

No Coverage under Medical Malpractice Policy for False Claims Act Suit

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An Illinois appellate court has held that a medical malpractice policy did not provide coverage for a *qui tam* suit alleging that the policyholder submitted various fraudulent claims to Medicare. *ISMIE Mut. Ins. Co. v. Michaelis Jackson & Assocs., LLC*, 2009 WL 5185380 (Ill. App. Ct. Dec. 30, 2009). In doing so, the court held that the *qui tam* suit did not involve personal injury caused by professional services as required by the policy.

Former employees of the policyholder filed a False Claims Act suit against the policyholder alleging that the company falsely claimed to have performed various medical procedures in order to receive reimbursement from Medicare. The policyholder sought coverage for the suit under a medical malpractice policy that provided coverage for any claim "which involves personal injury and is caused by professional services." The policy also provided \$30,000 of supplemental coverage for claims "related to Medicare investigations." The insurer accepted the defense pursuant to the supplemental provision, but informed the policyholder that it would not provide a defense once the \$30,000 was exhausted. Shortly after exhaustion of the \$30,000, the insurer filed the declaratory judgment action.

The appellate court affirmed the lower court's finding that the underlying lawsuit did not fall within the policy's coverage grant, as it was not a claim involving "personal injury" cause by "professional services." In doing so, the court relied on *Health Care Industry Liability Insurance Program v. Momen Meadows Nursing Center, Inc.*, 566 F.3d 689 (7th Cir. 2009), in which the Seventh Circuit rejected a similar claim tendered under a commercial general liability insurance policy. As explained by the appellate court, "the proof required to sustain a claim for personal injuries, like a medical malpractice claim, is clearly distinct from the proof required for a claim for false filings of claims for medical reimbursement." Thus, the underlying plaintiffs were not making claims involving personal injury caused by professional services, and there was no potential for coverage.

The appellate court then addressed the insured's argument that, by accepting the defense initially, the insurer was estopped from denying coverage because it did not seek a declaratory judgment until almost 13 months later when the \$30,000 supplemental coverage was exhausted. The appellate court first stated that there could be no "coverage by estoppel" where the underlying claim did not fall within the policy's coverage grant. Additionally, the court noted that the insurer instituted the declaratory judgment action within two months of the exhaustion of the supplemental coverage, and determined that the action thus was instituted within a

"reasonable time."