

# TEXAS INSURANCE LAW NEWSBRIEF

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## INSURER FAILED TO NOTIFY OF INTENT TO RESCIND POLICY IN 90 DAYS AS REQUIRED UNDER INSURANCE CODE §705.005 - SUMMARY JUDGMENT REVERSED

Last Thursday, the Waco Court of Appeals overturned an insurer's summary judgment on its policy rescission claim on the ground that the insurer failed to notify the insured of its intention to rely on material misrepresentations in the policy application within 90 days of discovering their falsity, under Tex. Ins. Code §705.005. In *Wallace v. AmTrust Ins. Co. of Kansas, Inc.*, 10-14-00209-CV, 2016 WL 3136875 (Tex. App.—Waco June 2, 2016, no. pet. h.), Wallace purchased a farm and ranch insurance policy for a piece of rural property in Wallace County. In the application, he represented the property was 100% occupied, when in fact it was vacant and had been vacant since he took possession of it. When a mobile home on the property was destroyed by a grass fire, Wallace made a claim.

When AmTrust learned the property was vacant and had been vacant when Wallace acquired the property and applied for the insurance, it sought to rescind the policy and refund his premiums because its business practice did not include insuring vacant properties due to the high risk. In the resulting lawsuit, AmTrust moved for summary judgment on this issue on the ground that Wallace had made a material misrepresentation in the application.

Texas Insurance Code Section 705.005 provides:

(b) A defendant may use as a defense a misrepresentation made in the application for or in obtaining an insurance policy only if the defendant shows at trial that before the 91st day after the date the defendant discovered the falsity of the representation, the defendant gave notice that the defendant refused to be bound by the policy [to the insured].

AmTrust contended it discovered the misrepresentation during Wallace's examination under oath on July 26, 2011, and sent him the required notice on August 18, 2011, which complied with the statutory notice requirement. However, Wallace later swore in an affidavit that he had told the adjuster the property was vacant at the time he made the claim, which was more than 90 days before AmTrust's notice letter. Under the summary judgment standard of review, the court accepted Wallace's affidavit as true even though it contradicted Wallace's previous deposition testimony. (The court noted that AmTrust objected to the affidavit in the trial court on this ground but failed to obtain a ruling.) Thus, the court found a fact issue and reversed the summary judgment that had previously been granted to AmTrust in the trial court.

**Editor's Note:** While this reversal does not necessarily mean AmTrust loses, it means there will be no easy exit from this litigation. The *Wallace* case thus provides a cautionary tale that strict compliance with §705.005 is an essential element of any coverage defense that depends on a misrepresentation in the policy application. The 90-day deadline requires quick and decisive action by adjusters and claim management whenever they learn or think they may have learned of a misrepresentation in the policy application. It is better to notify early and reserve the right to deny coverage or rescind the policy than to notify too late. And... always obtain a clear ruling on your evidentiary objections.