

**FILED**

JAN 02 2018

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>WESTERN WORLD INSURANCE COMPANY,</p> <p style="text-align: center;">Plaintiff-Appellee,</p> <p>v.</p> <p>PROFESSIONAL COLLECTION CONSULTANTS,</p> <p style="text-align: center;">Defendant-Appellant.</p>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

No. 16-55470

DC No. CV 15-2342 MWF

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted December 5, 2017  
Pasadena, California

Before: TASHIMA and BERZON, Circuit Judges, and KENNELLY,\*\*  
District Judge.

In August 2013, FBI agents executed a search warrant at the offices of  
Professional Collection Consultants (“PCC”). Over the next several months,

---

\* This disposition is not appropriate for publication and is not precedent  
except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Matthew F. Kennelly, United States District Judge for  
the Northern District of Illinois, sitting by designation.

investigators subpoenaed several PCC employees and PCC produced thousands of documents. In February 2014, PCC applied for directors and officers liability insurance from Western World Insurance Co. (“Western”), and Western issued PCC a policy. PCC had submitted (and Western accepted) a CNA insurance renewal application form, even though Western is not a CNA Company and PCC was not renewing a Western policy. In 2015, Western moved to rescind the policy on the basis that PCC made a material misrepresentation in its application. The disputed question read:

None of the individuals to be insured under any Coverage Part (the “Insured Persons”) have a basis to believe that any wrongful act, event, matter, fact, circumstance, situation, or transaction, might reasonably be expected to result in or be the basis of a future claim?

PCC marked “No.”

The district court granted Western’s summary judgment motion for rescission and denied PCC’s request for additional discovery. PCC appealed. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court’s grant of summary judgment, *Jones v. Royal Admin. Servs., Inc.*, 866 F.3d 1100, 1104 (9th Cir. 2017), and we review for abuse of discretion the denial of a discovery continuance, *Tatum v. City & Cty. of S.F.*, 441 F.3d 1090, 1100 (9th Cir. 2006). We affirm.

1. PCC's answer was a material misrepresentation because it was aware of existing circumstances – the federal investigation – that could lead to a claim covered by the policy. Under California law, a party may rescind an insurance contract if the other party made representations “false in a material point.” Cal. Ins. Code § 359. “Materiality is determined solely by the probable and reasonable effect which truthful answers would have had upon the insurer.” *Thompson v. Occidental Life Ins. Co.*, 513 P.2d 353, 360 (Cal. 1973); *see also* Cal. Ins. Code §§ 334, 360. The materiality inquiry is a “subjective test viewed from the insurer’s perspective.” *Superior Dispatch, Inc. v. Ins. Corp. of N.Y.*, 104 Cal. Rptr. 3d 508, 520 (Ct. App. 2010), *as modified on denial of reh’g* (Feb. 22, 2010). “[R]escission effectively renders the policy totally unenforceable from the outset so that there was never any coverage and no benefits are payable.” *Imperial Cas. & Indem. Co. v. Sogomonian*, 243 Cal. Rptr. 639, 645 (Ct. App. 1988); *accord U.S. Fid. & Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126, 1136 (9th Cir. 2011).

PCC contends that it did not misrepresent the truth because, if the application question is read literally, PCC’s “no” answer informed Western that PCC *was* aware of circumstances that could lead to a claim. However, the form instructions stated that a “yes” answer would require applicants to provide “detailed information” about their answer and could precipitate “substantially

different terms and conditions.” PCC provided no additional information to explain its answer. Given that context, Western reasonably understood PCC’s answer to mean PCC was not aware of any circumstances that could lead to a claim. The policy covered claims arising from, *inter alia*, a civil, regulatory, criminal, or administrative proceeding or investigation against PCC or any of the individual insureds. Although PCC claims it thought the federal investigation was over before PCC completed the application,<sup>1</sup> the only reasonable conclusion is that the federal criminal investigation, even if closed or on hold, nonetheless *might* lead to a claim under the policy.

PCC also contends its answer was immaterial because the question was required only for applicants who, unlike PCC, sought increased policy limits. Specific demand for information “is in itself usually sufficient to establish materiality,” *Thompson*, 513 P.2d at 360, but not necessary. Courts also “inquire into the nature of the information withheld.” *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 655 (9th Cir. 1984). Put simply, a misrepresentation is material when it “regard[s] the nature of the risk to be insured.” *Merced Cty. Mut. Fire Ins. Co. v.*

---

<sup>1</sup> The investigation was in fact not over. The government issued additional subpoenas in the Spring 2014. In November 2017, the government filed a criminal information against PCC and PCC entered a plea of guilty pursuant to a plea agreement.

*California*, 284 Cal. Rptr. 680, 685 (Ct. App. 1991). PCC was not entitled to misrepresent the truth about the investigation simply because Western did not ask a specific question.

Moreover, Gregg Rentko, Western's senior underwriting executive, stated in a declaration that "Western World would not have issued the policy to PCC had it known of the ongoing federal criminal investigation." PCC presented no contrary evidence. Although the factfinder "is not required to believe the 'post mortem' testimony of an insurer's agents," *Thompson*, 513 P.2d at 360 (citations omitted), courts will accept an insurer's uncontradicted declaration as proof of materiality at the summary judgment stage. *See Superior Dispatch*, 104 Cal. Rptr. 3d at 521–22 (concluding misrepresentation was material based on underwriter's uncontroverted declaration that truthful disclosure would have affected insured's premium or precluded policy issuance); *Mitchell v. United Nat'l Ins. Co.*, 25 Cal. Rptr. 3d 627, 639 (Ct. App. 2005) (concluding misrepresentation was material where underwriter declared she relied on insured's answers). Western therefore carried its burden of showing materiality as a matter of law.

Nor did Western delay, as it moved to rescind the policy only after learning of the investigation. *See LA Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*,

67 Cal. Rptr. 3d 917, 925–26 (Ct. App. 2007) (permitting rescission after insurer defended insured under reservation of rights until it discovered misrepresentation).

2. PCC requested additional discovery after Western moved for summary judgment. Once a party moves for summary judgment, if the nonmovant “shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition,” the court may defer the summary judgment motion to permit additional discovery. Fed. R. Civ. P. 56(d). Specifically, the party desiring additional discovery must show that “(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment.” *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

Here, PCC did not meet its Rule 56(d) burden. PCC’s declaration stated only in a conclusory fashion that additional discovery was “calculated to lead to the discovery of relevant evidence pertinent to the issues” on the summary judgment motion. PCC identified some documents it wished to receive, but failed to “explain why those facts would have precluded summary judgment” if obtained. *Tatum*, 441 F.3d at 1100. The district court did not abuse its discretion in denying PCC’s discovery request.

• ● •

The judgment of the district court is **AFFIRMED**.

**FILED***Western World Ins. Co. v. Prof'l Collection Consultants*, No. 16-55470

JAN 02 2018

Berzon, J., dissenting:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

The question answered by Professional Collection Consultants (“PCC”) reads, in full, as follows:

Please answer this question only if the Applicant is applying for limits of insurance that exceed the expiring coverage currently written with CNA:

None of the individuals to be insured under any Coverage Part (the “Insured Persons”) have a basis to believe that any wrongful act, event, matter, fact, circumstance, situation, or transaction, might reasonably be expected to result in or be the basis of a future claim?  Yes  No

As a matter of English grammar, the answer checked – “No” – was accurate. “No” signified that it was *not* true that none of the Insured Persons had reason to expect a claim – in other words, that some Insured Persons *did* have reason to expect a claim.

I recognize that neither Western World nor PCC so read the question initially. But the rules of grammar do not bend because of inaccurate reading, or because of inattention to those rules when drafting an application. Whatever the parties’ impressions or intentions, the answer was correct.

Nor does the context of the question, as described by the majority, affect that conclusion. First, the context may suggest that there was poor drafting, but it does



not change the meaning of a perfectly clear (if inartful) inquiry. Second, when all of the questions on the application are considered, it becomes apparent that the admonition at the outset indicating that “Yes” answers *may* require different policy terms, thereby suggesting that “Yes” answers may indicate higher risk, did not signify that “Yes” answers are problematic in every instance.<sup>1</sup>

But for my persnickiness regarding the English language, I would concur in the majority disposition. However, as the answer was literally correct, there was no misrepresentation, and PCC should prevail. I therefore respectfully dissent.

---

<sup>1</sup> For example, one question is:

Have persons supervising employees receive[d] updated information and training on human resource policies . . . in the last 12 months?  Yes  No

Another question to the same effect is:

Has an attorney with expertise in employment and labor law updated the Applicant’s employee handbook, human resources documents, guidelines, or procedures in the last 12 months?  Yes  No

For both these questions – and others – it would appear that a “Yes” answer suggests a lower risk of claims than a “No” answer.

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

### United States Court of Appeals for the Ninth Circuit

### BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

**Note:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v.  9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
<b>Excerpt of Record</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>Opening Brief</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>Answering Brief</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>Reply Brief</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>Other**</b>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<b>TOTAL:</b>				\$ <input type="text"/>	<b>TOTAL:</b> \$ <input type="text"/>			

\* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

\*\* *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

*Continue to next page*

**Form 10. Bill of Costs - Continued**

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

*(To Be Completed by the Clerk)*

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk