

# Kansas Supreme Court Holds That Limited Retroactive Coverage in Excess Limits Endorsement Does Not Violate Public Policy

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The Kansas Supreme Court has held that limited retroactive coverage in an excess limits endorsement added on to a claims-made medical malpractice policy did not violate Kansas law or public policy. *Marshall v. Kan. Med. Mut. Ins. Co.*, 2003 WL 21673754 (Kan. July 18, 2003). The court also held that the policy language at issue was not ambiguous.

The insurer had provided claims-made medical malpractice coverage to a physician since 1989. The policy provided coverage of \$200,000 per claim, with an aggregate limit of \$600,000. In 1997, the physician delivered a baby with irreversible brain damage. In October 1998, the attorney representing the baby's parents requested medical records from the physician. In December 1998, after receiving the request for the medical records, the physician applied for an excess limits endorsement to the policy with coverage of \$1 million per claim and \$1 million in the aggregate. The endorsement stated that coverage would "be available only for claims first made against the named insured during the policy period and occurring subsequent to the excess limits retroactive date, as set forth in the Declarations page and Excess Limits Endorsement." That retroactive date was January 1, 1999. In August 1999, the baby's parents sued the doctor, and litigation ultimately ensued over whether the excess limits endorsement was applicable.

The Kansas Supreme Court held that the policy did not afford coverage. The court initially rejected the physician's argument that the lack of retroactive coverage was prohibited by a Kansas statute requiring doctors to maintain coverage of at least \$200,000 per claim and \$600,000 annual aggregate and requiring that "[s]uch policy shall provide as a minimum coverage for claims made during the term of such policy or during the prior term of such policy." The physician had argued that the bar on retroactive coverage limited the extent to which the policy provided claims-made coverage because coverage would not be available for most claims that would likely be made during the policy period. The court reasoned that although the statute required basic coverage—that is, "minimum coverage"—to be claims-made, it did not require "any and all" coverage to be claims-made.

The Kansas Supreme Court next held that the limited retroactive coverage did not violate public policy and, in fact, that public policy considerations weighed in favor of the limited coverage. The court reasoned that public policy supports freedom to contract and that without this freedom, "it is likely that insurance companies might refuse to assume additional risk on behalf of health care providers." The physician asserted that he did not have freedom to contract because no one from the insurer spoke to him about the policy, but the court rejected that argument, noting that the physician had a copy of the policy and an opportunity to review it. According to the court, "[a] party to a contract has a duty to learn the contents of a written contract before signing it." The court also reasoned that the goal of preventing fraud supported the result because it makes "excess liability insurance available at a reasonable cost." Although there was no indication in the record of "an overt attempt to defraud" the insurer, the timing of the physician's purchase of the endorsement demonstrated the possibility of fraud.

The Kansas Supreme Court also held that endorsement was not ambiguous. The court rejected the physician's argument that ambiguity was created by having different retroactive dates for the primary and the excess coverage.

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