

May 12, 2009

Fifth Circuit Enforces Disclaimer Provision in Form Agreement to Bar Misrepresentation Claims Against Manufacturer

On May 7, 2009, the Fifth Circuit affirmed a take-nothing summary judgment for Haynes and Boone, LLP client BASF Corporation, rejecting Plaintiff Thermacor Process, L.P.'s negligent misrepresentation, fraudulent inducement, and Texas Deceptive Trade Practices Act (DTPA) claims based on a standard disclaimer-of-warranty provision and the absence of any actionable misrepresentation. *Thermacor Process, L.P. v. BASF Corp.*, No. 08-10227 (5th Cir. May 7, 2009). This decision reinforces Texas law that manufacturers can rely on standard disclaimers in their form agreements to defeat claims based on the absence of any misrepresentation, particularly when the parties are sophisticated and the disclaimer is conspicuous.

Thermacor purchased a pipe-insulation product from BASF under a form agreement that contained standard "Terms and Conditions." These standard terms, like the parties' previous agreements, included a provision under which (i) BASF disclaimed any warranty regarding technical advice associated with the product, (ii) Thermacor assumed full responsibility for quality control, testing, and determining whether the product was suitable for its intended use, and (iii) BASF disclaimed implied warranties of merchantability and fitness for a particular purpose.

Thermacor filed suit alleging that BASF misrepresented to Thermacor that it could develop a high-temperature spray foam that would insulate Thermacor's steel piping at certain high temperatures. The Fifth Circuit affirmed the district court's summary judgment for BASF on all of Thermacor's claims, enforcing the disclaimer provision and holding that BASF made no misrepresentation. The Court held that the disclaimer provision negated the causation elements of each of Thermacor's claims because it disclaimed any reliance by Thermacor on any alleged misrepresentation regarding the product's end-use suitability. In enforcing the provision, the Fifth Circuit emphasized that the disclaimer was written in all capital letters in bold type, the parties were sophisticated and had a long-term relationship under which they had repeatedly agreed to this disclaimer provision, and there was no evidence of any false representation by BASF.

Karen Precella, of Haynes and Boone's Appellate Practice Group, was lead counsel on appeal. Thomas J. Williams, George Parker Young, and Josh Borsellino, all of Haynes and Boone's Business Litigation Practice Group, were counsel in the District Court and on appeal.

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