The Federal Claims Act (“FCA”) is often referred to as the government’s primary litigation tool for recovering losses or damages resulting from alleged fraud. The FCA permits private plaintiffs, often referred to as “relators,” to pursue claims on behalf of, and sometimes with the intervention of, the United States Department of Justice (“DOJ”). Over the past several years, corporations, particularly those who accept federal funds, have been on edge as the number of FCA lawsuits and the associated penalties continue to rise. In 2018 alone, the DOJ obtained more than $2.8 billion in settlements and judgments from civil cases involving fraud and false claims against the government.

While any corporation that receives federal funds is exposed to a potential FCA lawsuit, the industries historically most affected by FCA lawsuits are: (1) healthcare (including pharmaceutical and medical device companies, managed care providers, hospitals, pharmacies, laboratories, etc.), (2) education (including universities and online, for-profit K-12 schools), (3) banking, and (4) government defense contracts. Because the FCA allows for penalties and treble damages for each false claim, it is not uncommon for corporations to expend inordinate amounts due to settlements and judgments stemming from FCA lawsuits. For example, AmerisourceBergen Corporation (and certain of its subsidiaries) paid nearly $625 million in a settlement to resolve FCA claims against it. Settlements and judgments of this magnitude can be crushing to a corporation.

1 The views expressed in this article are solely those of the authors, and do not necessarily reflect the views of Haynes and Boone, LLP or any of its clients. This article also does not constitute or provide legal advice.
2 United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010) (“The FCA is the Government’s primary litigation tool for recovering losses resulting from fraud.”).
7 The United States Justice Department, supra note 4.
Corporations inundated with FCA lawsuits will look to their insurers to defend and indemnify them and offset this risk. However, with this influx, insurance companies may react by taking more aggressive coverage positions, including outright denying any obligation to pay settlements or judgments related to FCA claims. While there are hurdles to obtaining insurance coverage for FCA claims, the truth of the matter is, FCA claims may be covered under an insurance policy.

I. **Background on the FCA**

A general overview of the FCA is important in understanding how a claim under the FCA can impact a corporation’s ability to obtain insurance coverage.

An individual or entity violates the FCA if it knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval to the government. See 31 U.S.C. § 3729(a). In establishing civil liability, the FCA requires (1) that the defendant made a statement in order to receive money from the government; (2) that the statement was false; and (3) that the defendant knew the statement was false. *Gen. Star Nat’l Ins. Co. v. Adams Valuation Corp.*, No. 13 C 2973, 2014 WL 479759, at *6 (N.D. Ill. Feb. 6, 2014).

It would be nearly impossible, if not incredibly expensive, for the DOJ to investigate every single government transaction. As such, most FCA lawsuits are not initiated by the government – instead, the *qui tam* provision of the FCA allows whistleblowers, known as relators, to pursue claims on the government’s behalf. After the relator files the complaint (generally under seal), the DOJ has sixty days to investigate the claim and decide whether it will intervene, decline to intervene, or settle the case. 31 U.S.C. § 3730(b). If the DOJ opts to decline to intervene, the relator may still pursue the claim on behalf of the government.

The FCA allows for the recovery of civil penalties not less than $5,000 and not more than $10,000, plus treble damages (three times the amount of damages), as well as all attorneys’ fees and costs in pursuit of the claim. 31 U.S.C. § 3729.

II. **Policies that May Respond to FCA Claims**

There are several types of insurance policies that may apply to provide coverage for FCA claims. Corporations should review the following lines of coverage to determine whether insurance coverage is triggered by an FCA claim: (1) Comprehensive General Liability (“CGL”) Policy, (2) Directors’ & Officers’ (“D&O”) Policy, (3) Professional Liability (“E&O”) Policy, and (4) Employment Practices Liability Insurance (“EPLI”) Policy.

A CGL policy typically provides broad coverage for third-party claims alleging damages resulting from bodily injury and property damage caused by a corporation’s product or behavior. Therefore, a corporation may seek coverage under a CGL policy if the allegations in the FCA lawsuit allege the “false claim” resulted in some sort of bodily injury or property damage. Although courts to date have been reticent to find coverage exists for FCA claims under a CGL policy, that should not be the end of the policyholder’s inquiry. See *XL Specialty Ins. Co. v. Bollinger Shipyards, Inc.*, 800 F.3d 178 (5th Cir. 2015) (applying Louisiana law), *XL Specialty Ins. Co. v. Bollinger Shipyards, Inc.*, 57 F. Supp. 3d 728 (E.D. La. 2014); *Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc.*, 566 F.3d 689 (7th Cir. 2009), *aff’g Health Care Indus. Liab. Ins. Program v. U.S.*, 548 F. Supp. 2d 632 (C.D. Ill. 2008). Indeed, while an insurer may

The analysis under a D&O policy, E&O policy, or EPLI policy, along with their corresponding insuring agreements, differs slightly. Although these three types of policies provide a variation of coverages, each commonly covers losses resulting from a “Wrongful Act” which is generally defined as “any act, error, omission, breach of duty, misstatement or misleading statement.” Therefore, so long as the government or qui tam plaintiff includes some allegations of wrongful conduct in its FCA lawsuit, the definition of “Wrongful Act” should be satisfied to trigger these policies.

III. Analysis of Coverage Issues Related to FCA Claims

A. Conduct Exclusions.

The FCA requires that the defendant “knowingly” violate the statute to be liable under the FCA; however, “knowingly” does not require specific intent. 31 U.S.C. § 3729(a). Accordingly, insurers often invoke exclusions that are applicable to deliberate criminal, fraudulent or dishonest acts, or for the gaining of any profit or advantage to which the policyholder was not entitled to, often referred to as conduct exclusions. While the specific wording of the conduct exclusion may vary from policy to policy, these conduct exclusions are commonplace in D&O, E&O, and EPLI policies.

An FCA lawsuit likely will allege a “Wrongful Act;” however, it will also likely allege the insured-corporation “knowingly” committed that “Wrongful Act.” As such, insurers often assert the conduct exclusion bars coverage of such FCA claims. However, most conduct exclusions contain language such that the exclusions will not apply until there is a “final adjudication” adverse to the insured that establishes such conduct. Therefore, courts have distinguished between coverage for a judgment rendered in an FCA lawsuit, i.e. “a final adjudication,” and the settlement of the same. U.S. Bank Nat’l Ass’n v. Indian Harbor Ins. Co., 68 F. Supp. 3d 1044, 1049-50 (D. Minn. 2014), amended sub nom. U.S. Bank Nat’l Ass’n v. Indian Harbor Ins. Co., No. 12-CV-3175 (PAM/JSM), 2015 WL 12778848 (D. Minn. Mar. 19, 2015) (“When an underlying action alleging ill-gotten gains and seeking disgorgement of those gains settles before trial, there is no final adjudication in that action determining that the gains were ill-gotten and ordering the return of those gains.”); see also Gallup v. Greenwich Ins. Co., No. N14C-02-136, 2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015) (citing U.S. Bank Nat’l Ass’n to reach a similar conclusion that the Fraud/Ill-Gotten Gains Exclusion was not triggered by a settlement when the exclusion contained “final adjudication” language.).

For example, in U.S. Bank Nat’l Ass’n, the court held that a conduct exclusion, which included “final adjudication” language, did not preclude coverage of the bank-insured’s settlement of an FCA lawsuit which included allegations of ill-gotten gains. Id. at 1050. The court reasoned that “when an underlying action alleging ill-gotten gains and seeking disgorgement of those settles
before trial, there is no final adjudication in that action” to trigger the conduct exclusion. *Id.* A policyholder may have a policy that does not contain “final adjudication” language, or otherwise feel strongly about its defense against the FCA claims such that it decides to roll the dice and not settle. However, in the event the policyholder is found to have “knowingly” violated the FCA, and an adverse judgment is rendered against the insured, the conduct exclusion may bar coverage for the adverse judgment, depending on the specific facts of the case. *Gen. Star Nat’l Ins. Co. v. Adams Valuation Corp.*, No. 1:13-cv-02973, 2014 WL 479759, at *17-19 (N.D. Ill. Feb. 6, 2014) (holding the insured’s judgment was precluded by the conduct exclusion pursuant to the elements for establishing civil liability under the FCA.).

**B. Professional Services Exclusion.**

Liability policies, including CGL policies, typically exclude coverage for losses arising from performance or failure to perform “professional services,” also known as the “professional services exclusion.” Because many FCA claims center around billing practices, insurers have asserted that FCA claims asserting faulty billing practices constitute “professional services” under the policy and are, therefore, barred.8

Courts, however, have unanimously concluded that the submission of billing claims under the FCA does not qualify as a “professional service.” *MSO Washington, Inc. v. RSUI Group, Inc.*, No. C12-6090, 2013 WL 1914482, *8 (W.D. Wash. May 8, 2013) (“The courts in this District and elsewhere have unanimously concluded that the submission of billing claims under the FCA does not qualify as a “professional service.”); see also *Chicago Ins. Co. v. Center for Counseling & Health Res.*, No. C10-0705, 2011 WL 1222792 (W.D. Wash. Mar. 31, 2011); *Zurich Am. Ins. Co. v. O’Hara Regional Ctr. For Rehabilitation*, 529 F.3d 916, 925 (10th Cir. 2008); *Medical Records Ass’n v. Am Empire Surplus Lines Ins. Co.*, 142 F.3d 512-516 (1st Cir. 1998); *Gallup*, 2015 WL 1201518, *6.

However, courts have found that the professional services exclusion can be triggered by allegations other than billing practices. *HotChalk, Inc. v. Scottsdale Ins. Co.*, 736 F. App’x 646 (9th Cir. 2018). In *HotChalk, Inc.*, the insured provided technology and support services to universities seeking to establish online services. *Id.* at 647. An employee of the insured filed a *qui tam* lawsuit against the insured under the FCA alleging the insured violated regulations concerning the enrollment of students who received federal financial aid, including a ban on incentive compensation, and caused both those students and the universities with which the insured partnered to submit false claims to the federal government. *Id.* The Ninth Circuit held the professional services exclusion barred coverage of the FCA claims asserted against the insured. *Id.* at 648. The court reasoned that the insured’s liability arose from the fact that its “professional services” caused ineligible students and ineligible universities to submit false claims for federal financial aid to the Department of Education. *Id.*

---

8 Most E&O policies are triggered by a suit arising from “professional services;” therefore, courts have likewise held that “billing” practices do not constitute a “professional service” which triggers the E&O insurer’s duty to defend or indemnify. *Horizon West Inc. v. St. Paul & Marine Ins. Co.*, 214 F. Supp. 2d 1074 (E.D. Cal. 2002).
In the end, the specific insurance policy, the policyholder’s industry and the allegations in the FCA lawsuit frame the factual backdrop for the discussion of whether the professional services exclusion will apply.

C. Are the Damages a “Loss”?

As noted above, the language of the FCA provides for a litany of damages, including civil penalties, treble damages, attorneys’ fees and costs. The inquiry now turns to what damages are considered covered “loss” under an insurance policy.

The FCA is a mechanism to recover amounts wrongly paid by the government as a result of fraud. Therefore, some courts across the country have generally categorized damages under the FCA as non-insurable restitution. *United States v. Bornstein*, 423 U.S. 303, 314 (1976) (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1942) (“We think the chief purpose of the (Act’s civil penalties) was to provide for restitution to the government of money taken from it by fraud ... ”)). Many policies exclude damages in the form of restitution in their definition of “loss.” And, separate and apart from the policy language, many states also restrict an insured’s ability to seek restitution damages under an insurance policy. *See Vigilant Ins. Co. v. Credit Suisse First Boston Corp.*, 10 A.D.3d (1st Dep’t N.Y. 2009) (holding, under New York law, “the risk of being directed to return improperly acquired funds is not insurable.”); *Bank of the West v. Superior Court*, 2 Cal.4th 1254 (1992) (“It is well established that one may not insure against the risk of being ordered to return money or property that has been wrongfully acquired. Such orders do not award ‘damages’ as that term is used in insurance policies.”); *Level 3 Comms., Inc. v. Federal Ins. Co.*, 272 F.3d 908 (7th Cir. 2001) (holding that loss does not include restoration of an ill-gotten gain).

But in *Unites States ex. rel. Taylor v. Gabelli*, the court found the FCA claims leveled against the insured were damages, as opposed to restitution. *Unites States ex. rel. Taylor v. Gabelli*, No. 03-civ-8762, 2005 WL 2978921, *7-8 (S.D.N.Y. Nov. 4, 2005). In coming to this conclusion, the court focused on the issue of whether the government, or the relator, could recover the insured’s profits which stemmed from the violation of the FCA, not whether the relator could recover the actual amount the government paid to the insured. *Id*. There, coverage of the FCA claims was found in a careful analysis of the actual nature of damages sought in the lawsuit, as opposed to automatically concluding the relief sought was restitution.9 This distinction can be critical if the government’s damages include the return of money due to the insured’s violations of the FCA.

Often citing public policy reasons, many insurance policies will specifically exclude civil penalties from the definition of “damages” or “loss.” This language could pose a challenge for coverage for civil penalties imposed by the government. However, again, a careful analysis of the factual allegations, nature of the damages, policy language, and applicable choice of law is necessary before foreclosing on the possibility of coverage.

While obtaining coverage for the government’s actual damages and civil penalties could be difficult, an insurance policy may likely provide coverage for the trebled portion of the damages (which typically make up a large percentage of the damages). This is because some courts have

---

9 In a case that does not involve insurance coverage, the Ninth Circuit provided what could be guidance into the nature of damages under the FCA as being compensatory rather than restitutionary in nature. *See United States v. Eghbal*, 475 F. Supp. 2d 1008, 1011 (C.D. Cal. 2007), aff’d, 548 F.3d 1281 (9th Cir. 2008).
characterized the treble damages available under the FCA as compensatory in nature, rather than punitive. See Gabelli, 2005 WL 2978921, at *9-10 (citing Cook County v. United States ex rel. Chandler, 538 U.S. 119 (2003) which held that “treble damages certainly do not equate with classic punitive damages.”). This distinction can be critical as courts have also generally found that damages intended to punish the insured are uninsurable under an insurance policy. See, e.g. Soto v. State Farm Ins. Co., 635 N.E.2d 1222, 1224 (N.Y. 1994) (punitive damages are not insurable under New York’s public policy); PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 657-58 (Cal. 1999) (public policy prohibits indemnification for punitive damages); Country Manors Ass’n v. Master Antenna Sys., 534 So.2d 1187, 1195 (Fla. Dist. Ct. App. 1989) (holding coverage for punitive damages is prohibited by public policy if imposed as a result of direct liability, but not for vicarious liability); Beaver v. Country Mut. Ins. Co., 420 N.E.2d 1058, 1061 (Ill. App. Ct. 1981) (public policy prohibits coverage for punitive damages arising from insured’s own misconduct, but it is not against public policy for an employer to insure against punitive damages arising from vicarious liability).

D. Defense Costs.

As a general matter, the duty to defend is much broader than the duty to indemnify. As such, while a policy may exclude coverage for indemnity (a settlement or judgment), an FCA lawsuit may still contain allegations that will trigger the insurer’s duty to defend. Therefore, even if exclusions eliminate coverage for the bulk of the FCA allegations, some components of the overall claim may not be eliminated. And, if even a small component of the claim is covered, the insurer must defend the entirety to of the FCA lawsuit. See Innovative Mold Solutions v. All Am. Ins. Co., No. 4:15-cv-40010, 2016 WL 3814774, *5 (D. Mass. July 12, 2016) (finding a duty to defend FCA claims under a CGL policy); United States Liab Ins. Co. v. Sigmatek, Inc., No 14-c-1747, 2015 WL 801504 (N.D. Ill. Feb. 20, 2015) (finding a duty to defend FCA lawsuit under an EPLI policy). Because the cost of defending an FCA lawsuit can be substantial, a defense provided by the insurer can be invaluable.

IV. Conclusion

As noted above, although there are obstacles to coverage for FCA claims, the truth is that policyholders can still find coverage in the midst of those hurdles. And, as the frequency and severity of claims and exposure under the FCA continue to increase, so will the disputes between insurers and their policyholders regarding coverage for such claims. A policyholder facing an FCA lawsuit should carefully examine the factual allegations underlying the lawsuit, in addition to the actual nature of the damages sought by the government. That analysis can drive the inquiry into (1) what insurance policies may provide coverage for FCA claims; (2) whether any exclusions – such as conduct exclusions or professional services exclusions – bar coverage of those claims; (3) whether the policy provides coverage for the damages imposed under the FCA, including civil penalties, treble damages and attorney’s fees; and (4) whether the allegations in the FCA lawsuit trigger the insurer’s duty to defend.