

# Insurer's Suit To Rescind Policy and Determine Duty To Defend Not Subject To Stay

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The United States District Court for the District of Colorado has held that an insurer's declaratory judgment action to determine whether it may rescind a policy or has a duty to defend against underlying suits should not be stayed because the coverage litigation was independent of and separable from the underlying litigation. *MinnesotaLawyers Mut. Ins. Co. v. King*, 2010 WL 4449371 (D. Colo. Nov. 1, 2010).

The policyholder, a lawyer, was sued for allegedly making misrepresentations regarding real estate investments. The lawyer was also named in an unfiled complaint, which alleged legal malpractice related to the same real estate investments. The insurer denied coverage for the suit because the policy's business enterprise exclusion barred coverage for the suit and because the policy was subject to rescission based on the lawyer's alleged misrepresentation in the application that he was not involved in any business other than the practice of law. The insurer then instituted a declaratory judgment action to determine whether it could rescind the policy and whether coverage was barred by the business enterprise exclusion. The lawyer sought to stay the insurer's coverage litigation pending the outcome of the underlying litigation.

The court held that the declaratory judgment action would settle the coverage litigation, clarify important legal questions, would not encroach on state court jurisdiction, and no better alternative remedy was available. The court also held that, under Colorado law, coverage litigation should be stayed unless the coverage litigation is "independent of and separable from the underlying action" and would not "unduly prejudice" the policyholder in the underlying action. The court held that the determination of the insurer's duty to defend the policyholder was independent of and separable from the underlying litigation because the determination of the duty to defend only required an analysis of the allegations in the underlying complaint and not a resolution of factual or legal issues in the underlying litigation. The court also held that its consideration of the rescission cause of action was appropriate because it involved the separate issue of a misrepresentation on the policy application and would not prejudice the lawyer in the underlying litigation.