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NEWSLETTER

# No Summary Judgment on Rescission Due to Questions of Fact Regarding Existence and Materiality of Misrepresentations; Bad Faith Claim Rejected

September 2010

The United States District Court for the Eastern District of Michigan, applying Michigan law, declined to grant summary judgment as to whether the policy should be rescinded due to misrepresentations in the application. *Axis Ins. Co. v. Innovation Ventures, LLC*, 2010 WL 3124160 (E.D. Mich. Aug. 4, 2010). The court granted summary judgment for the insurer on the insured's bad faith claim because Michigan law does not recognize a cause of action for bad faith where the insurer only is alleged wrongfully to have denied coverage.

The insurer issued a multi-media liability policy to the insured for the period beginning April 26, 2008. The insurer filed a lawsuit seeking to rescind the policy due to the following material misrepresentations made by the insured in the policy application: (1) the insured listed five states as the geographic area in which it operates, although it advertises and sells its products throughout the U.S. and worldwide; (2) the insured represented that no claims, suits or proceedings had been made against it during the past five years, although it had been sued in three lawsuits during this period; and (3) the insured represented that it was not aware of any facts or circumstances that might reasonably be expected to result in a claim, even though it was aware of a trademark dispute with a competitor. Both parties moved for summary judgment.

Addressing the first application question cited by the insurer, which asked about the "geographic area in which applicant operates," the court ruled that issues of fact existed as to whether there was a misrepresentation and whether any misrepresentation was material. The insured acknowledged that its products are widely advertised and sold, but argued that it appropriately identified in its response only those states where it has its headquarters and production facilities. The court determined that the word "operates" is sufficiently ambiguous in this context to preclude summary judgment as to whether the insured misrepresented the scope of its operations. The court also determined that issues of fact existed as to materiality because the underwriter's testimony did not directly address the materiality of the insured's answer to this application question and because there was evidence that the insurer was aware that the insured operated throughout the U.S. and worldwide.

With respect to the second question identified by the insurer, the court determined that the insured had made a misrepresentation in the application, but ruled that issues of fact existed as to materiality. The court reasoned that the application question required the insured to disclose any lawsuits against it, not only lawsuits that might give rise to coverage under the proposed policy, and that the insured failed to disclose the lawsuits filed against it. However, the court concluded that it was unclear from the record whether disclosure of the lawsuits would have caused the insurer either to reject the application or charge a higher premium. In this regard, the court noted that the underwriter had testified that the insurer expected only that claims that could give rise to coverage be disclosed on the application.

The court next concluded that it could not determine as a matter of law that the insured made a misrepresentation when it indicated on the application that it was not aware of facts or circumstances "arising out of the activities described in [the policy] application" that could reasonably be expected to give rise to a claim. The insured filed a trade infringement lawsuit against a competitor five days after the inception of the policy, and the competitor responded by filing two lawsuits against the insured alleging, in part, that the insured had engaged in a false advertising campaign. The court opined that the insured's decision to release the advertisement that was the subject of its competitor's claims against it could constitute advertising activity that should have been disclosed. The court found that a lack of evidence as to whether the insured intended before the policy incepted to issue the advertisement precluded summary judgment.

In addition, the court granted summary judgment for the insurer on the insured's bad faith claim. The court explained that Michigan law does not recognize a separate bad faith cause of action against an insurer where the allegation is only that the insurer wrongfully denied coverage under the policy.