

Representation Insufficient to Void Policy Under Ohio Law

November 2009

The United States District Court for the Northern District of Ohio has held that misstatements in an application were mere "representations," which did not render the resulting policy void *ab initio*, because the policy did not specifically incorporate the application as part of the policy. The court also held that despite exclusions barring coverage for intentional and dishonest acts, the insurer had a duty to defend because the underlying complaints included allegations of breach of fiduciary duty and professional negligence, which would not fall within the policy exclusions. *Chicago Ins. Co. v. Capwill*, 2009 WL 3063351 (N.D. Ohio Sept. 21, 2009).

The policyholder accounting firm was insured under three consecutive professional liability policies. In its application for each policy, the accounting firm answered "no" to a question whether there were "any circumstances which may result in a claim being made against the firm, its predecessors, or any current or past partner, officer or owner." Additionally, the policies contained exclusions for claims (1) "[a]rising out of any dishonest, fraudulent, criminal or malicious act, or omission, or deliberate misrepresentation . . . committed by, at the direction or with the knowledge of any insured" or (2) "[a]rising out of the insured gaining, in fact, any personal profit or advantage to which the insured was not legally entitled. . . ."

The accounting firm provided accounting services to two viatical funding companies at the time it was filling out the subject applications. These two clients were placed in receivership during the last of the three consecutive policy periods. Lawsuits were filed against the accounting firm alleging various claims, including breach of contract, breach of fiduciary duty and professional negligence arising out of the insured's "wrongful" transfers of escrowed funds. The insurer denied coverage, asserting that the policy was void *ab initio* and that the exclusions barred coverage in any event.

The court stated that under Ohio law there are two types of statements that can be made in connection with the placement of an insurance policy: a "warranty" or a "representation." A false warranty renders the policy void *ab initio*. A false representation only renders the policy "voidable" if it is fraudulently made and the fact is material to the risk. The insurer did not allege that the statement in the application was fraudulent, so the rescission issue turned on whether the statement constituted a "warranty" or a "representation" under Ohio law. The court opined that under Ohio law a statement can only be deemed a "warranty" if it is an explicit part of the policy. The policy must incorporate the application and not merely reference it. In this case, the policy included a statement that "the insured agrees that the statements, Declarations and application are his

agreements and representations, that they shall be deemed material and that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance." According to the court, this was not sufficient to render any statement in the application a "warranty." The court, therefore, denied the insurer's motion for summary judgment on rescission.

The court then considered the exclusions for intentional acts. The court noted that each of the complaints against the accounting firm included counts, such as for breach of fiduciary duty or professional negligence, which did not require findings of intentional wrongdoing. The court declined to consider the "true facts" gleaned from findings made in the receivership or allegations in criminal indictments against the insured, which the insurer argued would show that the negligence and breach of fiduciary duty claims were merely derivative of claims of intentional graft and fraud. Instead, the court confined its analysis to the allegations of the complaints, which it found sufficient to trigger the insurer's duty to defend. The court opined that the "personal profit" exclusion did not apply because Ohio law requires a final adjudication where the personal profit exclusion uses the "in fact" language.