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ALERT

Insurer Did Not Waive Right to Rescind Policy

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A federal district court, applying Ohio law, has held that an insurer did not waive its right to rescind a professional liability policy issued to an accountant and his firm when the insurer knew of the accountant's potential involvement in a fraudulent investment scheme but still issued the policy and then canceled it after complying with a 90-day notice of cancellation provision. *Chicago Ins. Co. v. Capwill*, 2011 WL 6440756 (N.D. Ohio Dec. 21, 2011).

In 1997, the accountant applied for and obtained the first of three consecutive professional liability policies from the insurer. In 1998, two investment companies that had suffered losses in a fraudulent investment scheme sued the accountant and then went into receivership. At some point in 1998, the insurer learned that the accountant potentially was involved in the fraudulent investment scheme, but because the 1998 policy contained a 90-day notice of cancellation provision, the insurer issued the 1999 policy, then provided the accountant with notice of cancellation and canceled the policy after the 90-day period expired. The accountant eventually was convicted of fraud and imprisoned. When the receiver for the investment companies sought to recover from the proceeds of the 1999 policy, the insurer filed a declaratory judgment action, seeking to rescind the policy based on misrepresentations in the renewal application.

On cross-motions for summary judgment, the court held that the insurer was entitled to rescind the 1999 policy because it established as a matter of law that the accountant had made material misrepresentations with fraudulent intent in answering three questions on the renewal application for the policy. The court relied on unrebutted testimony by the insurer's former underwriter to find that the questions were material. The court also held that the insurer had

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presented clear and convincing evidence that the accountant had intentionally submitted fraudulent answers. Finally, the court rejected the receiver's argument that the insurer was barred from rescinding the 1999 policy by the doctrines of waiver, acquiescence, or equitable estoppel. The court reasoned that it would be inequitable to penalize the insurer for attempting to comply with the 90-day notice of cancellation provision. The court also concluded that the insurer had not indicated any intent to relinquish its right to rescission.