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NEWSLETTER

# Insurer Not Entitled To Rescission As Matter of Law Based on Undisclosed Malpractice Claim Made After Application Was Submitted

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The United States District Court for the Northern District of Illinois, applying Illinois law, has held that it could not determine that a physician's failure to disclose a claim made while his application for malpractice insurance was pending was a material misrepresentation as a matter of law. *Valiant Ins. Co. v. Jawich*, 2010 WL 3894059 (N.D. Ill. Sept. 30, 2010). The court accordingly denied the insurer's motion for summary judgment in a lawsuit seeking rescission of the malpractice policy it issued to the physician.

The physician submitted a policy application that required him to disclose prior accusations or claims of professional negligence and whether he had knowledge of claims, potential claims or suits in which he might become involved in the future. He disclosed two prior claims of professional negligence. Hours after he submitted the application, the policyholder learned that he had been named as a defendant in a lawsuit alleging that he had provided negligent medical treatment to the underlying plaintiff. The physician did not notify the insurer about the suit while his policy application was pending. Subsequently, based on the physician's limited participation in the treatment of the underlying plaintiff, the plaintiff voluntarily dismissed the physician from the litigation.

The insurer's underwriting agent, which was authorized to issue physician's liability policies on the insurer's behalf, reviewed the application and issued the policy without knowledge of the new lawsuit. After the policy period began, the insurer learned about the underlying suit, agreed to provide a defense under a reservation of rights, and filed suit against the physician seeking to rescind the policy. In the rescission suit, a vice president of the underwriting agent who evaluated the application testified that she would not have approved the application if the physician had disclosed the underlying suit because that would have increased the number of negligence claims against the physician to three, an amount which the underwriting agent asserted was too great to support issuing the policy, regardless of the past claims' merit.

Based on the underwriting agent's testimony, the insurer moved for summary judgment, arguing that it was entitled to rescission as a matter of law because there was no disputed issue of material fact regarding whether the policyholder's failure to disclose the underlying suit constituted a material misrepresentation. The court denied the motion, holding that the insurer had failed to provide sufficient evidence demonstrating that

the nondisclosure materially affected the risk associated with insuring the physician. In doing so, the court explained that materiality was a question of fact for the jury unless "all would agree that [something] is or is not material." The court noted the policyholder's argument that a reasonable person would not have found that the underlying suit substantially increased the insurer's risk, given the physician's minimal involvement in the treatment of the underlying plaintiff and the plaintiff's decision to dismiss the policyholder from the lawsuit. The court also discounted the underwriting agent's testimony, stating that she merely described her criteria for binding insurance policies, did not elaborate on what part of her experience or judgment led her to formulate her "three prior claims" rule, and failed to explain why an applicant with three prior claims was more likely to pay professional negligence damages than one with only two prior claims. Accordingly, the court indicated that it could not conclude as a matter of law that all reasonable persons would determine the non-disclosure of the suit was material and denied the insurer's summary judgment motion.