

Insurer Allowed to Rescind EPL Policy Based on Material Misrepresentations in Renewal Application

January 2005

In an unpublished opinion, a California intermediate appellate court has held, in a ruling on summary judgment, that an insurer could rescind an employment practices liability (EPL) policy because the policyholder made material misrepresentations in its renewal application. *Hartford Ins. Co. of Ill. v. BKM Enterprises, Inc.*, 2004 WL 2677204 (Cal. Ct. App. Nov. 24, 2004).

An insurance company issued an EPL policy to a company. Prior to renewal, the company was notified that two former employees had filed administrative claims with the California Department of Fair Employment and Housing and the U.S. Equal Employment Opportunity Commission (EEOC) alleging wrongful termination, retaliation and harassment. The renewal application asked whether "any person proposed for coverage [is] aware of any fact or circumstance or any actual or alleged act, error or omission which might give rise to a claim that would fall within the scope of the proposed policy." The company answered "no" and warranted the truthfulness of this statement.

Based on the application of the first insurer, a second insurer renewed the policy. The renewal policy expressly stated that it renewed the policy originally issued by the first insurer. The renewal provided that "a Claim shall be deemed first made when the Claim is received by [the company], not when the Claim is filed or initiated by the party or parties asserting the Claim." The policy defined "claims" to include "any investigative order or notice of charge received by [the company] relative to an administrative or regulatory proceeding initiated before the EEOC or a similar state agency" Wrongful acts was defined to include "conduct connected with any wrongful termination of employment; unlawful discrimination; [or] unlawful retaliation."

The company tendered the administrative complaints and the second insurer initially paid defense costs. Thereafter, the insurer filed suit seeking to rescind the renewal policy, obtain reimbursement for amounts paid to defend the administrative actions and other suits tendered under the policy and withdraw from the defense of these actions. The insurer also sought a declaration that it had no obligation to defend or indemnify any of the matters tendered under the renewal policy.

The intermediate appellate court held that the insurer was entitled to summary judgment. First, the court held that the question on the renewal application asking about knowledge of potential claims was unambiguous and required disclosure of the administrative actions. The court explained that both matters constituted fact or circumstances "which might give rise to a claim" and "independently triggered [the company's] obligation to disclose those claims on the renewal application."

The court rejected the company's argument that the insurer did not have standing to rescind the policy because the renewal application defined "the company" as the first insurer, which had issued the prior policy. The court explained that the declaration page of the renewal policy stated that the second insurer issued the policy in reliance on the renewal application and that the company had admitted this fact in other pleadings.

The court also rejected the company's argument that the insurer must show that it was prejudiced by the late notification of the administrative actions. The court explained that this case involved rescission, not late notice, and that the terms of the policy allowed the insurer to rescind the policy if "the Application contains misrepresentations or fails to state facts which materially affect either the acceptance of the risk or the hazard assumed."

The court also held that the insurer was entitled to monetary damages, even though its complaint did not specify a dollar amount. According to the court, under California law, "the specific dollar amount is necessary only when a default judgment is to be entered . . . Hence, the absence of a specific amount from the complaint is not necessarily fatal as long as the pleaded facts entitle the plaintiff to relief." The court noted that the insurer's complaint sought reimbursement for expenses relating to the tendered claims, and it specified a dollar amount in its motion for summary judgment. The court also awarded prejudgment interest, finding that the damages were certain and calculable, explaining that the parties "disputed liability, not the amount [the insurer] would be able to recover in the event [the company] was found liable."

For more information, please contact us at 202.719.7130.