wiley

NEWSLETTER

Church's Failure to Disclose Allegations of Sexual Misconduct Permits Insurer to Rescind Coverage

March 2005

In an unreported decision, the United States Court of Appeals for the Sixth Circuit, applying Michigan law, has held that a church's failure to disclose prior allegations of sexual misconduct against its employees in an application for a sexual liability coverage endorsement permits the insurer to rescind that endorsement and declare it void *ab initio*. *Zion Christian Church v. Bhd. Mut. Ins. Co., 2005* WL 548887 (6th Cir. March 8, 2005).

The insurer issued a multi-line policy to the church that included a sexual acts coverage endorsement providing coverage for, among other things, sexual acts liability and sexual harassment liability. In order to obtain the sexual acts coverage endorsement, the church was required to complete a separate application disclosing its knowledge of prior situations involving actual or alleged sexual abuse or misconduct. The church answered each question regarding prior incidents or allegations in the negative. The insurer subsequently issued the policy, including the additional coverage for sexual acts liability.

A former church employee later sued the church, head pastor and an assistant pastor (the head pastor's son), alleging sexual harassment by the assistant pastor. The church tendered this claim to the insurer. The insurer denied coverage and refused to defend the action based upon its determination that the church fraudulently failed to disclose prior known incidents of improper conduct by the assistant pastor in the sexual acts liability application.

The court of appeals held that the insurer properly disclaimed coverage because the record established that the church and head pastor knew about multiple prior incidents of sexual misconduct by church staff prior to completing the sexual acts coverage application. Among other things, the court noted that (1) the church and pastor had been sued six years earlier by a former parishioner who alleged sexual misconduct, (2) the head pastor knew of a prior accusation of sexual molestation by his son, another pastor, and (3) the head pastor knew that a second son, also an assistant pastor, had engaged in extramarital sexual acts for at least four or five years. The court rejected the church's contention that the insurer had to produce "clear and convincing evidence" of fraud. The court held that, where an insurer raises fraud as a coverage defense, a "preponderance of the evidence" standard applies. The court found that a preponderance of the evidence established that the church's application for sexual acts coverage contained material misstatements,

permitting the insurer to rescind that coverage.

The court also ruled that even if the sexual acts coverage endorsement was not void, coverage would still be barred by exclusions in the endorsement for "loss . . . on behalf of any person who participates in or directs any sexual act" and loss arising out of sexual acts if past or present church leaders "had actual knowledge that . . . an alleged perpetrator employed or appointed by you has . . . admitted to anyone that he or she had participated in any extramarital sexual act." The court found coverage barred by these exclusions because the assistant pastor admitted to improper sexual acts and the head pastor admitted that he knew of these acts.

For more information, please contact us at 202.719.7130.