

Title Insurance Company's Failure to Disclose Injunction against It Is Material Misrepresentation Allowing E&O Insurer to Rescind Policy

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The U.S. Court of Appeals for the Seventh Circuit, applying Illinois law, has held that an insurer that issued an E&O policy to a title insurance and escrow issuing agent company was entitled to rescind the policy where the policyholder failed to disclose in its application that an Illinois court had entered a permanent injunction barring it from preparing deeds or other legal documents. *TIG Ins. Co. v. Reliable Research Co.*, 2003 WL 21488139 (7th Cir. June 30, 2003).

The insurer issued an E&O policy to a title insurance and escrow issuing agent company. The application, which was incorporated into the policy, asked the title insurance company to disclose every claim or suit filed against it in the past 10 years. The policy stated that "[i]f any Insured under this policy, or any of your authorized representatives, conceals or misrepresents any material fact or circumstance concerning the insurance, this policy will be void." In answering a question in the application concerning prior claims, the title insurance company did not disclose that four years earlier an Illinois Circuit Court had issued a permanent injunction enjoining it from "preparing Deeds or other legal documents relating to the transfer of real estate" and requiring it to "cease and desist the unlawful practice of law." After issuance of the policy, the title insurance company submitted claims for two lawsuits to the insurer. Those underlying lawsuits included allegations that the title insurance company had violated the permanent injunction, which therefore alerted the insurer, for the first time, to the existence of the injunction. The insurer subsequently sued for rescission and moved for summary judgment, which the district court granted.

The Seventh Circuit affirmed. The court held that, under Illinois law, an insurer may rescind a policy if the application contains a misrepresentation that was made with an intent to deceive or that was material. The court explained that "Illinois courts frame the materiality question in terms of whether 'reasonably careful and intelligent persons would regard the facts as stated to substantially increase the chances of the event insured against, so as to cause a rejection of the application.'"

The Seventh Circuit rejected each of the title insurance company's arguments as to why the failure to disclose the injunction was not material. First, the court rejected the argument that the injunction applied to the "unauthorized practice of law," but the policy merely insured against "faulty title work." The court explained that the argument conflicted with the company's application for insurance and that it was also inconsistent with the terms of the policy, which applied broadly to "Professional Services." The court also rejected the company's argument that the record did not support summary judgment because the insurer's underwriter had testified that, but for the injunction, the company was a "clean risk," thereby undermining the argument that this single additional disclosure would have been material. The court explained that "[i]t is perfectly reasonable to conclude that the nine-year old claim that resulted in no loss to [the title insurance company] or its E&O carrier would not be considered significant, but that disclosure of a permanent injunction barring [the title insurance company] from engaging in the unauthorized practice of law would." Finally, the court rejected the title insurance company's argument that summary judgment was inappropriate in light of the strong policy preference in Illinois to send materiality questions to the jury, reasoning that there was no factual question that the failure to disclose the permanent injunction was material.

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