lawsuits

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Law360, New York (September 18, 2015, 10:38 AM ET) -- The famous Charles Dickens line about these being the "worst of times" is alarmingly appropriate for American businesses when it comes to the growing number of False Claims Act suits brought by qui tam whistleblowers. In Fiscal Year 2014, more than 700 whistleblower suits were filed and the U.S. Department of Justice recovered over $5 billion from target businesses in qui tam litigation (see DOJ Official Press Release). Additionally, the decades-long "original source" precedent holding that whistleblowers must play a direct role in public disclosures in order to file suit was recently abandoned by the Ninth Circuit, leading one U.S. Attorney to remark that discouraged whistleblowers are now encouraged to file suit. See U.S. ex rel. Hartpence v. Kinetic Concepts Inc., No. 12-55396, (9th Cir. July 7, 2015). The floodgates have opened for more whistleblower lawsuits to be filed.

This intensifying storm of FCA litigation is reason for concern to any business that files claims with the government for payment of money. Simply by accepting money from the government, a business exposes itself to potential FCA liability. With this growing risk of claims brought under the FCA's whistleblower provisions, and the exorbitant costs associated with defending these claims, the stakes of losing FCA litigation are particularly great.

Traditionally, businesses have looked to their insurers for FCA whistleblower coverage and insurers have provided such coverage. See, e.g., Carolina Casualty Insurance Co. v. Omeros Corp., (W.D. Wash. Mar. 12, 2013) (providing coverage for FCA qui tam complaint under D&O insurance policy); Community Health Center of Buffalo Inc. v. RSUI Indemnity Co., No. 10-CV-8138, (W.D.N.Y. Mar. 5, 2012) (same). Corporate policyholders have rightfully relied upon an insurer's broad duty to defend FCA actions. Id.

Faced with ever-increasing liability, insurance carriers are now desperately trying to close the floodgates by denying FCA insurance recovery claims. As illustrated in recent disputes over coverage of FCA matters, insurers have seized on the fact that whistleblower lawsuits are filed under seal and that government-initiated investigations may commence years before a complaint initiating formal litigation is even served. Policyholders who fail to recognize insurance company denial tactics, may mistakenly believe that there simply is no coverage for FCA actions. By developing an insurance coverage strategy early, policyholders can sidestep this and other hurdles, and oftentimes successfully recover from their insurance carriers for qui tam related losses and expenses.

Insurance Company Strategies for Denying Coverage

To evade paying FCA qui tam claims, insurers have attempted to capitalize on unusual timing issues presented in whistleblower lawsuits. With FCA claims, a business may not even be aware of a claim until long after a qui tam suit is filed or the government has initiated its investigation. Recent cases highlight how insurers are taking a variety of contradictory positions on the timing of notice to avoid coverage. For example, in one recent case — AmerisourceBergen Corp. v. Ace American Insurance Co., 100 A.3d 283, 284-88 (Pa. Super. 2014) — coverage was excluded because notice was purportedly tendered far too late, and in another case — Braden Partners LP, et al., v. Twin City Fire Insurance Co., Case No. 3:14-cv-01689, Slip Op. Apr. 3, 2015 (N.D. Cal.) — coverage was excluded because notice was purportedly tendered too early.

In AmerisourceBergen, 100 A.3d 283, 284-88, the insurer argued that a qui tam FCA action was "filed or commenced" when it was first filed under seal for purposes of the policy's exclusion that barred coverage for claims attributable to prior or pending claims. There, several years after a whistleblower filed a sealed complaint against an unsuspecting policyholder, and the policyholder secured new coverage, the company was served with a copy of a redacted complaint. Because the policy defined "claim" as expressly requiring the "service" of a complaint, the company first tendered notice at that time. The insurer, however, argued that the exclusion for "prior or pending litigation," which did not require service, precluded coverage because the sealed complaint had been filed years before the coverage had been secured. Adopting the insurer's position, the court held that litigation commenced for purposes of the exclusion when the qui tam complaint was first filed under seal, even though technically there was no "claim" until many years later.

In contrast, in Braden Partners, the insurer argued that there was no covered claim for notice tendered after a company received a redacted version of a qui tam complaint because the complaint had not yet been served. Case No. 3:14-cv-01689. After the company sued for coverage of its defense costs, the insurer argued that the complaint was not a claim that had been "first made" under the policy. Although the court found that the complaint was a "claim" under the policy, it adopted the insurer's position that the claim was not "first made" under the policy because it had not yet been served on the company. The court granted the insurer judgment on the pleadings, holding that, without service, there was no covered "claim made."

These cases illustrate that with FCA investigations and suits, policyholders need to be especially alert. Otherwise, they can unintentionally forfeit coverage.

1. Proceed With the Understanding That FCA Claims are Covered

All too often, policyholders start with the incorrect assumption that qui tam lawsuits are not covered because they involve allegations of fraud. Under most circumstances, an insurer must defend its policyholder, even in the face of allegations that, if proven, would preclude coverage. Navigators Insurance Co. v. Resnick Amsterdam Leshner PC, No. 14-5158, 2015 (E.D. Pa. May 18, 2015). FCA suits are no different. See, e.g., Community Health Center of Buffalo. Defense coverage for fraud claims is built into most modern D&O insurance policies and so-called conduct exclusions typically have exceptions for unproven allegations of fraud.

2. Pursue Coverage for Both Defense and Indemnity

Although a business' initial focus should be on securing insurance to cover defense costs, policyholders should not be dissuaded from pursuing indemnity for FCA settlements or judgments. For example, an insurer may argue that indemnity costs resulting from an FCA civil settlement constitute a fine or penalty, or are akin to punitive damages. Yet, many states permit the recovery of FCA damages because these damages are different from traditional kinds of punitive damages, or are not even considered punitive in nature

because they compensate the government for its losses. See Court Finds Coverage For Willful Statutory Damages Don't Get Fooled Again. Moreover, many states have held that it is not against public policy for an insurance carrier to pay for fines and penalties. Finally, certain portions of a settlement, such as plaintiffs' attorney's fees, are traditionally considered covered by insurers. For these reasons, policyholders should pursue coverage for all costs arising out of a qui tam matter, including the payment of judgments or settlements.

3. Be Hypervigilant About Identifying Qui Tam-Related Acts

Disputes over qui tam coverage often center on the timing of when a "claim" was first made against the policyholder. AmerisourceBergen, 100 A.3d at 284-88. It is imperative for policyholders to identify possible qui tam events that might be construed as claims. Careful attention should be paid to communications with the government, including discussions concerning formal or informal requests for information, or requests for tolling agreements of potential FCA claims. Such communications may be made by the government in connection with a qui tam action that will eventually be served on the company. Although such communications may seem unimportant at the time, they also may represent the tip of an iceberg.

4. Implement Internal Procedures to Flag and Address Qui Tam-Related Events

Government inquiries often arise in the course of whistleblower litigation. Evidence of such an investigation may be receipt of a subpoena, or even a very informal or seemingly run-of-the-mill request for information. Such inquiries, no matter how routine, flag an immediate need to evaluate insurance. The best time to devote legal resources to FCA insurance issues is at this early stage. Case law has proven, time and time again, that early decisions regarding FCA insurance claims can make the difference between coverage and no coverage. Companies should analyze the legal implications of complex and often contradictory notice obligations in their insurance policies as soon as there is an indication of governmental or whistleblower activity, because the failure to do so may result in a forfeiture of coverage. Companies cannot conduct such a review, however, unless qui tam related inquiries are directed to appropriate personnel. To do this, policies and procedures should be put in place for employees at all company levels to identify and report qui tam related events, so that coverage counsel can be consulted as soon as there is an indication potential FCA-related activity.

5. Take Full Advantage of Policy Notice Options

Determining the right time to tender notice under claims-made insurance policies is challenging in qui tam matters because events that potentially trigger notice obligations may be hidden from a policyholder for years. Many claims-made insurance policies provide optional notice procedures to address this exact situation. These provisions not only provide for notice of claims, but also provide for notice of "acts" or "circumstances" that could give rise to a claim. This is particularly helpful in qui tam litigation if events occur before actual service of a complaint. Filing such a notice of circumstances that will withstand insurance company scrutiny, though, can be a complex legal undertaking. Companies should understand and evaluate their risks together with the notice options afforded under their insurance as early as possible.

6. Consider the Company's Entire Insurance Program

Corporations should review all of their insurance policies for possible coverage when determining whether and when to tender notice of an FCA investigation or claim. This is particularly important in light of the unique series of events that can give rise to qui tam FCA claims. Policyholders should first look to their directors and officers insurance, which can afford the broadest kind of coverage available, and then their errors and omissions

insurance. Analysis, however, should not be limited to these two kinds of insurance. Recent decisions highlight that FCA qui tam claims can also be covered under employment practices liability insurance policies. See, e.g., Eisai Inc. v. Zurich American Insurance Co., Case No. 2:12-cv-07208, slip op. at **9-19 (D.N.J. Jul 1, 2014) (FCA allegations that arose from the same facts and circumstances underlying a covered wrongful employment termination claim triggered EPLI insurer's duty to defend). Accordingly, a broad legal assessment of the policyholder's entire insurance program should be conducted as part of any notice evaluation.

7. Conduct Annual Reviews of Policies for FCA Coverage Compliance

Ideally, a company should assess and develop a working qui tam insurance strategy long before it is faced with a qui tam claim. The AmerisourceBergen court's statement that the policyholder's exclusions could have included certain terms that might have resulted in a covered claim should serve as a warning. 100 A.3d 284-88. To protect coverage rights, policyholders should determine at renewal whether current policy provisions need to be revised or whether entirely new coverage provisions should be added. Policies should include provisions that accommodate the unique aspects of qui tam claims, such as the fact that whistleblower lawsuits can be filed under seal and a policyholder may not learn that a lawsuit has even been filed for several years. Additionally, policies should be reviewed for consistency between policy terms and exclusions. No matter how unreasonable or impracticable, certain courts expect that policyholders will conduct a legal review of their insurance policies.

Conclusion

With whistleblowers, plaintiffs firms and the government all looking to qui tam actions as source of revenue, the wave of qui tam FCA litigation is likely to continue. Insurers are keenly aware that the floodgates have opened, and are denying FCA claims now more than ever. Even if insurers are behaving like bureaucrats in a Dickensian "Circumlocution Office," this should not deter policyholders.

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