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ALERT

Concealment of Criminal Conspiracy Is Grounds for Rescission of Professional Liability Policy

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Applying Florida law, a federal district court has held that an insurer may rescind a title agent's E&O policy on account of the insured's failure to disclose in the application for coverage her participation in an ongoing criminal conspiracy. *Zurich Am. Ins. Co. v. Diamond Title of Sarasota, Inc.*, 2013 WL 6283684 (M.D. Fla. Dec. 4, 2013).

In 2009, the owner and president of a title agency company pleaded guilty to various crimes relating to a mortgage fraud scheme. As part of her plea agreement, the insured admitted to participating in a conspiracy that involved making materially false and misleading statements to federally insured banks between 2002 and 2008. Meanwhile, in 2007, the insured had completed an application for professional liability coverage and responded "no" to Question No. 21, which asked whether "the Applicant or any prospective Insured kn [ew] of any circumstances, acts, errors or omissions that could result in a professional liability claim against the Applicant." In light of the admitted ongoing conspiracy at the time, the insurer took the position that this answer constituted a material misrepresentation that warranted rescission of the policy.

In the litigation that followed, pointing to the phrase "professional liability claim," the insured argued that Question No. 21 was limited to a potential claim for negligence, and therefore its negative response was truthful because the conspiracy involved intentional acts that would not result in such a claim. The court rejected the argument on the grounds that "[a] single act [could] be the basis for both professional and criminal liability." The court also rejected the insured's reliance on the fact that the policy expressly excluded

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coverage for claims arising out of intentional or criminal conduct, finding that the insured "was not relieved of [its] duty in the application to report acts that *could* result in a professional liability claim simply because the policy may not have covered those acts."

The court additionally held that rescission did not require the insurer to prove an intentional misrepresentation. The court noted that this holding was consistent with applicable law, as well as the language in the policy providing that the "discovery of any fraud, intentional concealment, or misrepresentation of material fact" renders the policy "void at inception." As the court explained, under this provision, the policy was void at inception "not just for fraud and intentional concealment, but also for misrepresentation of material fact."

Finally, the court concluded that the insured's misrepresentation was material. The court cited Florida Statute § 627.409 for the proposition that a misrepresentation was material if it "[did] not enable an insurer to adequately estimate the nature of a risk in determining whether to issue the policy." The court noted that "[a]n objective insurer" with knowledge that the insured was engaged in an ongoing scheme to commit mortgage fraud may "not have issued a policy at all" and "certainly" would not have issued it "under the same terms and pricing" as it did without such knowledge.