wiley

NEWSLETTER

Jury to Decide Whether the Policyholder's Answer on an Insurance Application Was Subjectively Truthful or a Material Misrepresentation

January 2005

In an unpublished opinion, a Kentucky intermediate appellate court has held that the jury must decide whether a policyholder honestly answered a question on an insurance application regarding knowledge of potential medical malpractice claims because the question contained a subjective component. *Lavender v. Am. Physicians Assurance Corp.*, 2004 WL 2755878 (Ky. Ct. App. Dec. 3, 2004).

Before the policyholder, a doctor and his practice, applied for a medical malpractice policy from the insurer, there were complications during the delivery of a child, which resulted in injury. In its application for insurance, the doctor answered "no" to the following question: "Have any incidents occurred in your practice (treatment results less than anticipated, complications that prolonged treatment/hospitalization, patient expressions of dissatisfaction, fee disputes, etc.), that, from your knowledge of the patient's situation, have any realistic potential of developing into a formal claim against you?" After submitting the application to the insurer's agent, the doctor received a letter from a lawyer representing the patient requesting the patient's medical records. This letter predated the insurance application, but the doctor did not receive the letter until after he submitted the application.

After the doctor released the medical records, the insurer's agent submitted the application to the insurer. The insurer requested a "no known loss letter" from the doctor, attesting to the fact that no claims had been made subsequent to the retroactive date of the policy. The retroactive date was before the doctor received the letter requesting the patient's medial records. The agent, however, only requested from the doctor a "no claim letter, " stating that no claims had been filed during this period. The doctor and his practice submitted the letter and the insurer issued the policy.

The insurer subsequently filed a declaratory judgment action seeking to rescind the policy, arguing that the doctor materially misrepresented that no claims were pending or likely at the time he submitted the application. The trial court agreed and granted summary judgment in favor of the insurer.

The intermediate appellate court found that there was an issue of fact as to whether the doctor subjectively answered the question on the insurance application honestly. Kentucky law allows rescission of a policy if the misrepresentation on an application is: "(1) material to the risk, or (2) the insurer in good faith would either not have issued the policy or would not have provided coverage with respect to the hazard resulting in the loss." The court found that the question on the application asked for the doctor's subjective belief as to whether a claim could result from a medical situation. As such, "[i]f [the doctor] honestly believed that a malpractice claim was unlikely, his negative answer to the question posed in this case is not a misrepresentation." Here, the patient was aware of the risks of this complicated delivery and stated that she did not blame the doctor for the results. Also, the doctor did not read the letter from the patient's law firm requesting her medical records. The court explained that "[i]t is the insurance company's responsibility to ask the questions on the application to which it wants answers." Here, the insurance company did not ask whether medical records in a complicated case were requested. As such, the court explained that a jury must determine whether, based on these facts, the doctor subjectively believed that a claim was likely and answered the question on the application truthfully.

The court also rejected the doctor's argument that the insurer could not rescind the policy because it did not receive a "no known loss" letter. "[T]he rule is that as between the applicant and the insurance company it is the applicant's responsibility to see that the application is correctly filled out."

For more information, please contact us at 202.719.7130.