Making the Best of a Bad Situation: Where and How Contractors Can Find Insurance Coverage for Civil Violations of the False Claims Act

Ronald G. Robey and Scott C. Turner

A. Introduction

The False Claims Act (FCA) makes it unlawful to present a “false or fraudulent” claim for government reimbursement. A claim can be “factually” false because, for example, a contractor did not provide the products or services that are the subject of the reimbursement. A claim can be “legally” false because the contractor, while providing the products or services, did not comply with a condition of payment imposed by statute, regulation, or the contract.

Many of the FCA cases are brought by private individuals, known as *qui tam* relators, who receive a share of the proceeds of any recovery. In FY 1987, relators filed 30 *qui tam* actions. In FY 2015, relators filed 638 *qui tam* actions. In FY 2015, the DOJ recovered more than $3.5 billion. In *qui tam* cases, the DOJ recovered $2.8 billion, and of that amount, the individual relators recovered $597 million. For government contracts, settlements and judgments in cases alleging false claims totaled $1.1 billion in FY 2015. See [http://justice.gov/opa/pr/justice](http://justice.gov/opa/pr/justice).

The insurance industry has yet to issue any policies specifically to provide defense or indemnity for civil violations of the FCA. Depending on the circumstances, however, contractors may find possible coverage under one or more of the four types of policies routinely purchased:

- Professional Liability (E&O);
- Directors and Officers Liability (D&O);
- Commercial General Liability (CGL); and
- Employment Practices Liability (EPL).

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1 Scott C. Turner is the author of the authoritative *Insurance Coverage for Construction Disputes* (2d ed. 2014), a two volume, 1,700 page treatise published by Thomson Reuters Corporation.
B. Professional Liability (E&O) Policies

Many FCA claims arise when billing the government. Monthly payment requisitions require the following certification: “The amounts requested are only for performance in accordance with specifications, terms, and conditions of the contract.” FAR 52.232.

E&O policies and FCA cases focus on the insuring agreement that the act must arise from providing “professional services.” The issue is whether the billing and associated documentation is the rendering of professional services.

The majority of cases (FCA and non-FCA) hold that simply billing does not qualify as the rendering of professional services, and that the preparation and billing is more in the nature of a ministerial or clerical task. However, these cases turn on how the policy defines professional services. Typically in these cases, the definition of professional services is narrowly defined. The billing of the government is deemed to be a simple administrative task like a list of services that could easily be performed by clerical staff.

Conversely, the minority of cases finding some duty to defend or indemnify have a broader insuring provision and a broader definition of professional services. See Bayley Constr. v. Great American E & S Ins. Co., 980 F. Supp. 2d 1281 (W.D. Wash. 2013) (involving FCA claim and coverage for failure of a subcontractor to pay prevailing wages). In Bayley, the duty to defend was triggered because professional services were defined as “Construction Management, Pre-Construction Consulting Services and Design Services.”

C. Directors and Officers Liability (D&O) Policies

The government and qui tam relators can also name individuals who are officers, directors, and managers as defendants. However, not to be overlooked is coverage for the entity. From the few cases reported on this issue, it does not appear that the carriers are disputing potential coverage for FCA claims.

1. The Insuring Clause

In Carolina Casualty Ins. Co. v. Omeros Corp., 2013 WL 5530588 (W.D. Wash. Mar. 11, 2013), an FCA qui tam claim was made alleging false reporting to the National Institute of Health in connection with a grant. The carrier brought a declaratory judgment action, but the issue was whether or not the “single claim”
clause was implicated. The carrier did not contest whether the claim was otherwise covered under the insuring clause.

Another FCA case, Community Health Center of Buffalo, Inc. v. RSUI Indemnity Co., 2012 WL 713305 (W.D.N.Y. Mar. 5, 2012), concerned alleged false statements in grant application and resulting applications for payment concerning staff salaries and staffing levels. Again, the carrier brought a declaratory judgment action but only on the “single claim” clause and did not otherwise contest coverage under the insuring clause.

2. The “Claim” Requirement

In Protection Strategies, Inc. v. Starr Indemnity & Liability Co., 2014 WL 1655370 (E.D. Va. Apr. 23, 2014), aff’d 611 F. App’x 775 (4th Cir. 2015), an 8(a) contractor received a search warrant from the NASA Office of Inspector General and a letter from the United States Attorney for the Eastern District of Virginia stating that Protection Strategies was being investigated for civil liability in connection with the Section 8(a) program.

Protection Strategies tendered the defense to its D&O carrier, Starr. Starr denied any coverage asserting no claim was made as defined in the policy. The court held that the actions by NASA and by the DOJ constituted a claim under the policy.

3. Other D&O Issues

Other D&O issues are as follows:

- Damages;
- Negligence or recklessness (as opposed to intentional conduct);
- Fraud and Ill-Gotten Gains Exclusion; and,
- Known Prior Claims Exclusion.

D. Commercial General Liability (CGL) Policies

CGL policies are the foremost means of insurance recovery for the construction industry. CGL generally covers property damage and personal injury liability to third parties. FCA claims do not often allege personal injury or property damage.
An FCA claim can arise from billing for goods or services alleged to be defective which could qualify as property damage under a CGL policy. Therefore, a construction defect claim couched as an FCA claim may implicate the CGL policy. Remember, the duty to defend is broader than the duty to indemnify.


Remember that the typical CGL policy covers the insured (and additional insured) for “damages because of property damage.” These can include consequential damages in discussions of insurance coverage. A number of published cases (not FCA cases) allow coverage for consequential damages that “property damage” has caused. See Turner, Insurance Coverage for Construction Disputes §§ 6:21-22 (2015).

In FCA cases, the government or the qui tam relator may allege a common law claim for property damages. Where the duty to defend is at issue, even an ambiguous allegation against the insured could trigger the duty to defend.

Unique CGL exclusions in FCA coverage include incorrectly performed work and product recall.

E. Employment Practices Liability (EPL) Policies

Many FCA qui tam relators are current or former employees. The FCA also imposes liability for retaliatory behavior against whistle-blowing employees. In general, EPL policy coverage for qui tam retaliation claims is available.

In Gallup, Inc. v. Greenwich Ins. Co., 2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015) (analyzing Delaware and Nebraska law), FCA and retaliation claims were asserted. The EPL carrier accepted coverage, settled the employment claim, and only disputed the remaining FCA claims.

See also Carolina Cas. Ins. Co. v. Omeros, 2013 WL 5530588 (W.D. Wash. Mar. 11, 2013) (noting that the carrier accepted defense and paid the employment claim).
EPL policies typically include “retaliation” as a “wrongful employment act” which is expressly a covered risk. Therefore, EPL policies generally provide coverage for FCA-related retaliation claims.

F. Requirement of “Damages”

The FCA has civil penalties in addition to the recovery by the government of actual damages (trebled).

There is a split of authority on the issue of whether civil penalties are “damages” for purposes of coverage. Some non-FCA cases hold that statutorily imposed civil penalties are not “damages.” See Travelers Ins. Co. v. Waltham Indus. Laboratories Corp., 883 F.2d 1092 (1st Cir. 1989) (applying Massachusetts law). Other non-FCA cases hold the opposite. See Governmental Interinsurance Exch. v. City of Angola, Indiana, 8 F. Supp. 2d 1120 (N.D. Ind. 1998).

At least one FCA case lends some support to civil penalties being damages (if associated with other property damages). See Hercules, Inc. v. AIG Aviation, Inc., 776 A.2d 550 (Del. Super. Ct. 2000).

G. Negligence v. Intentional Acts

Most policies require the action from which liability arises not to be intentional, i.e., it must be an accident or a negligent act.

The FCA requires a claim to be made “knowingly.” However, since 1986, this has been defined to mean: “actual knowledge”; “deliberate ignorance of the truth or falsity”; or “reckless disregard of the truth or falsity.” There is no requirement of any specific intent to defraud.

There is, therefore, a disconnect between an intentional act for which coverage may be barred, and an act triggering liability under the FCA. For example, reckless disregard is a form of gross negligence or an extreme version of ordinary negligence. Also, reckless disregard of the truth is a lesser standard than intentional conduct. For example, a negligent false statement is not deemed to be “dishonest.” See Pacific Ins. Co. v. Burnet Title, Inc., 380 F.3d 1061 (8th Cir. 2004) (applying Minnesota law).
H. Dishonesty

Some policies contain a “Dishonesty” exclusion. However, that specific term is not defined. Reckless disregard is short of dishonesty. The FCA does not require an intentional lie to trigger liability.


I. Fines, Penalties, and Exemplary Damages

Typically, policies exclude fines, penalties, awards of punitive damages or any amounts in excess of compensatory damages.

The few FCA cases that considered these exclusions held they eliminated much of the potential coverage. However, not excluded in one case was the claim by the government for its attorney’s fees, see Pacific Insurance, 380 F.3d 1061 (8th Cir. 2004), or the base or non-multiplied damages, see Nowacki v. Federated Realty Group, Inc., 36 F. Supp. 2d 1099 (E.D. Wis. 1999).

Remember, however, the penalty and treble damages in the FCA are not fines and penalties in the traditional insurance sense. They were designed as a way to make the government whole, rather than as a deterrent.

J. Fraud and Ill-Gotten Gains

This exclusion is not necessarily a bar to defense. It usually applies only after a “final adjudication,” and then the insurer has a claim to recoup previously paid defense costs.

K. Governmental Action

Policies also usually exclude damages in connection with a claim brought by or on behalf of a governmental entity. Coverage in an FCA case has been denied based on this exclusion. See XL Specialty Ins. Co. v. Bollinger Shipyards, Inc., 800 F.3d 178 (5th Cir. 2015) (applying Louisiana law), aff’g XL Specialty Ins. Co. v. Bollinger Shipyards, Inc., 57 F. Supp. 3d 728 (E.D. La. 2014).

The question is whether this exclusion applies to a FCA qui tam action. Generally, the exclusion will apply because the relator is prosecuting the case as a private attorney general on behalf of the government and the government remains the “real party in interest.” However, the relator often asserts claims for itself under separate state or federal law. See Certain Underwriters of Lloyd’s London v. Huron Consulting Grp., Inc., 2014 WL 1997170 (N.Y. Sup. Ct. May 16, 2014), rev’d on appeal based on governmental action exclusion, Certain Underwriters at Lloyd’s London v. Huron Consulting Grp., Inc., 8 N.Y.S. 3d 302 (N.Y. App. Div. 2015).

L. Known Prior Claims

Prior to the “incept” date, policies may bar coverage for actual knowledge the insured reasonably believed may give rise to a claim. For example, FCA guilty pleas prior to the incept date barred coverage in Protection Strategies, Inc. v. Starr Indem. & Liability Co., 2014 WL 1655370 (E.D. Va. Apr. 23, 2014), aff’d 611 F. App’x 775 (4th Cir. 2015).

M. Professional Services Exclusion

A CGL policy, for example, excludes loss arising from performance or failure to perform professional services.

This exclusion, as mentioned above, usually arises in connection with an FCA claim for billings (invoices). For traditional professionals, the preparation and submittal of billings is not generally regarded as a professional service under the professional liability policies. Therefore, coverage under the D&O policies may be applicable in the construction management context. See Gallup, Inc. v. Greenwich Ins. Co., 2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015) (applying Delaware and Nebraska law).
N. Duty to Defend

The insurer’s duty to defend is broader than the duty to indemnify and is often easily triggered. If even a small component of the claim is covered, the insurer must defend the entirety.

Recent studies indicate that at least half the outlays in FCA litigation are for defense costs.

Even if the exclusions eliminate coverage for the bulk of the FCA allegations, some components of the overall claim may not be eliminated. Therefore, there may be resources to deal with at least half of the financial impact.

O. Conclusion

Insurance coverage for FCA claims is still evolving. No insurance product exists for the specific risk of civil FCA claims.

However, the standard policies obtained by most entities in the construction industry can provide both some coverage and, more importantly, defense to FCA claims.

The FCA is a complicated statutory scheme. Insurance primarily deals with common law claims.

Some policies, like CGL policies, generally contain standard language (ISO). Other policies, like E&O, are much more likely to be similar but are manuscript policies which differ among insurers.

Any coverage analysis is highly dependent on the specific language of the policy.

This much is clear, however: given the high stakes and cost, the relevant insurance policies should be examined and compared to the very specific claims alleged any time FCA claims are made.

The modest cost of this analysis can provide substantial financial benefits.