

Underwriting Documentation Required to Prove Materiality of Misrepresentation in Rescission Action

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The federal court in Manhattan, applying New York law, recently ruled that to prevail on summary judgment in a rescission action, an insurer must provide documentary support, in the form of underwriting guidelines, manuals, or rules, for its contention that the alleged misrepresentations at issue were material. *Chicago Ins. Co. v. Kreitzer & Vogelmann, et al.*, No. 97-CIV-08619 (RWS), 2002 WL 1446622 (S.D.N.Y. July 17, 2002). In so holding, the court rejected the insurer's argument that underwriting documentation need only be supplied if available.

In completing an application for malpractice insurance, an attorney failed to disclose that he was the subject of a disciplinary proceeding and that he was aware of numerous potential claims. After the attorney sought coverage for a legal malpractice claim, the insurer filed suit seeking a declaration that the policy was void *ab initio* as a result of material misrepresentations in the application.

The court denied the insurer's initial motion for summary judgment because the insurer failed to prove as a matter of law that the misrepresentations in the application were material. The court indicated that the insurer's submission of an affidavit of the underwriter regarding materiality was insufficient and that the insurer needed to provide documentary support for its materiality claim to prevail on summary judgment. Accordingly, the insurer filed a second motion for summary judgment, submitting an affidavit of an underwriting director. The affidavit reaffirmed that the insurer would not have issued the policy had it been aware of the true facts and indicated that there were no guidelines or policies in effect regarding the issue. In fact, the affiant stated that the guidelines leave the issue to the discretion of the underwriter. The insurer argued that documentary support for an insurer's claim that a misrepresentation is material is necessary only if such proof is available. The court rejected this argument and indicated that some proof beyond conclusory statements of an underwriter is necessary to prevail on summary judgment in a rescission action.