

## Pharmaceutical Company's Settlement Payment To DOJ Is Not Uninsurable Disgorgement Of Ill-Gotten Gains, Says Illinois District Court

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An Illinois district court granted a policyholder's summary judgment motion, finding that a settlement payment constituted a covered "loss" under an excess policy and that coverage was not barred based on considerations of public policy. *Astellas US Holding, Inc. v. Starr Indem. & Liab. Co.*, 2021 WL 4711503 (N.D. Ill. Oct. 8, 2021).

The Department of Justice initiated an investigation of Astellas' charitable donations to certain patient assistance programs. The investigation, which focused on whether Astellas had made donations in order to "funnel impermissible co-pay assistance" to patients using its drugs, resulted in the issuance of subpoenas and a civil investigation demand relating to potential False Claims Act ("FCA") violations. The parties ultimately settled for \$100 million plus interest. Federal denied coverage, arguing that the settlement was not for a covered "loss," defined to exclude "matters which may be deemed uninsurable under applicable law." Federal also argued that coverage was prohibited as a matter of Illinois public policy. The court rejected these assertions.

The court ruled that Federal did not meet its burden of establishing that the settlement was an uninsurable disgorgement payment intended to divest Astellas of the benefit it received by virtue of its wrongdoing. Federal argued that the settlement agreement's designation of \$50 million as "restitution to the United States" demonstrated that the payment was, in fact, restitution based on Astellas' ill-gotten gains. Rejecting this contention, the court explained that the "restitution" label in the settlement agreement was used to identify the tax-deductible portion of the payment, as required by federal law, and did not support a finding that such amounts represented disgorgement payments.

Instead, the court concluded that the settlement payment constituted damages to compensate the government for loss incurred. In so ruling, the court noted that the purpose of the False Claims Act (and the damages allowed under it) supported Astellas' assertion that the settlement payment represented compensation to the government rather than restitution.

The court also rejected Federal's contention that the overall intention of the settlement was to "divest Astellas of the net benefit of its unlawful scheme" and was thus uninsurable under Illinois law. The court stated:

despite the Government's allegations and 'themes' about Astellas' intent to profit from its donations to the ARI Funds, the damages sought by

the Government and agreed upon in the Settlement Agreement were primarily (if not solely) compensatory damages under the FCA meant to cover the Government’s losses in the form of Medicare payments.

The court distinguished decisions in which settlement payments were held to constitute uninsurable disgorgement, reasoning that in those cases damages were based on a calculation of the money the insured had wrongfully taken directly from underlying claimants. Here, however, there was no calculation of wrongfully obtained profits and the record established that the settlement amount was derived from the number of “tainted” prescriptions paid by Medicare to third parties.

Federal also argued that the settlement payment was uninsurable because it released liability for unjust enrichment, among other claims for which the government could seek disgorgement.. However, applying a “primary focus” analysis, the court concluded that Astellas was entitled to coverage for the entire settlement because a covered loss was a primary focus of the settlement.

Finally, the court ruled that coverage of the settlement would not contravene public policy, which prohibits insurance coverage for liability arising out of a policyholder’s intentional or willful wrongs. The court reasoned that the wrongful conduct was “only alleged” and not admitted in the settlement agreement, and emphasized the absence of authority supporting Federal’s assertion that “it is against Illinois public policy to insure the payment of damages to a third party resulting from an insured’s fraudulent conduct.”

Authors and  
Contacts

Andrew Frankel  
Partner  
[afrankel@stblaw.com](mailto:afrankel@stblaw.com)  
[+1-212-455-3073](tel:+12124553073)

