

Failure to Explain Disciplinary Actions on Application Is Material Misrepresentation

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The United States District Court for the District of New Jersey has held that an insurer stated a claim for rescission by alleging that an insured attorney had failed to disclose on a malpractice policy application past disciplinary actions in addition to circumstances that could reasonably have led to a claim. *Am. Guaranty & Liability Ins. Co. v. Mongelli*, 2006 WL 1805890 (D.N.J. June 29, 2006).

The insured attorney obtained three consecutive malpractice insurance policies between March 10, 2003, and March 10, 2006. The attorney completed an application for the first policy and thereafter signed renewal applications. A former client subsequently sued the attorney in connection with a prior representation. The insurer denied coverage for this suit and sought rescission and a declaratory judgment that the policy did not provide coverage for the suit. The attorney moved to dismiss the insurer's coverage action for failure to state a claim upon which relief may be granted.

The insurer sought rescission on two grounds. First, in response to a question on the initial policy's application, the attorney failed to explain that there were "circumstances, incidents, acts, errors or omissions which could result in a professional liability claim against the firm, any attorney of the firm, or its predecessors." Second, the attorney, in response to a separate question that asked if he had been the subject of a "reprimand, disciplinary action, or current investigation," failed to disclose that he had previously received a "Letter of Admonition" from the bar for the negligent management of client funds.

Without discussing the failure to disclose the circumstances of the prior representation, the court ruled that the Letter of Admonition was a "disciplinary action" within the meaning of the second question, and that the insurer had adequately pled that it had issued the insurance policy in reliance upon the attorney's statement in the application that there were no prior disciplinary actions. The attorney argued that the insurer failed to meet the higher pleading standards necessary for fraud-based allegations, but the court rejected this argument, noting that the insurer had sufficiently pled the misrepresentations.

With regard to a second declaratory judgment count, the court found that the insurer had insufficiently pled that there was no coverage and dismissed this count without prejudice. In pleading in the alternative that there was no coverage, the insurer merely listed the policy provisions upon which it believed coverage would be barred without explaining what those provisions meant and why they barred coverage. The court ruled this

was insufficient, and so dismissed the declaratory judgment count while granting leave to the insurer to file an amended complaint.