



And The Defense Wins

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DRI member [Scott Newman](#) of **Marlow, Connell, Abrams, Adler, Newman & Lewis** in Miami, Florida, recently obtained a summary judgment on behalf of Commerce & Industry Ins. Co. (C&I) in a case of first impression regarding the voiding of coverage in a combined Workers' Compensation and Employers' Liability Policy that had been issued based upon misrepresentations in the application for the combined policy. The ruling eliminated the carrier's liability for bodily injury exposure in an underlying worksite death suit.

C&I filed suit in the U.S. District Court, Southern District of Florida, for declaratory relief under a combined Workers' Compensation and Employers' Liability Policy issued to Sandi Construction (Sandi) in 2005. The policy provided statutory workers' compensation benefits and \$1 million of employers' liability coverage. C&I sought to have the court declare (1) that it had no duty to defend and/or indemnify; (2) the policy was void for misrepresentation in the application; and/or (3) the policy could be rescinded for the fraud committed by the insured in obtaining the coverage. The suit arose from a construction site accident involving Jose Tejada, an illegal alien. Following Tejada's death, a claim was submitted by the family to C&I for workers' compensation benefits. Rather than continue a contested effort to obtain workers' compensation benefits, the Estate's attorney filed a separate civil suit in state court against Sandi containing allegations of negligence and intentional torts designed to circumvent the exclusive remedy provisions of the Florida Workers' Compensation Act. Pursuant to a Reservation of Rights, C&I defended the tort suit under the "Employers' Liability" section of the policy.

Prior to filing suit, C&I amassed significant evidence supporting fraud by its insured, Sandi, regarding the application for this policy, including an indictment for conspiracy to defraud insurance companies out of millions in premium dollars. C&I sought to extricate itself from the defense and indemnity obligations by relying upon Fla. Stat. § 627.409, which allows a carrier to void a policy if misrepresentations in the application were material to the risk being insured. The counter argument to this position is found in the Florida Workers' Compensation Act, which provides exclusive statutory fines against insureds who have defrauded a carrier in an application for coverage. Additionally, Florida case law held a workers' compensation insurer's only remedies for fraud and misrepresentations in the application were the prescribed statutory fines against the insureds. These cases also held, as a matter of public policy, a workers' compensation policy could not be declared void under Fla. Stat. § 627.409. As such, the court had to be convinced that, despite the absence of a severability clause, these were two distinct and different coverages that were merely coupled together in one policy. C&I argued the statutory remedies applicable to workers' compensation coverage did not apply to employers' liability coverage.

In its ruling, the court found nothing in the Florida Workers' Compensation Act indicating the remedies afforded insurers who had been defrauded regarding workers' compensation coverage also extended to employers' liability coverage—even though those coverages were issued as part of the same policy pursuant to the same application. Because there was no such pronouncement in the Workers' Compensation Act and because Fla. Stat. § 627.409 applied to all other forms of coverage (*i.e.*, employers' liability), the court left the workers' compensation coverage in tact (even though the statute of limitations had expired to pursue such a claim) and found the misrepresentations and fraud in the application sufficient to void the employers' liability coverage.

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