

EQBL LEGAL REPORT

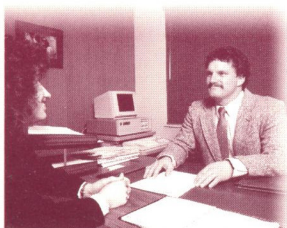
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Insurance applications require careful attention

by MEGAN G. HEEG

Obtaining a life insurance policy and paying all the premiums on time is not enough to guarantee that insurance proceeds will be paid upon an insured's death. Another prerequisite is an accurate application for life insurance.



An application for life insurance generally includes questions about an applicant's current and past medical condition. If the answers to these questions are inaccurate and/or incomplete (what the law deems "material misrepresentations"), the insurance company can later use these misrepresentations to void the policy.

Most beneficiaries find this practice unfair, especially if the insurance company accepted premiums for a number of years or if the insured died from a medical condition unrelated to the one not disclosed in the policy application.

Under Illinois law, however, these facts do not matter. Instead, what matters is whether the application contained a material misrepresentation at the time it was submitted to the insurance company. If it did, the company can void the policy. Of course, the company will be required to refund the premiums

previously paid, but this amount usually will be much smaller than the voided death benefit.

In Illinois, insurance companies:

- can void a policy for any material misrepresentation, even if the misrepresentation was made in good faith or by mistake;
- can void a policy on the ground of material misrepresentation even after the insured has died;
- are not required to investigate the truthfulness of an application when it is submitted and instead can wait until a claim is made before investigating whether the application contained material misrepresentations; and
- can void a policy even if the insured died from something unrelated to the applicant's misrepresentations. In one reported case, for example, a company was permitted to void a policy for the insured's failure to disclose an ulcer, even though the insured died from coronary thrombosis. In another case, the policy of an insured killed in an auto accident was voided because the insured had not disclosed a prior mental illness.

The insurance company might be able to void the policy even though the application was completed by the insurance agent.

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Employers can solve the light duty riddle

by Douglas E. Lee

In workers' compensation cases, one of the least understood concepts is light duty. As a result, most employers dread hearing those words. When employers understand their rights and responsibilities, however, they can confidently determine when light duty assignments are appropriate.

Light duty is most often urged by workers' compensation insurers, which are eager to return recovering employees to work, and injured employees, who desire to earn more than they receive under workers' compensation. Employers, however, frequently are reluctant to "create" unnecessary positions, especially when the availability of light duty discourages employees from diligently returning to their former duties.

Under the Illinois Workers' Compensation Act, an employer is required only to pay the injured employee's medical expenses and to provide Total Temporary Disability ("TTD") payments.

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Commentary: Not everything should be a crime

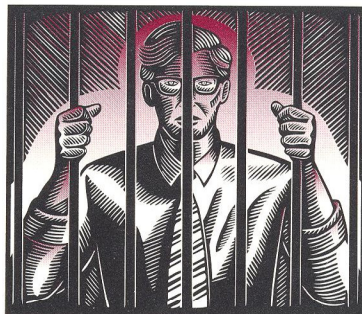
by Rolfe EHRMANN

There is the joke about Moses coming down the mountain with the Ten Commandments saying, "You realize this will inevitably lead to the creation of a legal profession." As everyone knows, since the days of just ten commandments, the legal profession has had to deal with an ever-increasing body of law in our increasingly complicated society.

Far from being a necessary evil, many of these laws are essential to the orderly operation of a free society and to the preservation of justice. For instance, in family law, one of my areas of practice, many laws exist to govern property rights, support obligations and custody issues. These laws allow people to solve disputes in an orderly and just manner.

A problem arises, however, when a new law is passed not to obtain sound public policy but to please constituencies. This problem is compounded when the new law is a criminal statute. In criminal law, another of my areas of practice, 117 new criminal provisions became effective in the last half of 1999 alone. These cover many "hot" topics, from making deaths caused by drunk driving the equivalent to a form of murder to again enhancing the penalties for drug crimes. Many of these are arguably appropriate as social policy. As an attorney, however, I am concerned that we now are criminalizing many areas of conduct that never before have been thought of as criminal.

In family law, for example, the failure to pay either child support or alimony was formerly a purely civil matter. Civil matters are prosecuted by the person injured and usually result in a combination of money damages, an injunction to stop the offending conduct and other appropriate remedies. But the failure to pay either child support or alimony is now a crime.



Someone convicted of this crime can be sentenced to up to one year in jail for the first offense and up to three years in a penitentiary for a second offense. While this might seem to be a positive reform in an era of "deadbeat dads," my experience is that criminalizing civil disputes does not solve them.

Placing civil disputes in criminal court creates two significant problems. First, the aggrieved party loses control of the case. In civil cases, the injured party files the lawsuit and decides what

the remedy should be. In some cases, the struggling mother just wants the money to which she is entitled. She has no desire to have her children see their dad put in jail. The primary criminal penalty, however, is incarceration. The alternative of a fine puts money in the hands of the State, not the victim. To make matters worse, control of a criminal case rests only with the State's Attorney. A prosecutor may be responsive to the victim but cannot constitutionally be required to follow the victim's wishes. Just as in domestic violence matters, an area of family law previously criminalized, victims may end up complaining more about the system than the deadbeat dad.

Second, what of those cases in which the alleged deadbeat dad is innocent? In civil matters, the cost of the attorney can be passed onto the wrongdoer, and attorney fees themselves are a disincentive to false charges. The criminal process, however, is free to the alleged victim but very expensive to the defendant, who has no recourse even if he is found innocent.

Because freedom and justice suffer when new criminal laws are not grounded in sound policy, our legislators must resist their constituents' calls to criminalize more and more conduct.



Insurance applications. . .

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not the insured. Because it is common for agents to complete applications for insureds, courts have determined that policies can be voided in these circumstances if the applicant:

- acted in bad faith, either on his own or in collusion with the agent;
- knew the agent would not include medical information requested in the application; or

- failed to disclose medical information in response to the insurance company's written request that the applicant confirm the insurance agent's application.

Because life insurance companies have the right to void policies, an insurance applicant should always review the accuracy of the application before it is submitted. For policies currently in force, an insured can ask to review the application that was completed when the policy was obtained. If the insured finds any misrepresentation that could be deemed "material," the insured should meet with his agent to determine whether to file an amended application or to apply for a new policy.



New home repair law requires written contracts

by MEGAN G. HEEG

Both contractors and homeowners should be aware of Illinois' Home Repair and Remodeling Act, which imposes new requirements on those in the home repair and remodeling business.

The Act, which took effect Jan. 1, 2000, applies to home repairs and remodeling costing \$500 or more. The Act establishes three major requirements:

- If the cost of the work is over \$1,000, the homeowner, before the work is initiated, must sign an itemized home repair contract.
- The contractor must provide the homeowner with a "Home Repair: Know Your Consumer Rights" pamphlet. If the cost of the repair is over \$1,000, the homeowner and contractor must sign a written acknowledgment that the pamphlet was given to the owner before the owner signed the contract. If the cost is \$1,000 or less, the pamphlet must be given to the homeowner but no written

acknowledgment of receipt is required.

- Unless the contractor's net worth is \$1,000,000 or more, the contractor must maintain public liability and property damage insurance in the amount of \$100,000 per person and \$300,000 per occurrence for bodily injury, \$50,000 per occurrence for property damage and \$10,000 per occurrence for home repair or remodeling not completed in conformance with applicable codes.

If the contractor violates the Act, it can be fined up to \$50,000, with additional penalties of \$50,000 per violation if, for example, the homeowner is 65 years of age or older. The contractor's license or certificate to do business in Illinois also can be revoked or suspended.

What constitutes "home repair and remodeling" will be the subject of future



court cases. The statute defines home repair and remodeling to mean the "fixing, replacing, altering, converting, modernizing, improving, or making an addition to real property primarily designed or used as a residence." Thereafter,

the Act lists specific actions that do or do not constitute home repair and remodeling, but this list only clouds the definition. For example, installation or replacement of central air conditioning, central heating, boilers and furnaces falls within the Act, but installation of carpeting or the repair of hot water heaters "or other appliances if the repairer is an employee or agent of the merchant that sold the appliance or sold new products of the same type," does not.

Until these and other issues surrounding the Act are clarified, contractors should be careful to comply with the new law.



Light duty . . .

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An injured person receiving TTD is in legal limbo. By definition, the person is unable to work. That person, however, also has the right to be protected against a discharge motivated by his or her filing for workers' compensation benefits. Whether an injured person remains an employee therefore depends upon the employer's policies and whether the person has rights under the federal Family and Medical Leave Act ("FMLA").

In Illinois, an employer can legally terminate an injured employee for excessive absenteeism, even if the absences result from a work injury. An employer also can terminate an employee who is medically unable to work, provided that a reasonable accommodation under the

Americans with Disabilities Act ("ADA") would not enable the employee to perform the work. Illinois courts also have held that an employer is not required to find a new job for an employee who is physically unable to perform his or her original one. Employers therefore are not required to create light duty jobs for injured employees.

Employers not covered by the FMLA (those that employ fewer than 50 persons) thus do not need to "hold" positions or continue health insurance. Employers covered by the FMLA, however, must protect the positions of eligible employees and continue their health insurance during any family and medical leave. Under the FMLA, an employer can fill an employee's position only if "necessary to prevent substantial and grievous

economic injury to the operations of the employer."

Because of all the protections afforded injured employees by the Workers' Compensation Act, the FMLA and the ADA, employers need to be especially careful not to discriminate against injured workers. The best way to guard against discrimination claims is to adopt a family and medical leave policy and to apply it consistently to all employees seeking an extended medical leave, whether it be for a work injury, a non-work injury or a pregnancy. For larger employers, this policy likely would mirror the FMLA. In addition, larger employers should consider adding policies dealing with light duty and position and benefits protection after FMLA leave expires.



Can murderers obtain liability insurance coverage?

by GARY R. GEHLBACH

From the truth-is-stranger-than-fiction category comes this case from DeWitt County, Illinois, which establishes that the estate of a murder victim usually cannot collect from the murderer's homeowner's insurance company.

In this case, Ronald Sturgeon found himself involved in an altercation in a local tavern. Dibs over a particular barstool being the provocative agent (it's always something important that leads to a fight), Sturgeon ended up stabbing Art Fornshell, who succumbed. Sturgeon, protesting that

he didn't intend to kill Fornshell (just to have stabbed him, apparently), was nonetheless convicted of first degree murder.

Fornshell's parents sued Sturgeon for wrongful death. Sturgeon submitted the claim to his homeowner's insurer, Lincoln Logan, which filed a separate lawsuit to determine whether first degree murder was covered under its policy, which excluded coverage for intentional acts.

Justice prevailed for Lincoln Logan. The trial court as well as the appellate court found that Sturgeon had indeed committed an intentional act. After weighing whether

a criminal should be able to profit from his wrongdoing (that is, whether coverage should be afforded for Sturgeon) against the public policy favoring compensation to victims, the appellate court came down on the side of the insurance company.

Interestingly, however, the appellate court held that Lincoln Logan's policy did not clearly exclude coverage for all intentional acts. Rather, the court said, coverage might be available if, although the act was intentional, the injury or damage was not intended. In Sturgeon's case, however, at least some injury was intended, so his actions fell outside the policy.



In Print and At the Podium

Mr. Lee recently was a featured guest on "Justice Talking," a radio series that looks in-depth at controversial legal issues. The program, which was taped at Carpenter's Hall in Philadelphia, explored the extent to which the First Amendment protects hate speech, particularly the racist speech espoused by Matthew Hale and his World Church of the Creator. "Justice Talking" is taped in a debate-type format, with legal experts on each side of an issue debating each other and answering questions from the audience. **Mr. Lee**, who argued that the First Amendment protects even offensive speech, was opposed by Mary Ellen Gale, a professor from Whittier Law School in California. The 90-minute debate will be edited to 60 minutes and then distributed for broadcast. "Justice Talking" currently is broadcast on more than 65 radio stations across the country . . . **Mr. Gehlbach** has been re-appointed by the President of the Illinois State Bar Association to the

Association's Real Estate Law Section Council. **Mr. Gehlbach** is a former Chair of that organization and for 11 years served as editor or associate editor of the organization's newsletter . . . **Mrs. Heeg** authored an article in the April-May issue of the LAUTUM News, a publication of the Illinois Association of Mutual Insurance Companies. The article analyzed a recent Illinois appellate court opinion outlining the procedure farm mutual companies should use when canceling an insurance policy . . . **Mr. Lee's** most recent commentary for the web site of The Freedom Forum First Amendment Center (www.freedomforum.org/first/welcome.asp) concerned the important role played by the First Amendment in the government's handling of the Elian Gonzales affair . . . **Mr. Gehlbach** recently spoke to the Lee County Area Association of REALTORS® regarding income tax aspects of sales of personal residences and tax-deferred exchanges.



Deals and Decisions

Mr. Lee successfully challenged a fringe benefit fund's audit of a client. As a result of the challenge, the fund not only dropped its claim for more than \$25,000 in allegedly unpaid benefits but also agreed to refund more than \$10,000 in contributions that should not have been charged . . . **Mr. Gehlbach** recently negotiated an audit of a federal estate tax return, which resulted in a refund to the estate of approximately \$11,000 . . . **Mr. Lee** represented a client charged with unlawful racial discrimination before the Illinois Department of Human Rights and obtained a dismissal of the charge after the fact-finding conference . . . **Mr. Ehrmann** recently was appointed counsel for the

Village of Franklin Grove. **Mr. Ehrmann** also is counsel to the City of Amboy . . . **Mrs. Heeg** continues to advise rental property owners regarding the laws applicable to landlords and continues to represent these clients in eviction and collection actions . . . **Mr. Gehlbach** and **Mr. Badger** are representing clients forming Illinois Limited Liability Companies . . . **Mr. Lee** recently represented clients who, through a corporate redemption, became majority owners in an ongoing business . . . **Mr. Lee** recently assisted a client in terminating a dealer representation agreement and avoiding a covenant not to compete.