"HOW FAR MUST AN ATTORNEY GO TO DETECT MISREPRESENTATION?"

by Elliot H. Gourvitz

A COMMON field of inquiry in any divorce action where an insurance policy is part of the divorce judgment is the amount of life insurance that the payor maintains on his/her life, the policy's cash surrender value, if any, and the policy's beneficiaries. The answers to such questions are revealed in various forms of discovery, including answers to interrogatories and statements in matrimonial case information statements. For example, a regular part of a pendente lite application asks for either the continuance of existing life insurance coverage, or the establishment of same in order to insure the payment of support.

Of critical importance and national concern, however is the problem encountered by the policy's beneficiary/payee when a material misrepresentation is discovered, and the policy rescinded. The issue then becomes, how much should the payee's attorney rely on the information given to him, and then how far must he go in order to insure compliance, protect his clients and guard himself against future accusations of malpractice?

The New Jersey Supreme Court addressed this issue in *Menichelli v. Massachusetts General Life Insurance Co.*, 152 N.J.194, 704 A.2d 546 (1997), where it held that a policyholder's material misrepresentation in his life insurance application was sufficient grounds to rescind the policy. The case arose out of a divorce situation where the insured husband had to secure a $100,000 policy on his life for the benefit of his child support obligation.

Although the beneficiary did not dispute the fact that there was a misrepresentation as to whether the insured smoked, she argued that there should have been an exception to the rule of rescissions because the insurance policy was ordered as part of a divorce judgment.

Formerly, New Jersey courts had allowed rescission of policies if the material misrepresentation was made within a two-year contestability period. In *Massachusetts Mutual Life Insurance Co. v. Manzo*, 122 N.J. 104, 584 A.2d 190 (1991), for example, the court held that if there is a misrepresentation that materially affects a carrier's acceptance of risk, it would entitle the carrier to rescind an insurance policy, rather than merely recover the difference between the premium the insured would have paid but for the misrepresentation, and the premium actually paid.

In *Menichelli*, the appellate division, in its unreported decision, noted that life insurance requirements are a common element of divorce judgments where child support or alimony are provided during the lifetime of the parties. Nevertheless, the exception that the widow in that case sought would create a disincentive to honesty and truthfulness on

the part of matrimonial litigants who are required to obtain life insurance. The appellate division accepted this rationale and would not make an exception, reasoning that then applicants could gamble that they would live until the policy became incontestible, risking only that their estates would bear the extra premiums required to cover the higher rating costs in the event that the insurance company discovered a material misrepresentation within the period of contestability.

The question then arises: What increased obligation and onus What is most disturbing about the supreme court's decision is not the decision itself, but rather the dicta at the end of the decision wherein the supreme court encouraged "family practitioners and family court judges to examine closely the circumstances under which matrimonial litigants use life insurance policies to secure the payment of support. A court may consider including in such decree a provision that a party benefited by such a policy be furnished with a copy of the policy and the application as a means of detecting misrepresentation."

should be placed upon an attorney who represents a dependant spouse and her children in a divorce litigation?

It would seem that establishing proof that the life insurance policy is in full force and effect, and that the beneficiaries have not been changed from the spouse and the children, is not enough. It would seem that inquiry must also be made, and notice given, of any lapsed premiums, that copies of the original application be secured, and that all representations contained therein be verified independently.

In our litigious society, representations by either clients or adversaries cannot be taken at face value and every statement must be checked for its veracity. Are the car payments and mortgage payments really being made, or are they in default? Are the income tax returns presented genuine, or are releases necessary to receive verified copies directly from the Internal Revenue Service? Are deeds to be trusted, or should there be a title search? The list can go on and on, and the responsibilities of the attorney become more and more burdensome.

The court in *Menichelli* also stated that it realized that a former spouse may not have any way of knowing about the validity of these misrepresentations, and left it to future litigants and the insurance industry to determine whether and which options are plausible. What the court also did, however, was to increase the burden upon the attorney to make exhaustive inquiry, the cost of which to the client could be astronomical, but without which the attorney may be subjecting himself to liability and his client may lose his insurance proceeds.