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Can Insurance Cover False Claims Act Claims?

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On March 17, 2022, the California Court of Appeals in *Cardiovascular Consultants Heart Center. v. Norcal Mutual Insurance Company*, 2022 Cal. App. Unpub. LEXIS 1642, *11 held that False Claims Act (FCA) allegations in a civil investigative demand (CID) were not covered under a professional liability policy.

The court held that the CID contains "no allegations of substandard medical care so as to constitute a Potential Claim under the Policy." Furthermore, it noted 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."

To understand the court's reasoning, we must delve into the specific policy language at issue, as is typical when reviewing any policy for coverage. In the *Cardiovascular Consultants Heart Center* case, the subject policy covered claims resulting from a "medical incident," which 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*." (Emphasis added). 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 . . . [and] 2) making medical diagnosis and rendering medical opinions or medical service." The CID concerned "allegations that [the insured] ha[d] submitted false claims to the U.S. Government for excessive, medically unnecessary,

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and/or inadequately documented cardiovascular procedures."

The insured tendered the claim to its professional liability insurer, which denied coverage on the basis that the FCA allegations do not involve a "medical incident." The trial court agreed and the California Court of Appeal affirmed.

The court's opinion is in line with a number of other courts that have recently analyzed FCA claims under professional liability policies. In *Iberiabank Corp. v. Illinois Union Insurance Company*, 2019 WL 585288 (E.D. La. Feb. 13, 2019), aff'd, 953 F.3d 339 (5th Cir. 2020), for example, the Eastern District of Louisiana observed that "[e]very federal circuit faced with the issue has held that coverage under a professional liability insurance policy is not triggered by claims asserted under the False Claims Act because such claims are not predicated on the insured's professional services that are covered by such a policy." *Iberiabank* involved a qui tam action against a government lender alleging violations of the FCA arising from the lender's underwriting and origination of mortgage loans.

While Iberiabank urged for coverage by focusing on its underwriting as the "professional service" triggering coverage under the policy, the District Court held that the "conduct that lay[s] at the heart of the FCA claim and that falls outside the ambit of insurance coverage" was Iberiabank's false certifications to the government that it had provided the agreed level of underwriting in connection with obtaining the FHA insurance." Because substandard underwriting alone does not give rise to an FCA claim, coverage under a professional liability policy was unavailable.

Several courts have similarly distinguished conduct that gives rise to False Claims Act allegations from the underlying professional service. For example, the court in *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 921-23 (10th Cir. 2008) found no coverage under a professional liability policy because "[t]he government's injury was not caused by [insured's] professional services, but instead from [the insured's] submission of false and fraudulent claims for reimbursement"). In *Horizon W., Inc. v. St. Paul Fire & Marine Ins. Co.*, 45 F. App'x 752, 753-54 (9th Cir. 2002), the court found no coverage because "[t]he FCA injury did not 'result from' [the insured's] failure to provide professional services, but from its submission of allegedly fraudulent bills and its alleged misrepresentation of care standards."

This does not mean that all hope for coverage under a professional liability insurance policy is lost. The court in *Affinity Living Group, LLC v. StarStone Specialty Ins. Co.*, 959 F.3d 634, 642-43(4th Cir. 2020), for example, found coverage for FCA allegations under professional liability insurance.

What About D&O Coverage?

What then does this mean for a policyholder facing False Claims Act allegations? It means don't place all your eggs in one basket. When faced with any claim, it is best practice to tender to all applicable carriers. When it comes to False Claims Act claims, however, it is critical for a policyholder to not only tender to its professional liability carrier, but also to its directors and officers (D&O) carrier. After all, D&O insurance is intended to provide coverage for loss arising out of false or misleading information on behalf of directors, officers and/or the company. And while such policies typically include exclusions for loss arising out of "the rendering of professional services," the breadth of case law finding that False Claims Act allegations

fall outside the ambit of professional services could prove helpful.

Indeed, several courts have found at least a potential for coverage under D&O policies. In *Call One Inc. v. Berkley Ins. Co.*, No. 21-CV-00466, 2022 WL 580802 (N.D. Ill. Feb. 25, 2022), the Northern District of Illinois held that the policyholder stated a claim for breach of contract and bad faith denial of coverage when its D&O carrier refused to defend and indemnify it against a subpoena issued pursuant to the Illinois False Claims Act. In so finding, the District Court dismissed the D&O carriers' claims that FCA claims are excluded as uninsurable loss under the policy. In another case, *Astellas US Holding, Inc. v. Starr Indem. & Liab. Co.*, No. 17-CV-08220, 2021 WL 4711503, at *22 (N.D. Ill. Oct. 8, 2021), the court granted summary judgment in favor of coverage for FCA allegations under D&O policy; this case was appealed to the Seventh Circuit.

Similarly, in *Gallup, Inc. v. Greenwich Ins. Co.*, C.A. No. CV N14C-02-136FWW, 2015 WL 1201518, at *14 (Del. Super. Ct. Feb. 25, 2015), a Delaware superior court held that an FCA settlement is a covered loss under a D&O liability policy. The court found that the settlement constituted a "loss" as defined by the D&O policy because 1) the definition of "loss" under the policy expressly included "settlements" and 2) the policy's exclusion for fraud/ill-gotten gains required a final adjudication and was therefore inapplicable to the subject settlement. In addition, the court held that the policy's "professional services" exclusion did not extend to the policyholder's fraudulent billing practices and instead, must be interpreted narrowly to extend only to the policyholder's polling and consulting services.

Of course, a host of issues may arise once you tender your claim to an insurer. A D&O carrier may argue that your FCA claim is not a covered "loss" or is excluded under a separate exclusion in the policy, such as an exclusion for fraud or ill-gotten gains. To protect coverage, an insured facing a denial of coverage should not be resigned to the insurers' denial and should consider available options, including consulting insurance coverage counsel.