

ALERT

Rescission Proper Where Insureds Failed to Disclose Administrative Complaints and Resulting Investigations on Policy Applications

October 1, 2012

Applying Washington law, the United States Court of Appeals for the Ninth Circuit has held that an insurer is entitled to rescind an errors and omissions liability policy where the insureds failed to disclose complaints filed with a state licensing department and the resulting investigations in their policy applications. *Tudor Ins. Co. v. Hellickson Real Estate*, 2012 WL 4320033 (9th Cir. Sept. 21, 2012). The court also rejected the insureds' argument that an insurer is estopped from rescinding a policy where the insurer has acted in bad faith.

An insurer filed a declaratory judgment action seeking to rescind a professional errors and omissions liability policy issued to two real estate brokers on the grounds that the brokers had made fraudulent misrepresentations in their policy applications. The brokers had been notified by state authorities of at least ten complaints filed against them with the Washington Department of Licensing (DOL), as well as the resulting DOL investigations, but had failed to disclose that information on the applications.

The district court held that the insurer was entitled to rescind the policy, and the United States Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion. The court held that it was clear that the brokers had made false statements in their policy applications—noting that the brokers' professed misinterpretation of the application questions was incompatible with the application's clear language—and thus that there was a presumption that the brokers had intended to deceive the insurer. The brokers argued that the misrepresentations were neither made with an intent to deceive nor material because the brokers had notified the insurer of a fine

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they had received from a private listing agency, which the brokers alleged should have put the insurer on notice of facts leading to the discovery of the DOL investigations. The court disagreed. The court reasoned that the notice only stated that the fine had been “handled through appeal” and “reduced or dropped” with “no claims made,” revealing nothing regarding the existence of the DOL investigations. Finally, the court rejected the brokers’ argument that the district court had erred by adjudicating the insurer’s rescission claim before addressing the brokers’ counterclaim for bad faith. The court explained that Washington courts have consistently held that insureds who render their contracts void by their own fraud may not pursue claims of bad faith against their insurers.

The opinion is available [here](#).