New DoJ policy limits settlement relief options

Jaclyn Jaeger | June 27, 2017

A Department of Justice policy that affords corporate defendants the option to make payments to third-party, non-governmental organizations as an alternative form of relief in resolving federal claims is now off the table.

In a June 5 memorandum to all Department of Justice staff and its 94 U.S. Attorneys' Offices, U.S. Attorney General Jeff Sessions implemented a new policy prohibiting Department attorneys from striking "any agreement on behalf of the United States in the settlement of federal claims or charges that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute."

The change is intended to stop settlement funds from going to "bankroll third-party special interest groups or the political friends of whoever is in power," Sessions said in a statement announcing the directive. "Unfortunately, in recent years the Department of Justice has sometimes required or encouraged defendants to make these payments to third parties as a condition of settlement," he said.

In 2014, the House Judiciary and Financial Services Committees opened an investigation into the Justice Department's mortgage-lending settlements with several major banks in the wake of the financial crisis, including JPMorgan, Citi, and Bank of America. The findings from that investigation claimed that the Justice Department was systematically subverting Congress' spending power by using settlements to funnel money to third-party activist groups.

"With this directive, we are ending this practice and ensuring that settlement funds are only used to compensate victims, redress harm, and punish and deter unlawful conduct," Sessions said.

The new policy, effective immediately, applies to all civil and criminal cases litigated under the direction of the attorney general. It includes civil settlements, *cy pres* provisions (the distribution of residual funds from class-action settlements), plea agreements, non-prosecution agreements, and deferred prosecution agreements.

The policy provides for the following three "limited" exemptions:

- An otherwise lawful payment or loan that provides restitution to a victim or that otherwise *directly* remedies the harm that is sought to be redressed, including, for example, harm to the environment or from official corruption;
- Payments for legal or other professional services rendered; and
- Payments expressly authorized by statute, including restitution and forfeiture.

Earlier this year, House Judiciary Committee Chairman Bob Goodlatte (R-VA) introduced legislation, the "Stop Settlement Slush Funds Act of 2017" (H.R. 732), that effectively would expand the scope of this directive. That bill would bar not only the Department of Justice, but all government agencies from requiring defendants to donate money to outside groups as part of their settlement agreements with the federal government. A similar version of the bill passed the House last year but died in the Senate.

Critics of the legislation and the directive argue that referring to third-party settlement payments as "slush funds" that go toward activist groups is an overblown assumption and that no actual evidence exists to substantiate such claims.

Furthermore, many defense attorneys argue that such alternative forms of relief—already strictly governed by existing federal agency policies—offer companies more flexibility in crafting settlements. "I wouldn't say all corporate defendants are going to welcome this policy," says James Auslander, a principal at law firm Beveridge & Diamond.

Many corporate defendants are agreeable to third-party payments in settlement negotiations, because they are "a useful tool in getting all parties on the same page," says Bart Kempf, counsel at law firm Bradley.

Rather than having to put money toward the Treasury Department, companies have long had the option to put those funds, instead, toward on-the-ground efforts that benefit the community or the environment, which at the same time can help foster positive public relation efforts and reduce the optics of reputational damage.

SEPs threatened. The new policy particularly threatens corporate defendants' funding of supplemental environmental projects (SEPs) in settling Justice Department enforcement actions involving environmental disputes. The U.S. Environmental Protection Agency defines a SEP as "an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action."

SEPs have long been used as alternative forms of relief in administrative, civil, and criminal enforcement actions for environmental violations. "It's just another tool in the toolbox in resolving these disputes," Kempf says.

The new directive requiring that the payment directly remedies the harm, however, is far more stringent than the nexus requirement for SEPs that the EPA and the Justice Department have historically followed. On a practical level, it means corporate defendants now have less flexibility to fund SEPs, which have been used in several significant environmental enforcement action settlements to date.

Consider the following examples:

- Volkswagen, as part of its settlement with the government for cheating emissions tests, will invest $2 billion over ten years to a third-party limited liability company to improve infrastructure, access, and education to support and advance zero-emission vehicles.

- BP, as part of its civil settlement to resolve Clean Air Act violations at a Texas refinery, funded a SEP valued at $6 million to retrofit heavy-duty diesel vehicles (buses) and light-duty vehicles (trucks or cars) owned by school districts surrounding the refinery to run on natural gas.
- Duke Energy, as part of its civil settlement to resolve Clean Air Act violations at some of its power plants in North Carolina, invested more than $4 million to fund several environmental mitigation projects, including restoring native wildlife and plants in North Carolina.

In another example, Gibson Guitar in 2012 reached a settlement resolving a criminal investigation into allegations that the company violated the Lacey Act by illegally purchasing and importing ebony wood from Madagascar and rosewood and ebony from India. The settlement, in part, required Gibson to make a community service payment of $50,000 to the National Fish and Wildlife Foundation "to be used to promote the conservation, identification, and propagation of protected tree species used in the musical instrument industry and the forests where those species are found," the settlement agreement stated.

The directive does not apply to administrative enforcement actions where the EPA retains jurisdiction. Thus, it remains to be seen whether the EPA will decide to follow the Justice Department's lead to reflect a broader Trump Administration policy or whether it continues allowing third-party SEPs in administrative enforcement actions.

"While this memo doesn't directly affect the EPA's SEP policy for settlements that don't involve the Department of Justice, you may see that the EPA is more reluctant to proceed down that path," says Andrew Perellis, a partner in the environment practice at law firm Seyfarth Shaw.

If a settling company wants to fund a SEP on its own, "there are workarounds," Kempf says. For example, a corporate defendant could decide to fund the project itself, rather than as a condition of the settlement agreement.

It will be important for corporate counsel in the coming months to closely monitor how the Department of Justice and the EPA implement this directive in practice and what remedies they afford corporate defendants, as those outcomes may be telling indications of how to tailor proposed third-party projects moving forward to satisfy this more demanding standard.