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California Appeals Court Finds That DOJ Investigation of False Claims Act and Civil Investigative Demand to Insured Do Not Constitute “Potential Claim” Under Medical Professional Liability Policy

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In *Cardiovascular Consultants Heart Center. v. Norcal Mutual Insurance Company*, 2022 Cal. App. Unpub. LEXIS 1642 (Cal. App. 2d Dist. Mar. 17, 2022), the California Court of Appeals, in an unpublished decision addressed whether a civil investigative demand (CIDs) in connection with the False Claims Act (FCA) investigation triggered a duty to defend under a medical professional liability policy issued by NORCAL. In determining whether NORCAL had a duty to defend, the key question was whether the CIDs issued by the DOJ in connection with the FCA investigation gave rise to a “Potential Claim” under the Policy. It was undisputed that a “Potential Claim” triggered the Policy’s duty to defend when there were allegations of a “Medical Incident” that may result in a notice or demand for “Damages” because of injury. According to the Court of Appeals, while the duty to defend is broad, it flows from the nature of the underlying claim, and cannot be triggered solely by unfounded speculation or conjecture by the insured about what claims the third-party plaintiff might pursue at some future date. As such, because the investigation and CIDs did not include allegations of an actual or potential claim resulting from a “Medical Incident,” NORCAL had no duty to defend under the Policy and summary judgment in NORCAL’s favor was proper.

By way of background, the DOJ initiated an investigation of the insured, a cardiovascular heart center, for possible false and improper claims to Medicare. The DOJ ultimately issued CIDs to the insured and five of its employees requesting documents and testimony related to their investigation for FCA violations. The CIDs did not contain allegations of substandard medical care and explicitly stated they were all issued in the course of the FCA investigation concerning allegations that the Center had submitted false claims to the federal government for “excessive, medically unnecessary, and/or inadequately documented cardiovascular procedures.” During the investigation, the insured and DOJ entered into a tolling agreement, stating the DOJ may have certain civil causes of action and administrative claims against the insured and/or its member physicians under the False Claims Act and/or the common law arising from the insured’s alleged submission of false claims.

The Court of Appeals concluded that neither the federal government’s investigation of FCA violations, nor the extrinsic evidence available amounted to a “Potential Claim” under the policy. In coming to this conclusion, the court reasoned that it must look at the facts the insurer knew at the time the insured tendered the defense, and that speculation of extraneous facts regarding potential liability or ways in which a third party might assert claims in the future do not trigger a duty to defend.

According to the Court of Appeals, it was undisputed that the CIDs themselves contained no allegations of substandard medical care so as to constitute a “Medical Incident” that may result in an actual claim for damages under the Policy. The CIDs explicitly stated that they were all issued in the course of a FCA investigation concerning allegations that the insured had submitted false claims to the federal government for excessive, unnecessary, or inadequately documented procedures. Furthermore, the Court of Appeals reasoned that the FCA attaches liability not to the underlying fraudulent activity (“excessive, medically unnecessary, and/or inadequately documented cardiovascular procedures”), but to the claim for payment. Thus, “[t]he gravamen of the CIDs in connection with the FCA investigation consistently involved the increased costs to the federal government based on the Center’s (alleged) submission of false claims, not damages for injury to the Center’s patients resulting from medical negligence.”

The court also addressed whether certain extrinsic evidence—a tolling agreement and later letter to NORCAL—provided sufficient notice of a “Potential Claim” against the insured. The Court of Appeals again concluded it did not: the tolling agreement was merely boilerplate language preserving the federal government’s ability to bring claims at a future date, and the later letter to the insurer happened only after the defense was tendered and NORCAL was not required to take post-tender extrinsic evidence into account. Irrespective of the timing, the meeting would not have triggered a duty to defend because the witness was merely speculating about potential claims that could happen in the future. Accordingly, the Court of Appeals affirmed that the DOJ never alleged any claims based on injury to the patients or negligently performed medical services during its FCA investigation, and therefore, failed to allege a “Potential Claim” triggering the carrier’s duty to defend. The trial court’s decision in favor of NORCAL was affirmed.