

**From:** Monica A. Sansalone

**Sent:** Fri 4/20/2012 11:47 AM

**Gallagher Sharp Case of Note:      Legal Malpractice Coverage Can Be Rescinded for Failure to Disclose Ethics Investigations**

On April 13, 2012, the Sixth Circuit Court of Appeals held that a malpractice insurance carrier was entitled to rescind a lawyer's insurance policy because the now-disbarred lawyer failed to disclose that he was being investigated by a bar association on his renewal application.

*Continental Casualty Company v. Law Offices of Melbourne Mills, Jr., PLLC*, 2012 U.S. App. LEXIS 7445, 2012 FED App. 0102P (6th Cir.), arose out of attorney Melbourne Mills' representation of a group of over 400 plaintiffs in a class action suit against American Home Products for alleged injuries related to the use of the drug Fen-Phen. In February 2002, Mills was informed that the Kentucky Bar Association was investigating complaints filed against him in relation to the class action, specifically with respect to the fee distributions and allegations of unauthorized practice of law for one of his non-attorney employees. In August 2003, while the Bar investigation was still ongoing, Mills applied to renew his professional liability insurance with his insurer Continental Casualty for the 2003-2004 year. Question 3 of the application asked: "Are there any claims, or acts or omissions that may reasonably be expected to be a claim against the firm, that have not been reported to the Company or that were reported during the expiring policy period?" Mills responded: "NO." Similarly, Question 4 of the application asked: "Has any attorney been disbarred, suspended, formally reprimanded or subject to any disciplinary inquiry, complaint or proceeding for any reason other than non-payment of dues during the expiring policy period?" Mills responded "NO" and stated "During the current year no attorney has been disbarred, suspended, formally reprimanded or subject to any disciplinary inquiry, complaint or proceeding. In prior years, attorneys in the Firm have responded to inquiries filed by all jurisdictions exercising jurisdiction and control over attorney conduct. There have been no adverse findings regarding any attorney or other party's conduct."

The renewal policy, which was granted for 2003-2004, contained a Dishonesty Exclusion providing that the Policy "does not apply...to any claim based upon or arising out of any dishonest, fraudulent, or criminal or malicious act or omission by an Insured except that this exclusion shall not apply to personal injury." The Exclusion further stated that Continental Casualty would provide a defense of a claim "unless or until the dishonest, fraudulent, criminal or malicious act or omission has been determined by any trial verdict, court ruling, regulatory ruling or legal admission, whether appealed or not."

In 2005, the class action plaintiffs filed a legal malpractice case against Mills and the other counsel, where it was determined that the attorneys breached their fiduciary duties to their clients, and a judgment of \$42 million was awarded to the class action plaintiffs. Continental Casualty provided a defense for Mills in the legal malpractice case, but reserved its right to rescind the policy.

Continental Casualty subsequently filed suit against Mills, seeking a declaration that it was entitled to rescind the insurance policy for the 2003-2004 year because of the misrepresentations in the renewal application. The Eastern District of Kentucky Court granted summary judgment in favor of Continental Casualty, finding that Mills' application included material misrepresentations and omissions regarding the ongoing Bar Association inquiries. The Sixth Circuit Court of Appeals affirmed the trial court's grant of summary judgment, holding that Continental Casualty was entitled to rescind its 2003-2004 policy, both under the Kentucky Revised Code and the terms of Dishonesty Exclusion, because Mills' responses to Questions 3 and 4 of the application constituted material misrepresentations. The Court explained that at the time Mills completed the application, he knew that the Bar Association was investigating him. He also knew that per the fee agreements in the class action, he was not entitled to the fees that he took, and therefore was aware that his conduct could reasonably be expected to lead to a claim against him or his firm. The Court noted that regardless of whether Continental Casualty provided evidence that it would not have issued the policy or would have issued it with different terms had Mills answered the questions truthfully, which it provided in this case, it was proper to determine that the statute permitted Continental Casualty to rescind its policy because a determination that a misrepresentation is material can be made "solely on the basis of commonsense assumptions regarding what would have an impact on the decision making process of a reasonable insurance company." With respect to the policy exclusion, the Court explained that although an insurance policy should be construed liberally and doubts should be resolved in favor of the insureds, the clear policy terms must be interpreted according to their "plain and ordinary meaning." The Court determined the plain and ordinary meaning of the exclusion showed that the policy did not include acts that were objectively fraudulent or dishonest, which they were in this case. As the Kentucky Supreme Court, in barring Mills from the practice of law, determined that Mills had committed dishonest and fraudulent acts or omissions, the policy language dictated that coverage is barred.

A link to the opinion can be found at: <http://www.ca6.uscourts.gov/opinions.pdf/12a0102p-06.pdf>

If you have any questions contact:

Monica A. Sansalone  
Professional Liability Practice Group Manager  
Jamie A. Price  
Gallagher Sharp  
Sixth Floor, Bulkley Bldg.  
1501 Euclid Avenue  
Cleveland, OH 44115  
Phone: (216) 241-5310  
[msansalone@gallaghersharp.com](mailto:msansalone@gallaghersharp.com)  
[jprice@gallaghersharp.com](mailto:jprice@gallaghersharp.com)  
[www.gallaghersharp.com](http://www.gallaghersharp.com)