

**Authors**

Gregory T. Casamento  
212-812-8325  
[gcasamento@lockelord.com](mailto:gcasamento@lockelord.com)

Brian T. Casey  
404-870-4638  
[bcasey@lockelord.com](mailto:bcasey@lockelord.com)

Patrick J. Hatfield  
404-870-4643  
[phatfield@lockelord.com](mailto:phatfield@lockelord.com)

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## It's About Time

*Finally a Case on the Enforceability of an e-Signature on an Application for Insurance - Long v. Time Insurance Corp.*

For insurers anxiously awaiting a reasoned opinion from a court enforcing the use of an electronic signature on applications for insurance, the wait is finally over. In a recent case involving an application for individual medical insurance<sup>1</sup>, the court held in favor of the insurer on its motion for summary judgment based on the insured's false answer to a medical question on the application. That the case was resolved on a motion for summary judgment may be encouraging to insurers that have a reasonably well-designed e-sign and e-contracting process as well as those working to implement such a process or considering one.

The case also is interesting in what was not raised by the insured. Notably, the insured appears not to have challenged the integrity or admissibility of certain e-records relating to the application signature process. As discussed below, insurers also should design their e-sign processes to meet the admissibility challenge because of the risks associated with the failure to have electronic records admitted into evidence.

### The Facts

The insured applied for and was issued a short-term medical insurance policy. The producer (or the producer's assistant) prepared the electronic insurance application, based on the verbal answers provided by the insured. The insured was asked to review and approve the information in the application, followed by a request to permit the insured's electronic signature to be affixed to the application. In the presence of the insured, the producer's assistant typed the insured's name on the signature line, as she was authorized by the insured to do. The record is clear that the insured reviewed the completed application before the signature process was completed.

Directly above the insured's electronic signature, was the following: "The undersigned applicant and the agent acknowledge...that the applicant has read, or has had read to him, the completed application. The applicant realizes that any false statement or misrepresentation in the application may result in claim denial or contract rescission..."

The policy was issued based on an application dated March 1, 2004. In August of 2004, the insured underwent surgery for a heart condition and later submitted a claim under the policy for the medical expenses. The insurer denied coverage, after finding that insured had been treated for a heart condition within the five years prior to applying for the insurance. The insured failed to disclose that prior

treatment, despite being asked about any prior treatment on the insurance application.

### The Decisions

The insured (actually, the estate of the insured) made a number of tort, or extra-contractual, claims, including filing a complaint with the Ohio Department of Insurance, all of which were denied by the Department and the court. Among the court's holdings under Ohio law are the following:

- "An individual will be viewed as having ratified the answers on an insurance application if the individual signs the application."
- "Furthermore, an insurance applicant's signature and assent that the statements contained in the application are correct serves, as a matter of law, as his adoption of the statements notwithstanding a claimed failure to review the application."
- "Having signed the application, the individual adopts and ratifies all statements appearing above the signature regardless of whether he specifically provided answers."
- "Similarly, once the insurance policy is issued and has been accepted by the insured, he is presumed to know the policy's contents and is bound by its terms."
- "In the event an insured provides a correct answer to the agent who records a false answer without the insured's knowledge, the insured has a duty to report the falsity upon discovery."
- "As applied here, even if [the producer's assistant] incorrectly typed "No" in response to [the medical question in controversy], [the insured] ratified that false statement by authorizing his signature and accepting the Policy as issued."

### Application of Locke Lord's Six Point Framework<sup>2</sup>

#### That's not my signature

The opinion suggests that the insured may have made some arguments that the insured did not actually sign the March 2004 application in question, as a way to repudiate his false answer on the application. The court notes that the insured offered no explanation of how he received the policy if he did not sign the March 2004 application. The implication being that in the absence of the insured signing the application, there would not

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have been any policy and thus no coverage. This is consistent with our Six Point Framework for analyzing the risks associated with electronically signed applications for insurance. The insured who contends that he did not sign the application containing the false information simultaneously must argue that he never applied for coverage, therefore there is no coverage, unless the insured can offer a substitute application attached to the policy issued. Such an approach could shift the burden of proof to the insured.

### That's not what I signed

There seems to have been no challenge in this case that the electronic record of the application may have been altered after it was signed. This type of challenge is also in our Six Point Framework for analyzing the risks of an e-process. The opinion does not address the fact that the policy application was most likely attached to the policy sent to the insured, when the insured has yet another opportunity, and perhaps a duty, to review the application and report any inaccuracies. This provides the insurer with additional defenses, as referenced in passing by the court. The court did focus primarily on the duty of the applicant to read the application before signing it.

### That's not admissible

Similar to not claiming that the application may have been altered after it was signed, the insured seems not to have challenged the admissibility, and specifically the authenticity, of the insurer's electronic evidence - the electronic policy application. This is surprising given the widely reported and discussed decision of *Lorraine v. Markel* in which the court denied summary judgment to the parties on the basis of their failure to properly lay the evidentiary foundation for the admission of electronically stored information and specifically set forth the admissibility requirements of such evidence. Similarly, *In re Vin Vinhee*, provides another example of where a proffering party's failure to accurately authenticate its own electronic records, even when given the opportunity to present post trial affidavits, barred the admission of that evidence.<sup>3</sup> Such an admissibility challenge, if it had been raised, may have created enough of a question of fact to prevent the court from granting summary judgment for the insurer. This, in turn, could have led the court to let the case go to trial, thereby changing the settlement value of the case. The insurer may have been able to prevail nevertheless because what may matter most are the answers in the application attached to the policy delivered to the insured.

See also our *Client Alert* on the *Markel* case, which provides a thorough review of how to satisfy the admissibility standards for electronic records. The

*Markel* case may also be a guide on how to challenge the admissibility of electronic records.

### Conclusion

On one hand, some insurers may be relieved to know there is now a case on point as to the use of electronic signatures in the new business process where the insurer seeks to have the right to rescind or deny coverage if insurance application answers are wrong. On the other hand, insurers may want to hold off on the "high-fives" because the insured in this instance may have missed some opportunities to challenge the evidence, even if only to survive a motion for summary judgment to change the settlement value of a claim.

For more information about the Six Point Framework, the admissibility and enforceability of electronically created and stored information and additional information on our e-Matters practice, [click here](#) or contact any of the authors.

### End Notes

- <sup>1</sup> *Long v. Time Insurance Co.*, 572 F. Supp. 2d 907, 2008 U.S. Dist. LEXIS 79212.
- <sup>2</sup> Locke Lord's Six Point Framework assists clients in analyzing the six risks associated with an e-sign process: (1) Authentication Risk; (2) Repudiation Risk; (3) Admissibility Risk; (4) Compliance Risk; (5) Adoption Risk; and (6) Relative Risk.
- <sup>3</sup> 336 B.R. 437 (B.A.P. 9th 2005).

### About the Authors

Gregory T. Casamento is a partner in the New York office of LLB&L. Greg's practice focuses on business, commercial, insurance and intellectual property litigation. He has significant experience litigating matters for his clients before both the State and Federal courts of New York, and before a variety of New York state administrative bodies. His experience includes advising clients on a review of their e-process systems to ensure those systems create admissible and enforceable e-signatures, e-contracts and e-records.

Brian T. Casey is a partner in LLB&L's Atlanta office. He focuses on corporate, merger & acquisition, corporate and structured finance and other transactional, and regulatory matters for corporate clients in the insurance, financial services and health care industries.

Patrick J. Hatfield is a partner in LL&BL's Corporate Department in the Atlanta office and co-chairs the Firm's Technology Transactions Group. Mr. Hatfield focuses on financial services and intellectual property and technology.