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NEWSLETTER

Ohio Court Rules Insured's Application Statements Were Not Warranties and Were Insufficient to Void Policy

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An intermediate Ohio appellate court has reversed a trial court's grant of summary judgment to an insurer seeking to rescind a medical malpractice policy. *Care Risk Retention Group v. Martin*, 2010 WL 5140051 (Ohio App. Dec. 10, 2010). In doing so, the appellate court ruled that the insured's statements in the policy application-that he was not aware of any actual or potential claims or of any medical incidents-were representations and not warranties that could void the policy *ab initio*.

The insured surgeon operated on the claimant in summer 2005. The claimant developed complications and was hospitalized for 21 days following surgery rather than the usual three to five days. Following his discharge, the claimant died of a heart attack less than a month after surgery. In October and November 2005, an attorney for the deceased claimant sent two letters to the insured requesting a copy of the claimant's entire medical record. The insured did not notify his then-current insurer of the letters. He subsequently stated that he did not think that the letters were "litigation letters," and that he did not think any potential claim had any merit.

In February 2006, the insured completed an application for malpractice coverage with the insurer. In the application and in a separate application for prior acts coverage, the insured stated that he was not aware of any actual or potential claims or of any medical incidents, requests for medical records or circumstances that might result in a malpractice claim against him. The insured warranted in the application that the information provided was true and would be the basis for the policy. The policy also contained a warranty provision that the statements in the application were true and accurate.

After the policy was issued, a medical malpractice lawsuit was filed on behalf of the claimant in July 2006. The insurer provided the insured with a defense subject to a reservation of rights. After an investigation, the insurer identified two other prior incidents that had not been disclosed in the application and cancelled the policy in December 2006. The insurer then filed a declaratory judgment action for a judgment that the policy was void *ab initio* due to the insured's misrepresentations in the application. The claimant's representative intervened in the coverage action. The parties filed summary judgment motions, and the trial court granted summary judgment for the insurer, ruling that the application and policy clearly provided that any

misstatements by the insured would render the policy void.

On appeal, the court ruled that the insured's statements on the application that he was not aware of any circumstances that could lead to a claim were representations rather than warranties that could void the policy. The court explained that, under Ohio law, a misrepresentation in a warranty will void an insurance policy *ab initio*, whereas a false representation will render the policy voidable if it is fraudulently made and the fact is material to the risk. Following the decisions in *Legler v. U.S. Fidelity & Guaranty Co.*, 88 Ohio St. 336 (1913), and *Heath v. Buckeye Union Insurance Co.*, N o. L 79-009 (Ohio A pp. N ov. 9, 1979), the court ruled that, although the application and policy provisions at issue stated that they were warranties, the insured's statements that he was unaware of potential claims could not constitute a warranty as a matter of law. Specifically, the court ruled that the policy questions at issue asked for statements of personal belief or opinion that could not constitute a warranty, rather than statements of fact. The court further ruled that whether the insured made a representation in bad faith was an issue for the trier of fact to decide.