wiley

NEWSLETTER

Ninth Circuit: Insurer Entitled to Rescind Based on Insured's Failure to Disclose Prior Claims

November 2008

The United States Court of Appeals for the Ninth Circuit, applying California law in an unpublished decision, has held that an insurer was entitled to rescind two consecutive employment practice liability policies where the insured failed to disclose two earlier harassment and discrimination claims against it. *Admiral Ins. Co. v. Debber*, 2008 WL 4429527 (9th Cir. Sept. 26, 2008).

The application for the first policy—the 2002 policy—asked whether "[i]n the last 5 years . . . any current or former Employee or third party made any Claim, or otherwise alleged discrimination, harassment, wrongful discharge and/or Wrongful Employment Act(s) against the Insured Entity or its directors, officers, or Employees. " The insured failed to disclose two harassment and discrimination claims that were filed against it in 1998 and were concluded in 1999 and 2001. The court recognized that "[u]nder California law, 'a material misrepresentation or concealment in an insurance application, whether intentional or unintentional, entitles the insurer to rescind the insurance policy *ab initio*,'" citing *West Coast Life Insurance Co. v. Ward*, 33 Cal. Rptr. 3d 319, 323 (Ct. App. 2005). Concluding that the omitted information was material, the court affirmed the district court's ruling that the insurer was entitled to rescind the first policy. The court also held that rescission of the 2003 policy was proper because the insured omitted the same information in its subsequent application for that policy.

Additionally, the court concluded that the insurer had not waived the right to rescind by issuing a binder for the 2002 policy based on a renewal application prepared for the insured's previous carrier because the binder explicitly conditioned issuance of the policy on the completion of the issuing insurer's application. The court further concluded that rescission was not barred by the insurer's nine-month delay in issuing the policy because the delay primarily was caused by the insured's own "dilatory response" to the insurer's requests for supplemental information. Moreover, according to the court, rescission was not barred by the doctrine of laches because even if the insurer had unreasonably delayed notifying the insured of its intent to rescind as the insured contended, the insured failed to affirmatively demonstrate prejudice from the delay.