

## Courts Find Coverage for False Claims Act Suits in an Era of Increasing DOJ Enforcement

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After a near-record number of settlements and judgments in 2022, False Claims Act (“FCA”) enforcement remains a priority for the Department of Justice (“DOJ”) in 2023. In February, the DOJ’s civil fraud section reported 351 settlements and judgments in fiscal year 2022—the second-highest number in a single year—totaling \$2.2 billion in settlement proceeds.<sup>1</sup> Haynes Boone’s [False Claims Act - 2022 Year in Review](#) highlights these key developments. In 2023, the DOJ has continued to report aggressive enforcement activity, including a \$377.4 million FCA settlement with Booz Allen in July.<sup>2</sup>

In this environment of active FCA prosecution, courts have issued two recent rulings offering important guidance on liability insurance coverage for FCA claims. On September 14, 2023, the Delaware Supreme Court in *Ace American Insurance Company v. Guaranteed Rate*<sup>3</sup> ruled that an FCA investigation and settlement was covered by the respondent’s management liability policy, notwithstanding the policy’s “professional services” exclusion. In *Guaranteed Rate*, a lender’s former employee filed a *qui tam* suit alleging that the lender falsely certified certain of its loans were eligible for federal insurance. After the DOJ issued a subsequent civil investigative demand, the lender gave notice under a management liability policy, which included an exclusion for loss from a claim “alleging, based upon, arising out of, or attributable to any Insured’s rendering or failure to render professional services.” While the management liability policy did not define the term “professional services,” a professional liability policy issued to the lender by the same insurer defined “professional services” as “mortgage banking and mortgage underwriting services and loan servicing for others for a fee.” The professional liability policy expressly excluded coverage for claims arising out of the FCA. The management liability insurer, ACE, denied coverage for the FCA claim, including a \$15 million settlement between the lender, GRI, and the DOJ, based on the policy’s professional services exclusion.

GRI filed suit against ACE in the Delaware Superior Court to recover its settlement of the FCA claim with the DOJ. Based on a prior ruling in *Iberia Bank Corp. v. Illinois Union Insurance Co.*,<sup>4</sup> the Superior Court granted summary judgment in favor of GRI and against ACE to hold that the management liability policy’s professional services exclusion did not bar coverage. On appeal, the Delaware Supreme Court ultimately distinguished between the professional services GRI provided to borrowers and the certifications made to the federal government in finding that (1) “GRI settled charges that it defrauded the government under the FCA by falsely certifying that loans met FHA and VA insurance requirements”; (2) “GRI’s alleged misconduct arose out of the false certifications, not the professional services GRI provided to borrowers” and (3) “Thus, the FCA charges and eventual settlement did not fall within the professional services exclusion in the Management Liability Policy.” Moreover, although the exclusion addressed claims “arising out of” professional services, the Court nonetheless affirmed the fundamental “difference between the subject of FCA claims — false certifications — and the underlying conduct used to demonstrate the falsity of the claims — underwriting loans.”

The Delaware Supreme Court's decision in *Guaranteed Rate* follows another significant FCA coverage opinion in May 2023 from the Seventh Circuit Court of Appeals in *Astellas US Holding, Inc. v. Federal Insurance Company*.<sup>5</sup> In *Astellas*, a pharmaceutical company paid the DOJ \$100 million to settle claims alleging that the company, Astellas, made contributions to patient assistance plans that violated the FCA, the Anti-Kickback Statute and the criminal health care fraud provision of HIPAA. Of the settlement amount, \$50 million was expressly designated as "restitution to the United States."

Astellas then sought coverage for the DOJ settlement from its D&O insurers, including Federal Insurance Company ("Federal"), who refused payment under its \$10 million excess liability policy, in relevant part, on the basis that the settlement did not constitute a "loss," which the subject policy defined to exclude "matters which may be deemed uninsurable under applicable law." In a coverage suit between Astellas and Federal, the federal district court ruled on cross-motions for summary judgment that Illinois law and public policy did not prohibit insurance coverage for at least \$10 million of the settlement.

On appeal, the Seventh Circuit Court of Appeals addressed the specific question of whether Illinois law prohibits coverage for settlement payments that are "restitutionary in character." Here, the Court confirmed that a settlement payment is restitutionary if (1) "the payment disgorges 'something that belongs of right not to the defendant but to the plaintiff'"; or (2) "the payment 'seeks to deprive the defendant of the net benefit of the unlawful act.'" In applying these principles, the Court noted that the "restitutionary" label applied by the parties to the settlement—whether for tax purposes or otherwise—"isn't important" in deciding whether the settlement was "restitutionary" for purposes of coverage. Moreover, even if part of the settlement qualified as restitution, under Illinois law, "[i]n cases where an insured enters into a settlement that disposes of both covered and non-covered claims, the insurer's duty to indemnify encompasses the entire settlement if the covered claims were 'a primary focus of the litigation.'"

As applied to the particular facts of Astrellas' settlement with the DOJ, the Court rejected Federal's argument that the settlement must have been focused on uninsurable restitution because the underlying Anti-Kickback allegation required proof of knowing and willful conduct. As the Court noted, "proving fraud does not necessarily prove restitution," and Federal failed to offer sufficient evidence of either fraud or disgorgement of profits. Furthermore, the Court recognized that "an insurance coverage dispute is not a forum for trying the merits of the potential claims against the insured" as this would "have a chilling effect on settlements." And substantively, the False Claims Act "allows only for civil penalties and compensatory damages, not for restitution." As a result, the Seventh Circuit affirmed the district court's ruling to hold that Federal failed to demonstrate that the \$10 million in coverage afforded by its excess policy applied to an uninsurable and restitutionary portion of the settlement between Astrellas and the DOJ.

Companies transacting with the federal government face the potential risk of exposure to FCA suits and related liability claims from the DOJ. Policyholders faced with FCA claims often confront a variety of potential coverage defenses from their liability insurers, whether under D&O, professional liability or general liability insurance policies. The recent decisions in *Guaranteed Rate* and *Astellas* provide important guidance to insureds in pursuit of liability coverage, in negotiations with the DOJ and even in addressing annual policy renewals. Specifically, corporate insureds, risk managers and in-house counsel should carefully scrutinize carriers' attempts to limit coverage for FCA claims as uninsurable restitution, subject to "professional services" exclusions or similar exclusions or limitations on coverage.

If you have any questions about coverage for FCA claims or about insurance recovery in general, please contact one of Haynes Boone's partners listed below.

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<sup>1</sup> Department of Justice, Press Release: False Claims Act Settlements and Judgments Exceed \$2 Billion in Fiscal Year 2022 (Feb. 7, 2023), available at <https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022>.

<sup>2</sup> Department of Justice, Press Release: Booz Allen Agrees to Pay \$377.45 Million to Settle False Claims Act Allegations (July 21, 2023), available at <https://www.justice.gov/opa/pr/booz-allenagrees-pay-37745-million-settle-false-claims-act-allegations>.

<sup>3</sup> *Ace Am. Ins. Co. v. Guaranteed Rate, Inc.*, 2023 Del. LEXIS 307 (Del. Sept. 14, 2023).

<sup>4</sup> *Iberia Bank Corp. v. Ill. Union Ins. Co.*, 2019 WL 585288 (E.D. La. Feb. 13, 2019), *aff'd*, 953 F.3d 339 (5th Cir. 2020) (holding that false loan compliance certifications did not qualify as professional services and were excluded under a professional services policy).

<sup>5</sup> *Astellas US Holding, Inc. v. Fed. Ins. Co.*, 66 F.4th 1055 (7th Cir. 2023).