Cardiovascular Consultants Heart Ctr. v. Norcal Mut. Ins.

Court of Appeal of California, Second Appellate District, Division Four

March 17, 2022, Opinion Filed

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Reporter
2022 Cal. App. Unpub. LEXIS 1642 *

CARDIOVASCULAR CONSULTANTS HEART CENTER, Plaintiff and Appellant, v. NORCAL MUTUAL INSURANCE COMPANY, Defendant and Respondent.

Prior History: [*1] APPEAL from a judgment of the Superior Court of Fresno County, No. 18CECG01943, Kimberly A. Gaab, Judge.

Disposition: Affirmed.

Core Terms

duty to defend, insurer, coverage, documented, potential claim, false claim, allegations, federal government, summary judgment, cardiovascular, extrinsic, patients, Damages, tolling, scans, summary adjudication, trial court, give rise, subpoena

Counsel: Wilkins, Drolshagen & Czeshinski, Matthew J. Wilkins and James H. Wilkins for Plaintiff and Appellant.

Troutman Pepper Hamilton Sanders, Michael K. Cassata and Jennifer Mathis for Defendant and Respondent.

Judges: WILLHITE, Acting P. J.; COLLINS, J., CURREY, J. concurred.

Opinion by: WILLHITE, Acting P. J.

Opinion

INTRODUCTION

Plaintiff Cardiovascular Consultants Heart Center (the Center) appeals from the summary judgment granted in favor of defendant NORCAL Mutual Insurance Company (NORCAL). The Center also challenges the denial of its own motion for summary adjudication. The issue in this appeal arises from the Center's contention that NORCAL had a duty to defend the Center under a medical professional liability insurance policy in connection with civil investigative demands issued by the United Stated Department of Justice (DOJ). These demands alleged that the Center "submitted false claims to the U.S. Government for excessive, medically unnecessary, and/or inadequately documented cardiovascular procedures" in violation of the False Claims Act (31 U.S.C. §§ 3729-3733; FCA). We

conclude NORCAL did not have a duty to defend as a matter of law and affirm [*2] the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts and relevant policy language are largely, if not entirely, undisputed. The main issue on appeal is the question of coverage, which we resolve as a matter of law on undisputed facts. (*Crown Capital Securities, L.P. v. Endurance American Specialty Ins. Co.* (2015) 235 Cal.App.4th 1122, 1128, 186 Cal. Rptr. 3d 1.)

A. *Insurance Policy*

NORCAL issued Medical Professional Liability Insurance Policy No. 105297N to the Center for the period January 1, 2016, to January 1, 2017 (the Policy). As relevant here, the Policy provided coverage in the amount of $1 million per claim and $3 million in the aggregate per policy period under Coverage A for Medical Professional Liability Insurance. [1]

Under Coverage A, NORCAL had the following defense obligations: "We have the duty and exclusive right, using counsel of Our choice, to investigate, negotiate, and defend a Claim resulting from a Medical Incident . . . by the payment of Defense Costs and Additional Benefits, which are payable in addition to the applicable Each Claim Limit for Medical Professional Liability Insurance."

A claim was defined as: (1) "Actual Claim: Written notice or demand for Damages because of injury that an Insured has received regarding a Medical Incident"; or (2) "Potential Claim: Any Medical Incident [*3] that may result in an actual Claim." A medical incident was defined as "any act or omission or series of related acts or omissions resulting directly from the rendering of or failure to render Professional Health Care Services." Professional health care services was defined, in relevant part, as "medical or health care services the Insured provides, including: [¶] 1. direct medical, surgical, dental, or nursing treatment, including furnishing food or beverages in connection with these; [¶] 2. making medical diagnoses and rendering medical opinions and or medical advice."

Damages was defined, in relevant part, as "those sums that an Insured becomes legally obligated to pay by reason of the liability imposed upon that Insured by law." However Damages do not include: "restitution, return, or disgorgement of fees or profits, charges for productions or services rendered, . . . or any other funds allegedly wrongfully held or obtained"; "relief or redress in any form other than monetary compensation[;]" and "matters that are uninsurable under applicable law."

B. *Federal Claims Act Investigation*

On May 15, 2012, the Office of the Inspector General (OIG) issued a subpoena (OIG subpoena) to the [*4] Center for certain medical records "in connection with an official investigation into possible false or otherwise improper claims to Medicare." The OIG subpoena demanded the Center produce documents, including patient records and related billing records for a limited sample of Medicare beneficiaries.

On April 29, 2016, the DOJ issued a Civil Investigative Demand (initial CID) to the Center pursuant to FCA in the course of an investigation. The initial CID stated that the FCA investigation concerned "allegations that [the Center] ha[d] submitted false claims to the U.S. Government for excessive, medically unnecessary, and/or inadequately documented cardiovascular procedures." The initial CID required the Center to

[1] The policy also provided Administrative Defense Insurance under Coverage B, and Information and Network Security Insurance under Coverage C. However, neither are at issue on appeal.

produce documents and provide responses to written discovery.

In May 2016, the DOJ and the Center entered into a tolling agreement because the FCA investigation had been "lingering" with the prior Assistant United States Attorney (AUSA) and the then-newly assigned AUSA Edward Baker "was concerned about statute of limitations issues" with respect to the 2012 OIG subpoena, and "insisted on the tolling agreement." The agreement stated, in part, that the DOJ believed "they may have **[*5]** certain civil causes of action and administrative claims against [the] Center and/or its member physicians under the False Claims Act . . . , the Civil Monetary Penalties Law . . . , equity, and/or the common law arising from [the] Center's submission of alleged claims to the U.S. Government for allegedly excessive, medically unnecessary, and/or inadequate documented nuclear medicine scans, echocardiograms, and associated cardiovascular procedures (herein referred to as 'the alleged Claims.')."

On October 31, 2016, the DOJ issued Civil Investigative Demands to five Center employees (individual CIDs), requesting documents and testimony related to the DOJ's investigation of the Center for FCA violations. [2]

On January 30, 2017, NORCAL received a letter from counsel for the Center (Daniel O. Jamison) requesting coverage for the CIDs pursuant to the Policy. On March 7, 2017, NORCAL denied coverage for the CIDs. NORCAL stated that the Policy was "not implicated because, among other reasons, the False Claims Act Investigation does not involve a Medical Incident," rather the DOJ was "investigating allegations that [the Center had] submitted false claims to the United States Government for excessive, medically unnecessary, and/or **[*6]** inadequate documented cardiovascular procedures." [3]

On June 6, 2017, Mr. Jamison sent NORCAL another letter arguing that NORCAL was obligated under the Policy to defend against the CIDs as a "Potential Claim." He contended the federal government alleged it incurred and will incur damages because of a "Medical Incident." Mr. Jamison discussed a March 13, 2017 meeting that transpired between the Center and the DOJ. At this meeting, Mr. Jamison reported that AUSA Baker contended that "certain nuclear medicine scans, echocardiograms, cardioversions, and angiograms were medically unnecessary" and that these unnecessary procedures totaled to $6.1 million for 7,980 false claims. AUSA Baker also allegedly "noted that this number at this time does not include compensation for allegedly 'unnecessary diagnostic radiation exposure' for patients." From this meeting, Mr. Jamison concluded that it was "a fact and not speculation that the [federal] [g]overnment is contending . . . that the patients were physically harmed," and the federal government would have to pay for additional follow-up procedures.

On October 3, 2017, FCA investigation was ultimately resolved when United States of America (acting **[*7]** through the DOJ and OIG), the State of California, and the Center (and its shareholder physicians) entered into a settlement agreement (FCA settlement).

C. *Lawsuit*

On June 1, 2018, the Center filed a complaint against NORCAL for breach of the duty to defend and breach of the implied covenant of good faith and fair dealing. The complaint alleged, in part, that NORCAL owed a duty to

[2] The initial CID, together with the individual CIDs, will be collectively referred to as the CIDs.

[3] NORCAL also rejected any duty to defend under Coverage B for Administrative Defense Insurance.

defend to the Center in connection with the CIDs issued by the DOJ alleging FCA violations. On July 20, 2018, NORCAL filed a cross-complaint against the Center. NORCAL sought declaratory relief that, among other things, it had no duty to defend the Center.

On October 8, 2018, the Center filed a motion for summary adjudication on the issue of whether NORCAL owed a duty to defend the Center against the CIDs under the Policy. After hearing argument from the parties, the trial court denied the motion on March 14, 2019.

On July 16, 2019, NORCAL filed a motion for summary judgment, or in the alternative, summary adjudication, on the ground that there was no potential for coverage of the CIDs under the Policy and therefore, no duty to defend. And, where there are no coverage obligations, an insurer cannot be found liable **[*8]** for bad faith. After hearing argument from the parties and taking the matter under submission, the trial court issued its ruling granting the motion for summary judgment on December 16, 2019. [4] The court found, as relevant here, that the CIDs and related extrinsic evidence did not constitute a "Potential Claim" triggering the duty to defend. Judgment was entered in favor of NORCAL on January 10, 2020.

On appeal, the Center challenges both the grant of NORCAL's motion for summary judgment, and the denial of its own motion for summary adjudication.

[4] On December 16, 2019, the trial court also granted NORCAL's motion for summary adjudication on counts 6 and 7 of the cross-complaint. NORCAL subsequently dismissed, without prejudice, the cross-complaint against the Center as to the remaining counts on March 16, 2020. NORCAL's motion for summary adjudication is not at issue in this appeal.

DISCUSSION

In determining whether NORCAL had a duty to defend, the key question is whether the CIDs issued by the DOJ in connection with the FCA investigation gave rise to a "Potential Claim" under the Policy. It is undisputed that a "Potential Claim" triggers the Policy's duty to defend when there are allegations of a "Medical Incident" that may result in a notice or demand for "Damages" because of injury. 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 **[*9]** date. Therefore, we conclude NORCAL had no duty to defend under the Policy and summary judgment in NORCAL's favor was proper. [5] In light of our conclusion, we need not discuss the Center's challenge to the ruling denying its motion for summary adjudication on the same ground (NORCAL's duty to defend).

A. *Standard of Review*

"'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court

[5] In its opening brief, the Center requests that we reverse the trial court's order granting summary judgment. However, the Center failed to address the merits of the breach of the implied covenant of good faith and fair dealing claim. Therefore, we deem this claim forfeited. (See *Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282, 150 Cal. Rptr. 3d 673; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal. Rptr. 2d 457.) In any event, we conclude the Center cannot maintain its claim for breach of the implied covenant of good faith and fair dealing absent a duty to defend. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 35-36, 44 Cal. Rptr. 2d 370, 900 P.2d 619; see also *Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250, 39 Cal. Rptr. 3d 650.)

when it ruled on that motion. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1034-1035, 6 Cal. Rptr. 3d 441, 79 P.3d 556.) "'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" (*Id.* at p. 1035.) We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142, 12 Cal. Rptr. 3d 615, 88 P.3d 517.)' (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037, 32 Cal. Rptr. 3d 436, 116 P.3d 1123.)" (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717, 68 Cal. Rptr. 3d 746, 171 P.3d 1082.)

B. *Duty to Defend*

The Center contends NORCAL had a duty to defend a potential claim "for allegedly substandard care causing damage to the Government in having to pay hospitals for [follow-up procedures] that would not otherwise have been performed" absent the medically unnecessary scans that were alleged billed to the federal government. **[*10]** [6]

"'The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint [(or in this case, the CIDs)] with the terms of the policy. Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. [Citation.]' [Citation.]" (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295, 24 Cal. Rptr. 2d 467, 861 P.2d 1153 (*Montrose*).) "'For an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party [proceeding]. [Citation.] Hence, the duty "may exist even where coverage is in doubt and ultimately does not develop." [Citation.]' [Citation.]" (*Ibid.*)

"To prevail, the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*." (*Montrose, supra*, 6 Cal.4th at p. 300; *Buss v. Superior Court* (1997) 16 Cal.4th 35, 46, 65 Cal. Rptr. 2d 366, 939 P.2d 766 ["the insurer's duty to defend runs to claims that are merely potentially covered, in light of facts alleged or otherwise disclosed"].) "[A]n insured cannot manufacture **[*11]** a dispute on summary judgment, ipse dixit, by refusing to concede the truth of a fact without adducing some evidentiary support for its position." (*Montrose, supra*, 6 Cal.4th at p. 301; *Giddings v. Industrial Indemnity Co.* (1980) 112 Cal.App.3d 213, 220, 169 Cal. Rptr. 278 [an insurer will not be compelled to defend its insured when the potential for liability is so "tenuous and farfetched"].) Similarly, "'[a]n insured may not trigger the duty to defend by speculating about extraneous "facts" regarding potential liability or ways in which the third party claimant might [assert a claim] at some future date.'" (*Low v. Golden Eagle Ins. Co.* (2002) 99 Cal.App.4th 109, 113, 120 Cal. Rptr. 2d 827 (*Low*), quoting *Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114, 44 Cal. Rptr. 2d 272

[6] The Center also argues that so long as an action alleges a "Medical Incident" that could hypothetically support *anyone's* claim (such as a Center patient or "another party") for "Damages" at some future date, it is a "Potential Claim" requiring a duty to defend. Because the Center raises this argument for the first time on appeal, we decline to consider it. (*San Francisco Print Media Co. v. The Hearst Corp.* (2020) 44 Cal.App.5th 952, 965, 258 Cal. Rptr. 3d 180.)

(*Gunderson*).)

It is undisputed that the CIDs themselves contain no allegations of substandard medical care so as to constitute a "Potential Claim" under the Policy. The CIDs explicitly stated that they were all issued in the course of a 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." Furthermore, FCA attaches liability, not to the underlying fraudulent activity ("excessive, medically unnecessary, and/or inadequately documented cardiovascular procedures"), but to the claim for payment. (See 31 U.S.C. § 3729; *U.S. ex rel. Hopper v. Anton* (9th Cir. 1996) 91 F.3d 1261, 1266.) Despite the plain language of the CIDs, the **[*12]** Center relies on extrinsic evidence to advance NORCAL's duty to defend: (1) the May 2016 tolling agreement; and (2) Mr. Jamison's June 6, 2017 letter to NORCAL.

In determining whether there is a duty to defend an insured, "the issues . . . are what facts [the insurer] knew at the time [the insured] tendered the defense . . . , both from the allegations on the face of the third party complaint, and from extrinsic information available to it at the time; and whether these *known facts* created a potential for coverage under the terms of the Policy." (*Gunderson, supra*, 37 Cal.App.4th at p. 1114; in accord, see also *Low, supra*, 99 Cal.App.4th at p. 113; *Baroco West, Inc. v. Scottsdale Ins. Co.* (2003) 110 Cal.App.4th 96, 103, 1 Cal. Rptr. 3d 464 (*Baroco West*) [extrinsic facts may give rise to a duty to defend but "such facts must be known at the time of tender and must reveal a potential for liability"].) "[A]n insurer does not have a continuing duty to investigate whether there is a potential for coverage. If it has made an informed decision on the basis of the third party complaint and the extrinsic facts *known* to it at the time of tender that there is no potential for coverage, the insurer may refuse to defend the [proceeding]. [Citations.]" (*Gunderson, supra*, at p. 1114; see *Travelers Casualty & Surety Co. v. Employers Ins. of Wausau* (2005) 130 Cal.App.4th 99, 110, 29 Cal. Rptr. 3d 609.)

As previously noted, the initial CID was issued on April 29, 2016, and the individual CIDs were issued on October 31, **[*13]** 2016 (collectively, the CIDs), both of which requested documents and information related to the DOJ's investigation of the Center for FCA violations. It was not until January 30, 2017, that NORCAL received a letter from the Center requesting coverage for the CIDs pursuant to the Policy. On March 7, 2017, NORCAL denied coverage for the CIDs. In its denial of coverage, NORCAL stated that the Policy was "not implicated because, among other reasons, the False Claims Act Investigation does not involve a Medical Incident," rather the DOJ was "investigating allegations that [the Center had] submitted false claims to the United States Government for excessive, medically unnecessary, and/or inadequate documented cardiovascular procedures." Because the Center tendered a defense in January 2017, only extrinsic information available at that time can be properly considered in determining whether NORCAL had a duty to defend. Thus, we only look to the May 2016 tolling agreement in assessing a "Potential Claim" covered under the Policy.

The Center argues that the tolling agreement created a potential claim for substandard medical care based on the federal government having to pay for follow-up procedures as a result **[*14]** of the medically unnecessary scans. The agreement specifically stated the DOJ believed "they may have certain civil causes of action and administrative claims against [the] Center and/or its member physicians under the False Claims Act . . and/or the *common law* arising from [the] Center's

submission of alleged claims to the U.S. Government for allegedly excessive, medically unnecessary, and/or inadequate . . . procedures." (Italics added.) This boilerplate language preserving the federal government's ability to bring claims against the Center at a future date is not sufficient to give rise to the specific common law claim (substandard medical care) alleged by the Center. Moreover, when combined with AUSA Baker's insistence on the tolling agreement to preserve the federal government's ability to file suit against the Center for matters related to the FCA investigation dating back to the 2012 OIG subpoena, the agreement clearly concerned potential claims wholly arising out of the submission of false claims to the government. The Center provides no evidence (aside from the tolling agreement itself) to support its contention that by entering into this agreement, the federal government contemplated any **[*15]** medical negligence claims against the Center.

Even if we were to consider the post-tender evidence proffered by the Center, it would not give rise to a duty to defend. In the June 6, 2017 letter to NORCAL, Mr. Jamison recounted the meeting with the DOJ regarding the federal government's case against the Center. According to Mr. Jamison, AUSA Baker stated that the Center faced liability in the amount of $6.1 million dollars for 7,980 false claims because of allegedly unnecessary nuclear medical scans. AUSA Baker then allegedly noted that these damages did not include compensation for allegedly "unnecessary diagnostic radiation exposure" for patients. Contrary to the Center's contention, the DOJ (or AUSA Baker as its representative) did not indicate that the federal government was seeking or might seek damages for patient harm. Rather, it appears these comments by AUSA Baker relayed, at most, a concern for a potential outcome that could result from the Center's medically unnecessary scans. Accordingly, we conclude that the CIDs did not expand beyond the Center's (alleged) violations under FCA.

In addition, this letter is based on Mr. Jamison's subjective belief that the DOJ could ostensibly **[*16]** amend its allegations against the Center to include medical negligence at some future date. Mr. Jamison's speculation about what the DOJ could have alleged is not the proper standard for determining whether the potential for coverage exists. (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America* (2011) 197 Cal.App.4th 424, 433, 127 Cal. Rptr. 3d 444.) An insured's pre-suit theories to support coverage by an insurer cannot transplant or amend allegations actually made by a third party. (See *Friedman Prof. Management Co., Inc. v. Norcal Mutual Ins. Co.* (2004) 120 Cal.App.4th 17, 35, 15 Cal. Rptr. 3d 359 ["[t]he potentiality rule for the duty to defend is pegged to the possibility of actual indemnity coverage, not the mere existence of a plausible argument"].) Otherwise, the duty to defend would effectively be limitless. [7]

Thus, we conclude that even if we were permitted to consider the post-tender evidence upon which the Center primarily relies, it would still fail to give rise to a duty to defend. Not only were these facts unknown to NORCAL at the time of tender, they also fail to "reveal a potential for liability." (*Baroco West, supra*, 110

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[7] Contrary to the Center's contention on appeal (and not raised in the trial court), the Policy's "Potential Claim" language does not expand but merely mirrors the requirement for insurers to defend a claim where any allegation demonstrates a potential for coverage. (See *Friedman Prof. Management Co., Inc. v. Norcal Mutual Ins. Co., supra*, 120 Cal.App.4th at p. 34, citing *Buss, supra*, 16 Cal.4th at pp. 45-49, *Montrose, supra*, 6 Cal.4th at pp. 295-296 and *Horace Mann Ins. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081, 17 Cal. Rptr. 2d 210, 846 P.2d 792.)

Cal.App.4th at p. 103.) The 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. Accordingly, [*17] the trial court correctly determined that the DOJ never alleged any claims based on injury to the patients or negligently performed medical services during its FCA investigation.

DISPOSITION

The judgment is affirmed. NORCAL shall recover its costs on appeal.

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.

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