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NEWSLETTER

Other Decisions of Note

December 2004

Failure to Disclose Potential Claim in Insurance Application Grounds for Rescission

In an unreported decision, a federal district court has held that an insurer was entitled to rescind a products liability and clinical trial liability policy where the insured failed to disclose a severe injury to one of its clinical trial participants in response to the policy's application questions regarding whether the insured had knowledge of any "circumstances that might reasonably be expected to give rise to a claim." *Fed. Ins. Co. v. Curon Med., Inc.*, 2004 WL 2418318 (N.D. Cal. Oct. 28, 2004). The undisputed evidence showed that at the time the application was prepared, the insured had knowledge of the participant's injury and that the injured participant had consulted a lawyer in connection with her injuries. Yet in its application for insurance, the insured responded "no" to the question of whether it knew of any incidents that might reasonably be expected to give rise to a claim. Citing *Casey v. Old Line Life Ins. Co. of America*, 996 F. Supp. 939, 944 (N.D. Cal. 1998), the court explained that, under California law, an insurer is entitled to rescind where (1) a misrepresentation was made on the policy application, (2) the misrepresentation was material and (3) the insured had knowledge of the misrepresentation. The court noted that there could be no question of the misrepresentation, given that the fact of the participant's serious injury and the insured's knowledge that the participant had consulted a lawyer necessarily constituted knowledge of a potential claim. The court then found the misrepresentation to be material, relying on an unrebutted affidavit from the underwriter to that effect and further noting that the application's inquiry into potential claims was sufficient in itself to establish the materiality of such information. Finally, the court found that undisputed evidence established the insured's knowledge of the misrepresentation. Accordingly, as all three *Casey* factors were established, the court determined that the insurer was entitled to rescind the policy.

Maine Court Holds that Settlement for Less Than Policy Limits Does Not Satisfy Exhaustion Requirement for Guaranty Statute

The Maine Supreme Judicial Court has held that a settlement with two underlying insurers for less than available policy limits does not satisfy the statutory requirement of exhaustion, thereby precluding recovery against the Maine Insurance Guaranty Association based on the insolvency of an excess carrier.*Jackson Brook Inst., Inc. v. Maine Ins. Guar. Ass'n,*2001 WL 2535374 (Me. Nov. 10, 2004). The applicable Maine statute requires that "[a]ny person having a claim against an insurer under any provision in an insurance policy, other than that of an insolvent insurer, which is also a covered claim, shall be required to exhaust first the person's right under the policy." The court explained that "[t]he Maine Insurance Guaranty Association [MIGA] exists for claimants of insolvent insurers who have no other source of recovery from damages and therefore [] the policy

provisions behind MIGA make it a guarantor of last resort." As such, the court held that an underlying "settlement for less than policy limits does not comply with the state's exhaustion requirement" and MIGA had no obligation to pay.

For more information, please contact us at 202.719.7130.