

Innocent Insured Provision Precludes Imputation of Knowledge for Application Question

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Applying New Hampshire law, the Supreme Court of New Hampshire has held that rescission of a policy based on misrepresentations in an application was improper because the policy's innocent insured provision precluded imputation of knowledge of one insured's wrongful acts to another, non-participating insured who completed the application. *Great Am. Ins. Co. v. Christy*, 2012 WL 4465149 (N.H. Sept. 28, 2012).

The insured law firm represented a client in handling a relative's estate. For several years during the representation, one of the firm attorneys misappropriated estate funds for himself. When the client learned of the misappropriation, he entered into a settlement agreement with the attorney on April 1, 2007, whereby the attorney promised to repay the funds. Subsequently, on May 22, 2007, another attorney at the firm completed a renewal application for the firm's professional liability insurance policy. The application asked: "After inquiry, is any lawyer aware of any claim, incident, act, error or omission in the last year that could result in a professional liability claim against any attorney of the Firm or a predecessor firm?" The attorney completing the application, who had no knowledge of the other attorney's misappropriation or the settlement agreement with the client, asked the other attorney if he knew of any such claims or incidents. When the offending attorney said he had no such knowledge, the innocent attorney answered "no" to the application question.

The insurer subsequently learned of the offending attorney's misappropriation and the client's claim, and the insurer filed suit to rescind the policy and for a declaration that no coverage was available for the claim. The trial court ruled for the insurer, holding that the misrepresentation constituted a valid basis for rescission.

On appeal, the Supreme Court of New Hampshire reversed, holding that rescission was improper because the offending attorney's knowledge could not be imputed to the innocent attorney who completed the application. The policy's innocent insured provision provided that, where coverage ordinarily would be lost due to non-compliance with the policy's notice provision, but such non-compliance was solely the fault of fewer than all insureds, coverage would be afforded to any non-participating insured. Pursuant to this provision, the court found, an insured who does not have actual knowledge of wrongful acts and thus does not have the ability to report them is entitled to coverage despite another insured's wrongful failure to report. According to the court, the basis for this provision is to distinguish actual from imputed knowledge, and not to punish

insureds who did not have actual knowledge of wrongful acts. In this regard, the court found that it was not clear whether the innocent insured provision also applied to notice on the application, and therefore concluded that it was necessary to construe the provision in favor of the insured. Accordingly, the court held that the offending attorney's knowledge of the wrongful acts would not be imputed to the innocent attorney, and thus the latter's response on the application was not a misrepresentation that supported rescinding the policy.