

District Court Denies Cross Motions for Summary Judgment Due to Issue of Fact Regarding Materiality of Misrepresentation

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The United States District Court for the Eastern District of Michigan has denied cross motions for summary judgment, holding that there was a genuine issue of fact as to whether misrepresentations made by the policyholder concerning disciplinary history in his application for professional liability insurance were material. *Chicago Ins. Co. v. Wiggins, et al.*, 2005 WL 2179384 (E.D. Mich. Sept. 9, 2005).

The insurer sought rescission of the legal malpractice policy due to alleged misrepresentations made by the policyholder in the application process. The application asked whether the applicant had ever had his legal license revoked, been subjected to disciplinary action by a state, local or national bar, or been subject to "any fine, reprimand, or criminal penalty related to performance of professional services." The policyholder answered these questions in the negative, despite the fact that he had been separately reprimanded and suspended by Attorney Discipline Board panels over criminal conduct and had consented to a reprimand by the Attorney Grievance Commission related to filing of frivolous lawsuits.

The court first noted that, under Michigan law, an insurer is entitled to declare a policy void *ab initio* when a policyholder has made material misrepresentation while applying for coverage. The policy may be rescinded even when the misrepresentation was unintentional, or bears no causal relation to any loss suffered under the policy, provided that the misrepresentation "affected the insurer's risk" and induced the offer of coverage. The court also observed that a misrepresentation is material when the misrepresentation would have caused the insurer to either reject the application or charge a higher premium for coverage.

Turning to the alleged misrepresentations, the court observed that the word "revoked" means "to annul by recalling or taking back." The policyholder answered the application question regarding past revocation in the negative. Under Michigan's disciplinary system, suspension and revocation are distinct and separate sanctions. The court therefore held that an ordinary applicant, as a lawyer, would understand the terms as having different meanings and found no misrepresentation as a matter of law.

The policyholder argued that it properly answered the application question regarding disciplinary action by local, state or national bars in the negative, as the Attorney Discipline Board is an arm of the Michigan Supreme Court and not the state bar. The court, again considering the question from the standpoint of an applicant as an "ordinary person in the particular profession," found a material issue of fact as to whether the question was properly answered in the application.

The policyholder asserted that his non-disclosure of past reprimands and fines was proper because they were not related to his "performance of professional services." The court agreed that the first reprimand, which concerned a conviction for resisting arrest and use of cocaine, was not related to professional services. The policyholder argued that the second reprimand, arising out of frivolous law suits filed by the policyholder on his own and his wife's behalf, was not related to professional services because it did involve representation of the public. The court stated that any activity typically performed by a lawyer, regardless of the client, constitutes professional services, and the policyholder therefore misrepresented his history on the application.

The court noted, however, that the question remained as to whether the misrepresentation was material. As the parties each presented competing evidence on that issue, the court denied summary judgment on both parties' motions.

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