

Ohio Court of Appeals: Issue of Fact Precludes Summary Judgment on Rescission Claim

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The Ohio Court of Appeals has held that a policyholder's expert evidence regarding the meaning of an insurance application question created a material issue of fact, precluding summary judgment, on whether the insurance policy was void *ab initio* as a result of the policyholder's alleged misrepresentations on the application. *S.E.A., Inc. v. Dunning-Lathrop & Assoc., Inc.*, Nos. 00AP-165, 00AP-178, 2000 Ohio App. LEXIS 6008 (Ohio Ct. App. Dec. 21, 2000).

After being sued by a former client for negligent performance of an environmental real estate assessment, the policyholder brought this declaratory judgment action regarding the availability of coverage for the underlying suit. The trial court granted the insurer's motion for summary judgment, finding that the insurance policy was void *ab initio* because the policyholder failed to disclose a failed attempt to obtain comparable insurance in response to an application question.

The relevant application question asked whether the policyholder's comparable insurance had "ever been canceled or renewal refused." Previously, an insurer had issued a binder for comparable insurance to the policyholder, but then declined to issue a policy. The policyholder presented expert testimony in the trial court that there was no "cancellation" within the meaning of the application question because the insurance binder was canceled flat, which "voids coverage as if the policy never existed." On appeal, the court held that summary judgment was inappropriate because a material issue of fact existed as to whether these circumstances constituted a cancellation based on the expert testimony.

The insurance broker and policyholder had also claimed that the insurer "negligently breached [its] duty to inquire in more detail as to the insured's activity to properly determine the risks sought to be covered by the insured." If the insurer had inquired further, they reasoned that the insurer would have discovered that the policyholder believed it was obtaining coverage for environmental real estate assessment activities. The court held that the insurer had no legal duty to inquire and thus there could be no recovery for negligence by the policyholder. In addition, the court noted that an insurer does not have a "duty to the applicant to enumerate and outline, beyond the language of the policy, all risks which it may ultimately decline to insure." The court observed that "the insured has a duty to examine the coverage provided and is charged with the knowledge

of the contents of the insurance contract." Accordingly, the policyholder's claim for misrepresentation against the insurer was properly dismissed.