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Insurance Agents Liable for Submitting Application With Incorrect Information That Client Signed Without Reading

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The Tennessee Supreme Court, in a case of first impression, recently held that insurance agents may be held liable to insureds for breach of contract for failure to procure an incontestable life insurance policy due to the wrongful conduct of the agent in submitting an application containing incorrect material information. *Morrison v. Allen,* 2011 WL 536593 (Tenn. Feb. 16, 2011). It was admitted that the insureds did not read the application before signing it.

Plaintiff wife and her husband agreed to a recommendation from defendant insurance agents/financial planners that they obtain a $1 million life insurance policy on the husband to be issued by defendant life insurance company. The husband already had a $300,000 life insurance policy that had become incontestable prior to the time he was convicted of a DWI. A first agent prepared an application which answered a question in the negative as to whether the proposed insured had been charged with or convicted of DWI or any driving violations during the past five years. The first agent then mailed the application to the wife and her husband for signature. The wife and her husband signed the applications without reading them. The insurance company sent a nurse to the wife's residence to conduct a physical examination of the husband and filled out a form which had the question: "During the past five years have you had a moving violation or your driver's licensed restricted, suspended or revoked?" Despite the fact that the husband answered "yes" to this question, the insurance company issued the policy and the wife and her husband allowed the husband's pre-existing policy to lapse.

The husband died in a one-car motor vehicle accident two months later. The insurance company subsequently denied coverage based on the false answer provided by the agents in the insurance application. The wife sued the insurance company for breach of contract, violation of the Tennessee Consumer Protection Act (TCPA) and negligence. She also asserted claims against the insurance agents and their employer for breach of contract, breach of fiduciary duty, negligence, negligent misrepresentation and violation of the TCPA.

The insurance company settled for $900,000 and the wife proceeded with a bench trial on the claims against the insurance agents and their employer. The trial court found that defendants had breached their contract by failing to procure an incontestable insurance policy and awarded $1 million in damages

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plus prejudgment interest. The trial court also held that the insurance agents and their employer were liable in tort for $300,000, the lapsed pre-existing life insurance policy's face value. The trial court doubled that award based on a finding that defendants had violated the TCPA and there was no comparative fault on the part of the wife or the insurance company.

The Supreme Court held that a cause of action for failure to procure insurance may arise where the insurer denies coverage on a policy that is still contestable as a result of the agent's acts or omissions. The Court found no distinction between an agent's procurement of coverage that is incontestable by the insurer and his or her failure to procure insurance coverage at all.

The Court determined that the wife's claim was actionable notwithstanding her admission that she and her husband had not read the insurance application provided by the agent. The Court observed that while the best practice is to always read every word of every document before signing, the failure to read did not insulate the agents from a suit based upon the procurement of an incontestable policy. An agent's duty to procure an insurance policy is distinct from the insurer's duty to pay under its policy and gives an insured a right to bring an independent cause of action.

The Court rejected arguments that an agent can be negligent in filling out an insurance application and yet be shielded from any liability by the applicant's signature. The agents argued that the husband's failure to proofread his application interfered with their ability to perform their own contractual obligations. The Court responded that insurance professionals, like other fiduciaries, are held to a higher standard. Accordingly, the Court determined that it was the agents' failure to ask the husband about his driving history that was the core concern. The agents were employed by the wife and her husband for their expertise and could not now claim any greater duty on their clients' part to anticipate and rectify their errors. The Court found that the agents never asked the husband about the information requested in the question on prior DWIs and did not review the application with the husband before signing. The Court agreed that had the husband been asked his driving record, he would have answered truthfully as he had done to the nurse's question concerning prior driving offenses. Further, the Court pointed out that the first agent had answered other questions in the application inaccurately, even though he knew the correct answers. Based on this record, the Court affirmed the $1 million judgment against the agents and the award of prejudgment interest.

The Supreme Court also held that the insurance agents were not entitled to a setoff for the wife's settlement with the insurance company based on the rationale that the prior settlement was for all claims, including torts and violations of the TCPA and thus were not entitled to a setoff for the breach of contract award. Finally, the Court reversed the $300,000 judgment against the insurance agents on the lapsed policy because the wife failed to establish that the agents' advice had caused her and her husband to let the preexisting policy lapse. The Court found it unreasonable to assume that the wife and her husband would have paid to keep both polices in effect for two years until the new policy was incontestable.

Practice Note

This opinion is part of a recent trend whereby courts have held that an insurance agent may be liable for negligently filling out applications that the insured reviewed and signed before submission. When an insured sues his or her insurance agent for negligently filling out the application, the courts will compare the negligence of the insured who fails to review the application before he signs it with that of the agent who fills it out and submits it to the insurer. This trend is consistent with the general rule that insurance agents are professionals who are required to use due care in procuring insurance coverage.

For further information, please contact your regular Hinshaw attorney.

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