



Order Disbarring is Adequate Grounds to Preclude Professional Malpractice Liability Coverage

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The Sixth Circuit Court of Appeals ruled recently that the “May 20, 2010 Order of the Kentucky Supreme Court disbaring [Melbourne] Mills from the practice of law is sufficient basis for precluding coverage under [professional liability] policy’s dishonesty exclusion.” *Continental Casualty Company v. Law Offices of Melbourne Mills, Jr., PLLC*, Case No. 10-5813. In this case, Continental sought a judicial declaration that it was entitled to rescind Mill’s malpractice liability policy in part under the policy’s dishonesty exclusion. This exclusion bars coverage for any claim arising out of a “dishonest, fraudulent, or . . . malicious act or omission.”

The Court found that Mill’s answers to his August 2003 application to renew his professional liability policy were false. Mills answered “no” to the question “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?” At that time, however, he was aware of a pending KBA investigation, and his attorney had the previous year attended a KBA Inquiry Commission hearing related to Mill’s involvement in the so-called “Fen Phen” litigation. Because Mills knew of the bar complaint, the trial court concluded that this answer constituted a material misrepresentation.

The Court also relied upon KRS 304.14-110, which states that a misrepresentation will bar coverage if “[t]he insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate . . . if the true facts had been made known to the insurer as required . . . by the application for the policy.”

Mills and the intervening class action plaintiffs relied upon *Cont’l Cas. Co. v. Lampe & Hamblin, PLLC*, No. 3:03CV604-H, 2004 WL 5708261, to argue that malpractice coverage shares the same public interest mandate as automobile insurance, and that such mandate “outweighs any right of an insurer to rescind an insurance contract.” *Id* at *3. The Court considered, but rejected this argument. As well, it found because Mills had not raised it at the district court level, it could not be considered on appeal.

In its conclusion, the Court took judicial notice of the Kentucky Supreme Court’s ruling disbaring Mills, and admitted that ruling under the public records exception to the hearsay rule, Fed. R. Evid. 803(8). The Court found this ruling a “sufficient basis” to preclude coverage.