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California Court of Appeal Affirms No Coverage for False Claims Act Investigation Under Medical Professional Liability Policy

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The California Court of Appeal has affirmed the Fresno County Superior Court's grant of summary judgment to NORCAL Mutual Insurance Company (NORCAL), finding there was no potential for coverage for a False Claims Act investigation under a medical professional liability insurance policy, as the gravamen of such a claim is the presentation of false claims to the government, not any deficiencies in the underlying patient care. In doing so, the court also affirmed that the insured's speculation about what the government could have alleged was not the appropriate standard for determining the duty to defend. Jennifer Mathis and Michael Cassata of Troutman Pepper represented NORCAL in the case.

The underlying matter involved a False Claims Act investigation into the alleged submission of fraudulent bills to Medicare for excessive, medically unnecessary, and/or inadequately documented cardiovascular procedures. The relevant insuring agreement provided coverage for "medical incidents" that may result in a claim for "damages." The insured argued that the potential harm to patients caused by the purportedly unnecessary diagnostic radiation exposure for the alleged unnecessary scans at issue in the government's FCA investigation created the possibility of a future claim that would fall within the coverage of the policy, and NORCAL accordingly owed a duty to defend. In rejecting this argument, the court affirmed 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." In submitting the FCA investigation for coverage to NORCAL, the insured's attorney had argued that the government had referred to possible harm to patients as a result of the alleged unnecessary procedures, and that this could result in a future claim for patient harm. However, the court relied on long-established California law rejecting coverage by speculation, noting that "[w]hile 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."

While the [opinion](#) is unpublished, its analysis is instructive in connection with assessing numerous coverage issues that arise in the context of FCA matters.

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