

## Attorney's Failure to Disclose Malpractice Warranted Rescission as a Matter of Law

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A California Court of Appeal has held that rescission of a professional liability policy issued to an attorney was warranted as a matter of law, based on the attorney's failure to disclose in the application for coverage that he neglected to meet certain deadlines for two former clients and that the missed deadlines resulted in the dismissal of the clients' actions. *Sigelman v. Lawyers' Mut. Ins. Co.*, 2008 WL 4418183 (Cal. Ct. App. Oct. 1, 2008).

The attorney, on behalf of his law firm, completed a renewal application in July 2004 that asked whether any lawyer for whom coverage was sought had "knowledge of any error or omission or any disagreement with [a] client which might reasonably give rise to a claim against him or her or against the applicant law firm." The attorney responded in the negative. The attorney also signed the application, explicitly acknowledging that the insurer would rely on the information in the application in deciding whether to issue the policy.

Two years earlier, the attorney had been retained to bring a personal injury suit on behalf of a woman who purportedly had received negligent obstetrical care, resulting in the death of her baby during delivery. The attorney filed suit after the statute of limitations on the client's claim had run, and the case was dismissed with prejudice. That same year, the attorney also had been retained to represent the husband of a woman who had been killed in an automobile accident allegedly due to tire tread separation. Although the attorney filed suit in a timely manner, the case ultimately was dismissed because of the attorney's failure to meet certain discovery deadlines.

Both of these former clients, after the renewal policy had been issued, asserted claims against the attorney for professional malpractice. The matters were tendered to the insurer and, in the coverage litigation that followed, the insurer took the position that it was entitled to rescind the policy based on the attorney's negative response to the question concerning knowledge of errors or omissions. The insured did not dispute that at the time he completed the application, he was aware that he had made legal errors in connection with his representation of the former clients and that the statute of limitations on any claims that they might assert had not yet run. Nevertheless, the attorney contended that his answer was not false because, in light of the fact that he had not heard from either client since their cases had been dismissed, he reasonably did not anticipate any claims.

Addressing the attorney's argument, the court first noted that California law provides for rescission of an insurance contract where there has been a material misrepresentation by the insured. Proof of an insured's intent to deceive is not required, provided that the fact at issue is material to the insurer's decision to issue the policy. In this connection, according to the court, that the application calls for specific information is usually sufficient to establish the materiality of that information as a matter of law. The court observed, however, that there was more here. Specifically, the information requested—that is, information concerning an attorney's errors and omissions—directly related to the nature of the risk for which coverage was sought. Additionally, the policy itself explicitly stated that statements in the application were deemed material and that the policy was issued in reliance on the truth of the information provided.

Next, the court rejected the notion that the applicant's subjective belief as to whether known errors and omissions might give rise to claims was dispositive. The court held that the reasonableness of that belief must be judged by an objective standard. Given the circumstances presented, including that the cases dismissed because of the attorney's admitted errors involved significant personal losses to the clients with potentially high compensatory values, that the attorney had not been provided any assurances that no malpractice claims would be forthcoming and that the statute of limitations had not yet expired on such claims, the court concluded that the applicant's purported belief was unreasonable and, thus, his answer on the application was "objectively false" as matter of law.