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ALERT

Coverage for *Qui Tam* Action Barred by Prior and Pending Litigation Exclusion

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A Pennsylvania state court has held that a prior and pending litigation exclusion bars coverage for a False Claims Act (FCA) *qui tam* action even though the insured was unaware of the sealed filing before the operative date in the exclusion. *Amerisourcebergen Corp. v. ACE American Insurance Co.*, No. 12101128 (Penn. Ct. of Common Pleas, First Judicial District July 16, 2013).

The insured provides drug distribution services, clinical education, and marketing and business resources to health care providers and pharmaceutical manufacturers. A *qui tam* action was filed under seal on June 13, 2006, alleging that the insured, among others, violated the federal FCA by falsely inflating the average sales price of a particular drug, which "systematically caused the submission of false Medicare claims." The insured received certain "back channel" information regarding the filing no later than February 2009, including a redacted version of an amended complaint, which still had not been served on the defendant at that point. The court subsequently ordered the case unsealed on December 17, 2009, and the insured was served with the operative complaint on January 5, 2010.

The insurer had issued an excess liability policy to the insured for the one-year period of May 1, 2006 to May 1, 2007. The insurer subsequently dropped down to provide primary coverage for the insured, issuing three successive one-year claims-made policies beginning May 1, 2007. The insured first reported the litigation to the insurer on July 8, 2009, under the policy in effect for the period of May 1, 2009 to May 1, 2010. The insured later reported that it had been served, and the insurer denied coverage under all three policies on multiple grounds on April 5, 2010.

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In the coverage litigation that followed, the court determined the 2009-10 was the applicable policy. In this regard, the court noted that the policies defined "claim" to include "a written demand against any Insured for monetary damage" and "a civil proceeding against any Insured seeking monetary damages . . . commenced by the service of a complaint or similar proceeding." The court held that an unsealed complaint did not constitute a written demand against an insured and that the earliest the complaint could be considered such a demand was when it was publicly available on Public Access to Court Electronic Records on February 11, 2009. The court also held, however, that because the term "civil proceeding" was a more specific term than "written demand," the latter took precedence for purposes of determining the existence of a claim under the policy. Accordingly, the court concluded that the claim was made against the insured at the time of service on January 5, 2010.

Exclusion L in the 2009-10 policy barred coverage for any claim based upon or arising out of any prior or pending litigation filed or commended on or before the effective date of the first policy issued by the insurer of which the 2009-10 policy was a continuous renewal or replacement. The court rejected the insured's argument that the May 1, 2006, effective date of the initial excess policy was the operative date, finding that the switch from excess to primary coverage did not constitute a "renewal or replacement." Rather, the operative date for applying the exclusion was the effective date of the first primary policy – *i.e.*, May 1, 2007. Because the *qui tam* action initially was filed on June 13, 2006, the court held that the exclusion barred coverage. The court held that this was the case even though the complaint had been filed under seal and not served until years later. According to the court, the exclusion was not anchored to the definition of "claim" and the use of the term "litigation" incorporated the situation in which a suit is docketed, but not necessarily served on a party.

Additionally, the court held that coverage for the *qui tam* action was barred by Exclusion Y, which applies to "[c]laims alleging, based upon, arising out of, or attributable to any false, deceptive or unfair business practices or any violation of consumer protection laws." Although it found that the Medicare and Medicaid Patient Protection Act at issue was not a "consumer protection law," the court did find that the insured's potential liability under the FCA results from false or deceptive business practices.