

Third Circuit Holds Policyholder Not Entitled to Discovery Regarding Intent and Drafting History of Policy Exclusion

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In an unpublished opinion, the United States Court of Appeals for the Third Circuit, applying New Jersey and Illinois law, has held that a policyholder is not entitled to discovery regarding the intent and drafting history of a financial institution endorsement (FIE) included in umbrella policies. *Westchester Fire Ins. Co. v. Household Int'l, Inc.*, 2006 WL 228589 (3d Cir. Jan. 31, 2006).

The policyholder provided private label credit card accounts and was sued by numerous consumers alleging that salesmen and distributors swindled them in connection with the sale of certain products. In a prior action, the Third Circuit had affirmed a district court ruling that the FIE was unambiguous and precluded coverage for the underlying actions. In this subsequent action, the policyholder sought discovery from the insurer on (1) the intent, drafting and meaning of the FIE in general and (2) the insurer's intent with respect to the inclusion of the FIE in the policies at issue. The Third Circuit held that the policyholder was not entitled to any of the discovery.

With respect to the first category of information sought, the court concluded that "Policyholders are simply attempting to relitigate our prior determination that the FIE unambiguously excludes this type of coverage" and held that "Policyholders cannot circumvent our prior ruling by contending that Westchester did not understand the plain meaning of a policy provision it drafted."

With respect to the second category of information, the Third Circuit held that the policyholder was not entitled to the information to prove fraudulent misrepresentation since it could not establish the other elements of such a claim. The court reasoned that the insurer did not make any representation as to the scope of the policy, rejected the policyholder's attempt to invoke a "tacit representation," and concluded that even if a representation could be shown, a fraud claim would founder through lack of reliance because of the plain language of the FIE. In this regard, the Third Circuit stated that "[c]ontrary to the Policyholders' suggestion, the Policies are not contracts of adhesion" because the policyholders "are large and sophisticated business entities that used professional insurance brokers to negotiate the specific terms of the Policies." The court concluded that "as a matter of law, it would be unreasonable for Policyholders to rely on an alleged tacit

misrepresentation when the lack of coverage is apparent from the face of the Policy."