Newsletter

New York Choice of Law Provisions

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Beware of Lloyds and Surplus Policies Changing the Rules of the Game

H.J. HEINTZ'S $25M PRODUCT CONTAMINATION POLICY RESCINDED

Lloyd's and surplus lines policies often contain contractual choice of law provisions requiring the application of New York law to the resolution of coverage related disputes. The reason is very simple, New York law sets the bar very, very low for rescinding insurance policies for misrepresentations in the application process. New York allows rescission based on a misrepresentation, regardless of whether it is intentional or accidental. In contrast, Texas requires an intentional misrepresentation of material fact. The recent decision in H.J. Heintz Co. v. Starr Surplus Lines Ins. Co., 2:15-cv-00631 (W.D. Pa.)(applying New York law), confirms that New York law affords carriers additional advantages beyond the relaxed mental state standard required for rescission.

CARRIER HAS NO DUTY TO INVESTIGATE FACTS EXTRINSIC TO THE APPLICATION PROCESS

Judge Schwab held in Heintz that Starr Surplus had no duty to seek out extrinsic facts regarding prior contamination incidents available from a prior application for a different policy by the same insured. The court also held that the carrier had no duty to seek out publicly available information about an insured's operations. Despite a jury finding that Starr Surplus knew about the misrepresentations and sold the policy anyway, the court found that there was insufficient evidence the carrier had knowledge of Heinz's misrepresentations.

COURT FINDS HEINTZ ACTED INTENTIONALLY

Despite the fact that proof of intent was not required, the judge held that Heinz acted intentionally in failing to disclose a number of prior incidents where there had been a government complaint or product recall. The court further found the evidence showed that Heintz failed to disclose so that it could obtain a reduced self-insured retention and/or lower premium charge.

CARRIER NOT REQUIRED TO GO ON A SCAVENGER HUNT WHERE A PUBLICLY TRADED COMPANY IS INVOLVED

Many publicly traded companies rely on information generally available regarding their operations as sufficient to trigger a duty to investigate on the part of the insurer. The decision in Heinz will be used to show that a carrier is not required to go on a scavenger hunt for information and that its failure to do so neither renders the misrepresentation not material nor shows a waiver by the insurer.

LESSONS LEARNED

Texas companies should avoid agreeing to New York contractual choice of law provisions. Care must also be taken where arbitration provisions are concerned, since many include choice of law provisions as well. Policyholders must disclose obviously relevant events inquired about in the application. Assume nothing in

terms of what the carrier might or should have known. The search for more affordable coverage has to be balanced against the dangers of tricky provisions, such as choice of law requirements, that can be outcome determinative as to coverage or not.

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