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11th Circuit Sidesteps Insurer's Attempt to Rescind Policy but Rules for Insurer Anyway

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After a district court determined that Certain Underwriters at Lloyd's of London (Lloyd's) could rescind a directors and officers' policy issued to Anchor Insurance Holdings Inc. and its subsidiary, Anchor Property Insurance & Casualty Insurance Co. (collectively Anchor), because the application failed to disclose complaints from disgruntled investors, the Eleventh Circuit sidestepped the rescission question and instead barred coverage because emails from the disgruntled investors constituted claims "first made before the policy's inception." These two opinions illustrate the challenge of documenting potential claims and submitting applications that can withstand insurer rescission defenses.

Lloyd's initially sued Anchor seeking a declaration that it had no duty to defend or indemnify Anchor for three lawsuits filed against Anchor by the investors. Lloyd's also sought a declaration that it could rescind the directors and officers' policy based on alleged misrepresentations during the policy application process. The district court relied on two key questions and answers in the application: (1) whether there were any pending claims against Anchor or any director, officer, or employee, and (2) whether Anchor or any director, officer, or employee knew of any act, error, or omission that could give rise to a claim. Anchor answered "No" to both questions even though the investors sent multiple emails to Anchor board members seeking to rescind their investments due to alleged misconduct during the six months before Anchor submitted its application. Lloyd's presented evidence that had the application disclosed the investor allegations, the policy would not have been issued. The district court found the "record is clear" that before submission of the application, "Anchor had actual knowledge of the potential claims against it by the Investors, including a claim for recission of the investment." The district court ruled for Lloyd's on the rescission claim: "Because plaintiff was deprived of the opportunity to meaningfully underwrite the exposures it was being asked to accept, the policy is due to be rescinded."

Anchor appealed the judgment to the Eleventh Circuit. Although it affirmed the district court's ruling of no coverage, the Eleventh Circuit did not address Lloyd's rescission defense. Instead, the Eleventh Circuit ruled that a claims-made policy provides coverage "only if a claim is first made against an insured during the policy period" and the investors' emails were claims voiding coverage because "the claims at issue were first made before the policy's inception and, as a result, are excluded under the policy's terms." The Eleventh Circuit neither addressed the rescission defense nor explained why it did not do so. The Eleventh Circuit vacated the district court's judgment and remanded for further proceedings. The Eleventh Circuit's decision highlights the importance of narrowing notice obligations to notice of claims that come to the attention of corporate management such as general counsel and risk managers. Without narrow notice obligations, emails alone can void coverage in the Eleventh Circuit. And despite the Eleventh Circuit's vacatur of the rescission judgment, the district court's decision highlights the importance of submitting accurate insurance

applications. Every insured should scrutinize applications, which are frequently prepared by insurance brokers for insureds' signatures, and ensure the application's accuracy before signing and submitting it to the insurer to avoid insurer rescission defenses and a loss of coverage altogether.

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