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Insurer Entitled to Rescind Policy Because Policyholder Failed to Report Complaints and Regulatory Investigations on Application

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The United States District Court for the Western District of Washington, applying Washington law, has held that an insurer was entitled to rescind a policy where the policyholder failed to provide information regarding complaints made to a state licensing board and the resulting investigations by such board on an application for insurance because the policyholder allegedly believed such issues "had been resolved." *Tudor Ins. Co. v. Hellickson Real Estate*, 2011 WL 3812642 (W.D. Wash. Aug. 29, 2011).

The policyholder, a real estate company, applied for errors and omissions liability insurance. The application asked the policyholder (i) whether any claims had been made against the insured, (ii) whether the insured was "aware of any act, error, omission or other circumstances, which might reasonably be expected to be the basis of a claim or suit against you," and (iii) whether the insured had been "involved in any suit or investigatory proceeding by any regulatory agency. . . ." The policyholder answered "no" to the first two questions and, in response to the third, identified only a minor fine by a non-governmental listing service.

Based on the policyholder's answers on its application, the insurer issued the policy. Less than two weeks later, the state licensing department filed a disciplinary proceeding against the policyholder, which the policyholder tendered for coverage. The insurer rescinded the policy based on intentional misrepresentations in the insurance application after it learned that the policyholder's clients had filed several complaints with the state licensing department over the preceding year. The complaints had resulted in several letters to the

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policyholder from the licensing department stating that "it appears from our analysis that grounds may exist to pursue administrative action against you for possible misrepresentation, negligence, incompetence and/or malpractice" and that the department was considering administrative action against the policyholder.

The court granted the insurer's motion for summary judgment and concluded that the insurer was entitled to rescind the policy. In reaching its conclusion, the court analyzed four factors that must be met in order to rescind an insurance policy: "(1) [the policyholder] represented certain information as truthful to the insurer during the negotiation of the insurance contract," "(2) those representations were untruthful," "(3) the misrepresentations were material," and "(4) they were made with the intent to deceive the insurer." According to the court, the policyholder did not contest that it made representations on the application. The court then found that the policyholder's representations that no complaints against it had been filed and that no regulatory investigations against it had been conducted were untruthful. Next, the court determined that the misrepresentations were presumed material because the application specifically requested the information at issue and explicitly stated that such information was "considered material and important," and the policyholder failed to provide any evidence to rebut the presumption of materiality. Finally, the court concluded that the policyholder's admission that she "thought the issues with the [state licensing department] had been resolved" established that the policyholder knew that complaints had been filed and, as a result, knowingly failed to provide such information on the application for insurance. Such a knowing misrepresentation creates a presumption of intent to deceive, which the policyholder was unable to rebut.

As a result of finding that the insurer was entitled to rescind the policy, the court also found that the insurer did not have a duty to defend, was not liable for bad faith or for alleged violations of state consumer protection and unfair settlement practices laws.