IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 1647 Disciplinary Docket No. 3
	:	No. 129 DB 2010
v.	:	Attorney Registration No. 81675
GLENN RANDALL, Respondent	:	(Bucks County)

ORDER

PER CURIAM:

AND NOW, this 4th day of October, 2010, upon consideration of the Recommendation of the Three-Member Panel of the Disciplinary Board dated August 12, 2010, the Joint Petition in Support of Discipline on Consent is hereby granted pursuant to Rule 215(g), Pa.R.D.E., and it is

ORDERED that Glenn Randall is suspended on consent from the Bar of this Commonwealth for a period of three years retroactive to March 28, 2008, and he shall comply with all the provisions of Rule 217, Pa.R.D.E.

A True Copy Patricia Nicola
As of: October 4, 2010
Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	:	No. 129 DB 2010
v.	:	Attorney Registration No. 81675
GLENN RANDALL Respondent	:	(Bucks County)

RECOMMENDATION OF THREE-MEMBER PANEL
OF THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

The Three-Member Panel of the Disciplinary Board of the Supreme Court of Pennsylvania, consisting of Board Members R. Burke McLemore, Jr., Charlotte S. Jefferies and Sal Cognetti, Jr., has reviewed the Joint Petition in Support of Discipline on Consent filed in the above-captioned matter on July 19, 2010.

The Panel approves the Petition consenting to a three year suspension retroactive to March 28, 2008 and recommends to the Supreme Court of Pennsylvania that the attached Joint Petition be Granted.

The Panel further recommends that any necessary expenses incurred in the investigation and prosecution of this matter shall be paid by the respondent-attorney as a condition to the grant of the Petition.

R. Burke McLemore, Jr., Panel Chair
The Disciplinary Board of the
Supreme Court of Pennsylvania

Date: August 12, 2010

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 129 DB 2010
	:	No. Disciplinary Docket No. 3
v.	:	
	:	Attorney Reg. No. 81675
GLENN RANDALL,	:	
Respondent	:	(Bucks County)

JOINT PETITION IN SUPPORT OF DISCIPLINE ON CONSENT PURSUANT TO Pa.R.D.E. 215 (d)

Petitioner, the Office of Disciplinary Counsel (hereinafter, "ODC") by Paul J. Killion, Chief Disciplinary Counsel, and Ramona Mariani, Disciplinary Counsel, and Respondent, Glenn Randall (hereinafter, "Respondent"), by and through his counsel, W. Austin Allen, II, Esquire, respectfully petition the Disciplinary Board in support of discipline on consent, pursuant to Pennsylvania Rule of Disciplinary Enforcement ("Pa.R.D.E.") 215(d), and in support thereof state:

1. ODC, whose principal office is situated at Pennsylvania Judicial Center, 601 Commonwealth Avenue, Suite 2700, P.O. Box 62485, Harrisburg, PA 17106-2485, is invested, pursuant to Pa.R.D.E. 207, with the power and duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Enforcement Rules.

FILED

JUL 19 2010

Office of the Secretary
The Disciplinary Board of the
Supreme Court of Pennsylvania

2. Respondent, Glenn Randall, was born on September 6, 1969, and was admitted to practice law in the Commonwealth on June 8, 1998. By Order of the Pennsylvania Supreme Court dated February 27, 2008, Respondent was suspended from the practice of law for a period of one year and one day. ***See Office of Disciplinary Counsel v. Randall***, No. 156 DB 2006 (2008). Respondent remains on suspension and is not engaged in the practice of law. Respondent maintains an office at 445 Second Street Pike, Southampton, PA 18966. Respondent is self-employed as a mortgage broker, real estate broker and offers automobile tag services. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent's affidavit stating, *inter alia*, his consent to the recommended discipline is attached hereto as Exhibit "A."

SPECIFIC FACTUAL ALLEGATIONS ADMITTED

4. The events giving rise to the proposed additional discipline occurred in 2005 and 2006 and did not involve the practice of law, but rather, concern the manner in which Respondent operated certain business ventures.

5. Respondent owned and operated several title companies: Lexington and Concord Search and Abstract, LLC ("Lexington"), Lexicon Property Services, Inc. ("Lexicon") and White Stone Search & Abstract, Inc. ("White Stone"), which provided real estate services, including closings on residential real estate and the issuance of title insurance.

6. Lexington is the first company formed by Respondent. Respondent formed Lexicon and White Stone after Lexington ran into financial difficulties.[1]

[1] Lexington acted as a non-exclusive policy issuing agent for Chicago Title Co. ("Chicago"). In March of 2006,

7. On February 21, 2007, Seneca Insurance Co., Inc. sued Lexington and Lexicon in Federal Court in the Eastern District of Pennsylvania seeking the rescission of insurance policies issued by Seneca in October of 2005 and January of 2006. Seneca alleged that Respondent made material misrepresentations and/or omissions on the insurance policy applications.

8. The specific misrepresentations and/or omissions include the following:

a. On the Lexicon application Respondent failed to disclose:

i. A Consent Order issued on July 26, 2006, by the Insurance Commissioner of the Commonwealth of Pennsylvania, disciplining Respondent for a violation of 40 P.S. §§ 310 et. seq.;

ii. His intention to have Lexicon take over the business of Lexington; and

iii. That Lexington was potentially facing a series of claims against it for a variety of reasons.

b. On the Lexington application, Respondent failed to disclose:

i. Litigation arising in April of 2005 in which it was alleged that Lexington and a group called Philadelphia Home Improvement Outreach Program were engaged in a consumer fraud scheme;

ii. Lexington's financial crises at the time of the application;

Chicago performed an audit of Lexington's books and records and confirmed that beginning in 2005 and continuing into 2006, Lexington engaged in a pattern of comingling funds and had a significant shortfall in its escrow account. Respondent attributes the shortfall and financial improprieties to former employees.

iii. Some ten "garden variety" claims or potential claims against Lexington; and

iv. The underlying disciplinary matter against Respondent filed by Office of Disciplinary Counsel.

9. The Honorable Eduardo C. Robreno granted Seneca's motion for summary judgment in a Memorandum Opinion dated May 19, 2008. (Attached hereto as Exhibit "B"). The Court found that everything but the Office of Disciplinary Counsel matter was material to the applications and should have been disclosed to Seneca.

10. Respondent offered a variety of excuses and/or explanations for the omissions. For example, with respect to the Lexington escrow shortfall, Respondent alleged that it was immaterial because he intended to remedy it with his own personal funds.[2] Respondent also explained that he had been assured by opposing counsel in the consumer fraud litigation that Lexington had been named as a defendant as a precaution only and that it was not likely to remain in the suit.[3] Respondent alleged that the 10 potential cases Seneca had discovered were in the process of being resolved and amounted to a tiny fraction of the total settlements handled by Lexington.

11. With respect to the Lexicon application Respondent argued that he merely entered into a cease and desist order with the Deputy Insurance Commissioner, and that such an order did not constitute any sanction that needed to be reported to Seneca. With respect to Seneca's allegation that Lexicon was formed to take over the business of Lexington, the Court found that while Respondent had admitted that eventually Lexington's business would

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[2] In October of 2008 the Chicago suit settled. Respondent made a partial repayment at settlement and agreed to pay the balance due in installment payments.

[3] All of the Philadelphia Home Improvement Outreach cases have now either settled or been dismissed with

be assumed by Lexicon, there was a genuine issue of material fact as to whether the former had been assimilated by the latter at the time Respondent signed the policy application for Lexicon. Nonetheless, the Court still found that Seneca was entitled to rescind the application. More to the point, the Court found that despite Respondent's explanations, Seneca was entitled to complete and accurate information, and that Respondent's omissions amounted to material misrepresentations.

12. On May 15, 2009, Respondent filed a reinstatement petition. The Seneca lawsuit was identified and disclosed as required by the petition. Upon review of the pleadings and Judge Robreno's opinion, ODC advised Respondent that it would oppose his reinstatement petition on the basis that he had engaged in additional misconduct for which he had not been disciplined. Respondent voluntarily withdrew the petition and has cooperated with ODC, as evidenced by his agreement to enter into this Joint Petition in Support of Discipline on Consent.

SPECIFIC RULES OF PROFESSIONAL CONDUCT AND RULES OF DISCIPLINARY ENFORCEMENT VIOLATED

13. Respondent violated RPC 8.4(c), which provides that "[i]t is professional misconduct for a lawyer to....engage in conduct involving dishonesty, fraud, deceit or misrepresentation" in connection with the applications for insurance he filed with Seneca for Lexington and Lexicon.

SPECIFIC RECOMMENDATION FOR DISCIPLINE OF A THREE-YEAR LICENSE SUSPENSION RETROACTIVE TO THE FIRST LICENSE SUSPENSION

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prejudice. Neither Respondent nor Lexington was found liable in any of those suits.

Respondent formed and operated Lexington in the midst of a robust real estate market. Indeed, Respondent states that during the three and one half years Lexington was open for business, the agency closed on over 3500 refinances and/or sales, and catered to over 50 independent mortgage brokers, realtors, private investors and speculators. The company was, for a time, a thriving venture and Respondent had a number of employees to whom he delegated a significant amount of the day-to-day operations. Respondent alleges that those employees engaged in fraud and mismanagement, leading to the Chicago lawsuit and, to some extent, the Seneca lawsuit.

Respondent disclosed the existence of the Chicago lawsuit at the disciplinary hearing and provided a brief description of the allegations in the suit. Nonetheless, because the lawsuit had not been resolved, it was not considered, even as an aggravating factor, in connection with the original discipline. The Seneca suit had not been filed at the time the disciplinary charges were heard. It is clear from a review of the Hearing Committee's Report and Recommendation and Judge Robreno's opinion that Respondent's misconduct in both matters occurred within the same time basic time frame (2005-06). Respondent is also involved, either as defendant or plaintiff, in a number of other lawsuits stemming from his businesses. Most appear related to the same time period and involve issues relating to the mismanagement of Lexington. For example, in some lawsuits in which Respondent is the plaintiff he has sued for overpayments made by his employees to homeowners in connection with real estate settlements. Respondent also sued several former employees and obtained a judgment in one case.

The Seneca litigation provides clear evidence of misconduct pursuant to RPC 8.4(c). In ***Office of Disciplinary Counsel v. Kiesewetter***, 889 A.2d 47 (Pa. 2005) the Pennsylvania

Supreme Court held that the doctrine of collateral estoppel applied to prohibit the respondent-attorney from relitigating facts established in his civil fraud trial. ***Id.*** at 488. Nonetheless, the Court still makes an independent determination as to whether the findings in the previous action constitute professional misconduct and an independent determination as to what sanction is appropriate for such misconduct. ***Id.*** at 489. The attorney is given an opportunity to present mitigation evidence and argue for a lesser sanction. ***Id.*** Kiesewetter converted funds he held as a fiduciary on behalf of certain family members. The Court found that his misconduct warranted disbarment. ***Id.*** at 492. Further, the Court found as aggravating factors that Kiesewetter: (1) had made no voluntary payment on the civil judgment; and (2) failed to obtain gainful employment for several years because if he did so, his earnings would be used to satisfy the judgment against him.

In contrast, the Seneca suit involved allegations of misrepresentation rather than theft or conversion. Further, it does not appear that Seneca suffered any financial loss through its dealing with Respondent beyond the cost of the suit to rescind the two policies. Respondent's misconduct, while serious, is not related to the practice of law. Finally, unlike Kiesewetter, Respondent has acknowledged his misconduct and cooperated with the Office of Disciplinary Counsel by entering into this Consent Petition and stipulating to the Rule violation.

Considering those facts, as well as the fact that the current misconduct for which Respondent is willing to accept discipline occurred nearly five years ago, it is respectfully submitted that a three-year license suspension, retroactive to the effective date of the first license suspension, is an appropriate level of discipline. The net effect will be to extend Respondent's current license suspension until at least March 28, 2011.

WHEREFORE, Joint Petitioners respectfully pray that your Honorable Board:

a. Approve this Petition; and

b. File a recommendation for a three-year license suspension retroactive to March 28, 2008 and this Petition with the Supreme Court of Pennsylvania.

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL
PAUL J. KILLION,
Attorney Reg. No. 20955
Chief Disciplinary Counsel

Date: 7/1/10

By: Ramona Mariani
RAMONA MARIANI,
Disciplinary Counsel
Attorney Registration Number 78466
Suite 170, 820 Adams Avenue
Trooper, PA 19403
(610) 650-8210

Date: 7/12/10

GLENN RANDALL,
Respondent

Date: 7/2/10

W. AUSTIN ALLEN, II
Respondent's Counsel

VERIFICATION

The statements contained in the foregoing *Joint Petition In Support of Discipline on Consent Pursuant to P.A.R.D.E. 215(d)* are true and correct to the best of my knowledge or information and belief and are made subject to the penalties of 18 Pa.C.S.A. §4904, relating to unsworn falsification to authorities.

7/1/10
Date

Ramona Mariani
RAMONA MARIANI
Disciplinary Counsel

7/9/10
Date

GLENN RANDALL
Respondent

7/2/10
Date

W. AUSTIN ALLEN, II
Respondent's Counsel

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. DB 2010 No. Disciplinary Docket No. 3
v.	:	
	:	Attorney Reg. No. 81675
GLENN RANDALL, Respondent	:	(Bucks County)

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 204 Pa. Code §89.2e (relating to service upon counsel).

First Class Mail Service, as follows:

W. Austin Allen, II, Esquire
Law Office of W. Austin Allen, II
755 York Road, Suite 204
Warminster, PA 18974

Dated: 7/15/10

Ramona Mariani

RAMONA MARIANI,
Disciplinary Counsel
Office of Disciplinary Counsel
Suite 170, 820 Adams Avenue
Trooper, PA 19403
(610) 650-8210
Attorney Reg. No. 78466

BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. DB 2010
Petitioner	:	No. Disciplinary Docket No. 3
	:	
v.	:	
	:	Attorney Reg. No. 81675
GLENN RANDALL,	:	
Respondent	:	(Bucks County)

AFFIDAVIT OF GLENN RANDALL

Glenn Randall hereby tenders this affidavit in support of the Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d), and further states as follows:

1. He freely and voluntarily consents to the proposed discipline; he is not being subjected to coercion or duress; he is fully aware of the implications of submitting the consent; and he has consulted and followed the advice of counsel in connection with the decision to consent to discipline.

2. He is aware that there is presently pending a proceeding involving allegations that he has been guilty of misconduct as set forth in the Petition;

3. He acknowledges that the material facts set forth in the Petition are true.

4. He consents because he knows that if charges continued to be prosecuted

Exhibit "A"

in the pending proceeding, he could not successfully defend against them.

Signed this 9th day of July, 2010.

NOTARIAL SEAL
DIANE SMITH
Notary Public
UPPER SOUTHAMPTON TWP. BUCKS CNTY
My Commission Expires Jul 26, 2013

Glenn Randall
Attorney Reg. No. 81675

Sworn to and subscribed
Before me this 9th day
of July 2010

Diane Smith
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SENECA INSURANCE CO., INC.,	:	CIVIL ACTION
	:	NO. 07-714
Plaintiff,	:	
	:	
v.	:	
	:	
LEXINGTON AND CONCORD SEARCH AND ABSTRACT, LLC, et al.	:	
	:	
Defendants.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. MAY 19, 2008

Plaintiff Seneca Insurance Company ("Seneca") brings this action for declaratory judgment against both Lexington and Concord Search and Abstract, LLC ("Lexington"), and Lexicon Property Services ("Lexicon"), seeking rescission of certain insurance policies[1] issued by Seneca for the benefit of Lexicon and Lexington. Seneca alleges that during the negotiations for both defendants' insurance policies, the defendants made material misrepresentations on the policy applications. The alleged misrepresentations were authored by Glenn Randall ("Mr. Randall"), the principal, sole shareholder and president of both Lexington and Lexicon, who completed both companies'

[1] Professional Liability Policy MTA 00 01 183 issued by Seneca to Lexington for the policy period running from January 8, 2006, through January 8, 2007, and Professional Liability Policy MTA 00 00 995 issued by Seneca to Lexicon for the policy period running from October 14, 2005, through October 14, 2006.

Exhibit "B"

applications. Seneca has now moved for summary judgment.[2] The motion will be granted.

I. FACTS

On September 29, 2005, defendant Lexicon completed and submitted an application for a professional liability insurance policy to Seneca. Decarlo Aff. Ex. D. Mr. Randall answered in the negative to the following four questions on the application:

1. Has the name of the applicant ever been changed or has any other business been purchased, merged, or consolidated with the applicant?
2. Does any director, officer, employee or partner of the applicant have knowledge or information of any act, error, or omission which might reasonably be expected to give rise to a claim?

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[2] In the defendants' response to the motion for summary judgment, the first paragraph states, "[the defendants] move this Honorable Court for summary judgment against declaring that Seneca's title Agents and Title Abstractors Professional Liability Insurance Polic[ies] issued to [the defendants]. . . be considered to be in effect from the time of their inception." Assuming that the defendant is moving for summary judgment, the dual motions shall be considered separately. Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co., 10 F.3d 144, 150 (3d Cir. 1993). Although cross-motions must be considered separately on the merits, a determination of a common issue of law and fact may, in fact, be dispositive of both motions. St. Paul Fire & Marine Ins. Co. v. Turner Constr. Co., 2008 U.S. Dist. LEXIS 26903, *7 (E.D. Pa. Apr. 2, 2008). For the same reasons that the Court grants the plaintiff's motion for summary judgment, the defendants' motion will be denied.

3. Have any claims been made during the past five years against the applicant, their predecessors in business or any other present or past partners?

4. Has any director, officer, employee or partner of the applicant even been the subject of disciplinary actions as a result of professional activities?

Id. Mr. Randall has admitted to purposefully omitting from the Lexicon application the following facts:

1. A Consent Order was issued on July 26, 2005, by the Insurance Commissioner of the Commonwealth of Pennsylvania, disciplining Mr. Randal for his violation of 40 P.S. §§ 310 et seq;

2. Mr. Randall planned to have Lexicon take over the business of Lexington;[3] and

3. Lexington was potentially facing a series of claims against it for a variety of reasons.

Upon receipt of Lexicon's application for insurance, Seneca did issue such a policy.

On December 2, 2005, defendant Lexington, a policy issuing agent for a company called Chicago Title,[4] applied for an

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[3] Randall Dep. 95:20-23, Aug. 17, 2007.

[4] Chicago Title filed a motion to intervene in this case which was denied. See Seneca v. Lexingon & Concord Search and Abstract, LLC, 484 F. Supp. 2d 374 (E.D. Pa. 2007). Chicago

insurance policy with Seneca. On the policy application, Question 8 read;

> Has any claim been made against the applicant in the last five (5) years? If "yes", please attach description of the claim(s), amounts paid and/or reserved for claim settlement.

Decarlo Aff. Ex. C. Lexington, through Mr. Randall, checked the "yes" box, and attached correspondence concerning three existing claims against Lexington by New Century Mortgage/Jackson, Agent Mortgage Company, LLC, and Franze and Ferande Ulysse. Mr. Randall also wrote, "nothing had been paid to date." Question 9 read;

> Are you aware of any actual or alleged act, error or omission that may reasonably be expected to give rise to a claim?

Id. The response was in the negative.

Mr. Randall purposefully omitted from the Lexington application the following facts:

1) Lexington was involved[5] in litigation arising in

Title is a title insurance underwriter. It appoints title agents to issue title insurance policies and then underwrites policies that its agents issue to property owners and lenders. Lexington served as an agent for Chicago Title.

[5] Both Lexington and Mr. Randall were served with complaints in the cases of Chase Manhattan Mortgage Corp. v. Brewer, 04-0591, (Phila. Ct. Com. Pl. Aug. 2005), and Brewer v. Chase Manhattan Mortgage Corp., 0507-2952, (Phila. Ct. Com. Pl. Aug.

April of 2005, in which it was alleged that Lexington and a group called Philadelphia Home Improvement Outreach Program were engaged in a consumer fraud scheme;

2) Lexington was in the midst of a financial crisis at the time is filled out the policy application;

3) Lexington had approximately ten "garden variety" claims that were either pending against it, or which would likely be filed; and

4) Mr. Randall and Lexington had been accused of misrepresentation and deception with regard to certain funds they were expected to be holding in escrow.

Notwithstanding the admission in Question 8, and the details of three pending claims with regard thereto, Seneca issued a professional liability policy for defendant Lexington. In connection with both policies, it is unquestioned that Mr. Randall was aware of the above facts which he omitted from the applications; he has never disputed their accuracy.[6]

The question before the Court is whether any of the

2005).

[6] The Court takes note of Mr. Randall's argument that, "Lexicon was not formed just as a replacement for [Lexington]." Def. Mem. Opp. Summ. J. 3. However, Mr. Randall's deposition testimony confirms otherwise. Randall Dep. 95:23, 150:22, 162:5, Aug. 17, 2007.

omissions listed above constitute material misrepresentations warranting rescission.

II. DISCUSSION

A court may grant summary judgment when "the pleadings, the discovery and the disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. Id. at 248-49. "In considering the evidence, the court should draw all reasonable inferences against the moving party." El v. Se. Pa. Transp. Auth., 479 F.3d 232, 238 (3d Cir. 2007). "[S]ummary judgment is essentially 'put up or shut up' time for the non-moving party: the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." Berckeley Inv. Group, Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006).

Under Pennsylvania law, "when an insured secures an insurance policy by means of fraudulent misrepresentations, the insurer may avoid that policy." Rohm & Haas Co. v. Cont'l Cas. Co., 781 A.2d 1172, 1179 (Pa. 2001). An insurer must demonstrate that, "(1) that the representation was false; (2) that the insured knew that the representation was false when made or made it in bad faith; and (3) that the representation was material to the risk being insured." N.Y. Life Ins. Co. v. Johnson, 923 F.2d 279, 281 (3d Cir. 1991) (applying Pennsylvania law). A misrepresented fact in an insurance application is material if on being disclosed to the insurer it would have caused the insurer to refuse the risk altogether or to demand a higher premium. Id. at 282. Anything which increases risk cannot be immaterial. Id. (quoting Hartman v. Keystone Insurance Co., 21 Pa. 466 (1853); Burkert v. Equitable Life Assur. Soc'y of Am., 287 F.3d 293, 298 (3d Cir. 2002).

A. Lexington

Seneca argues that Mr. Randall made several misrepresentations when he indicated that there were only three pending claims against Lexington and that he was unaware of any acts or omissions that would give rise to additional claims against Lexington. The Court agrees.

1. Financial Crisis

First, as an overarching concern, Lexington was in a financial crisis and suffered severe escrow shortages at the time it filled out the application with Seneca. Randall Dep. 161:1-5, Aug 17, 2007 ("every day . . . was a new incursion into fraud and nightmarish shortages in the escrow account."). This crisis was due in part to at least one employee at Lexington, Eric Senders, who unrecorded mortgages deeds, certified checks for thousands of dollars, signed and unsigned settlement sheets, blank checks and half written checks, and commingled and misfiled papers from other files. Randall Stmt. 9 and 22-25.

Mr. Randall claims that failing to inform Seneca of the dire straits faced by the company was not a material omission from the application because he and his mother, Diane Smith, who was also an employee at Lexington, "had contributed their personal funds to resolve any errors or omissions that had arisen from the operation fo the title agency." Pl.'s Mem. Summ. J. 5. Thus, while Mr. Randall recognized the problems within Lexington, his decision to inject his personal funds into the company would, he believed, obviate the need for Seneca's involvement. Seneca claims that this situation could have, and in fact did, lead to multiple claims filed against Lexington.

Accepting as true Mr. Randall's representation that he intended to satisfy the claims with personal funds without the aid of his insurance carrier, it is not certain whether his avowed personal and financial contribution would have obviated the need for Seneca's coverage.[7] Even if he could have satisfied the claims without Seneca's involvement, Mr. Randall would not have been freed from his obligation to be truthful in the application for insurance coverage. The purpose of Seneca's inquiry into the acts or omissions that might give rise to a claim was to learn as much as possible about the potential risk it faced. N.Y. Life Ins. Co. v. Johnson, 923 F.2d at 281. By denying Seneca this pertinent information, Lexicon deprived Seneca of the ability to develop the proper calculus with which to accurately estimate the risk of the policy.

In failing to disclose the financial condition of Lexington and the likelihood that such a condition would give rise to claims against it, Mr. Randall materially misrepresented the likelihood of potential claims. These misrepresentations increased Seneca's risks. Thus, Seneca is entitled to a rescission of the Lexington policy.

2. The Brewer Matter

Second, Seneca argues that Lexington's failure to divulge two pending civil actions in the Philadelphia Court of Common Pleas involving Lexington (collectively "Brewer matter"),

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[7] Mr. Randall admitted in his deposition that it was impossible to determine the magnitude of the problem. Randall Dep. 10:21-12:4.

in and of itself, entitles Seneca to a rescission. These suits were filed in April and August of 2005, and arose from the alleged participation of Lexington in a consumer fraud scheme perpetrated by Lexington and a group called Philadelphia Home Improvement Outreach Program. Lexington argues that it had been assured by opposing counsel in the above mentioned suits that naming Lexington a defendant was for "informational purposes" and that at no time were the plaintiffs in the two cases seeking to impose liability upon Lexington. Def. Mem. Opp. Summ. J. 7. Importantly, Lexington does not deny that it was involved in the litigation. Seneca contends that it would have denied coverage to Lexington had it been provided with this information because the claims present "the potential of a large number of future claims by similarly situated complainants." Pl.'s Mot. Summ. J. 12.

Again, Lexington's impression of the extent to which it was subject to potential liability is irrelevant to its obligations to Seneca. Whatever assurances were given to Lexington by opposing counsel in the Brewer Matter did not preclude the possibility of a judgment against Lexington, and the prospect that Seneca would be required to cover possible claims against Lexington. Here, as with the information concerning its financial condition, Seneca was denied material information with which to accurately estimate its risk under the policy. These material misrepresentations increased Seneca's risks. Thus, Seneca is entitled to rescind its policy with Lexington on these grounds.

3. Garden Variety Claims

Third, Seneca argues that there were at least 10 "garden variety" claims or potential claims pending against Lexington that Mr. Randall did not disclose on the policy application. See Maniloff Decl. Exs. 5-14. Seneca has submitted 10 letters from various businesses and individuals complaining of the conduct of Lexington and, in some cases, Mr. Randall specifically. Id. Some of these letters were addressed to Chicago Title concerning Lexington,[8] some to Mr. Randall or Lexington directly,[9] and the others simply referenced matters with which Lexington was involved.[10] The dates of these letters fall between July 27, 2004, and October 5, 2005. Many of letters used language such as, "This letter is to put Chicago Title Insurance Company on notice of a possible claim involving the above-captioned property"[11] or "Due to an error on behalf of your

[8] Maniloff Decl. Exs. 5-8.

[9] Maniloff Decl. Exs. 9-11.

[10] Maniloff Decl. Exs. 12-15.

[11] Maniloff Decl. Exs. 5.

company . . . the deed and mortgage note were never recorded."[12]

Lexington's defense to this charge consists of two sentences in its brief in opposition to summary judgment;

> The list of potential claims on **page 10** of the Memorandum of Law [filed by plaintiff] is again presented in a pile without indication of resolution to further impugn the integrity of L&C and Glenn Randall. Each of these is explainable and was either brought to light after December 2005 or was in the process of being remedied.

Def. Mem. Opp. Summ. J. 6.

While Lexington does not deny the existence of the claims against it, it contends that the claims themselves were actually were brought after December 2005, i.e., after the Lexington application was completed. However, all of the 10 letters at issue were dated between July 26, 2004, and October 5, 2005, months before the Lexington application to Seneca was filed on December 2, 2005. Given that the 10 letters at issue represent potential claims against Lexington, which were known to Mr. Randall at the time Lexington filed the application with Seneca, and that he failed to disclose them to Seneca, the Court concludes that Lexington materially misrepresented the potential claims which Seneca could face. These material misrepresentations increased Seneca's risk.[13]

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[12] Maniloff Decl. Exs. 9. This letter was addressed to Mr. Randall.

[13] By virtue of being truthful with regard to the three claims Lexington did disclose, Seneca doubled its premiums for

Seneca is entitled to rescission of the policy on these facts.

4. The Zinkland Matter

Lastly, Seneca argues that Lexington's failure to disclose Mr. Randall's involvement in a fraudulent transaction was a material misrepresentation. In this transaction, defendant Lexington was contacted by an individual named Zinkland in December of 2004, and asked to act as an escrow agent in a money dispute between Zinkland and another individual, Anderson. Def. Mem. Opp. Summ. J. 7. On two occasions, Mr. Randall indicated that he was in possession of the funds ($26,000). Maniloff Decl. Ex. 20. However, it became clear in early 2005 that Lexington was not, in fact, in possession of the funds. Id.; Pl.'s Mem. Summ. J. 15. As a result of a criminal investigation of Zinkland, Mr. Randall was deposed in early 2005, and for the first time, admitted that he was never in possession of the escrow funds. Maniloff Decl. Ex. 20. Also, with regard to the investigation and prosecution of Zinkland, Mr. Randall was

coverage in 2006-2007 from those for the 2005-2006 policy. DeCarlo Aff. ¶¶ 13, 16, 30. Undoubtedly, disclosure of 10 additional claims or potential claims would have impacted Lexington's premiums in some fashion. N.Y. Life Ins. v. Johnson, 923 F.2d at 282.

subpoenaed to testify at Zinkland's preliminary hearing.[14]

It is now clear that Mr. Randall has had his license to practice law in the state of Pennsylvania suspended for a period of one year and one day by the Disciplinary Board of the Supreme Court of Pennsylvania[15] and that such action was a direct result of his role in the Zinkland matter. However, the Lexington application did not inquire as to expected disciplinary action against officers of Lexington. And, the evidence on the record does not suggest that Lexington had any reason to believe it was exposed to financial liability with regard to the Zinkland matter. Therefore, Seneca is not entitled to rescission on the grounds that Lexington failed to disclose the Zinkalnd matter; failure to disclose information into which Seneca did not inquire cannot constitute a material misrepresentation.

* * *

In sum, while failing to disclose the Zinkland matter was not a material misrepresentation, failing to disclose 1) the financial status of Lexington, 2) the Brewer Matter, and 3) the 10 "garden variety" claims, all constitute material omissions which increased Seneca's risks, entitling Seneca to rescission with respect to the Lexington insurance contract.

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[14] Mr. Randall did not attend the hearing because he didn't believe his presence was necessary

[15] Office of Disciplinary Counsel v. Randall, No. 1320 (Pa. Feb. 27, 2008).

B. Lexicon

Seneca argues that the defendant made two material misrepresentations on the Lexicon application. The first concerns Mr. Randall withholding details of his reprimand by the Pennsylvania Insurance Commissioner, and the second, regarding the relationship between Lexicon and Lexington. The former will suffice for rescission, the latter will not.

1. History of Discipline

Plainly, the Lexicon application asked, "Has any director, officer, employee or partner of the applicant even been the subject of disciplinary actions as a result of professional activities?" Decarlo Aff. Ex. C. On July 26, 2005, the Deputy Insurance Commissioner of the Commonwealth of Pennsylvania entered into a consent degree whereby Mr. Randall was required to cease and desist all activities that were in violation of 40 P.S. §§ 310 et seq.[16] Such violations are punishable by suspension of license, imposition of a fine, a cease an desist order, or any other condition deemed appropriate by the commissioner. 40 P.S. 310.91. Mr. Randall contends that the cease and desist order

[16] Generally, 40 P.S. 310.11 prohibits a licensee from demonstrating a lack of general fitness, competence or reliability sufficient to satisfy the department that the licensee is worthy of licensure.

issued by the commissioner was not a sanction and that his conduct did not create a "moral hazard" which needed to be reported to Seneca. This argument is without merit.

Mr. Randall engaged in one of the activities listed under "prohibited acts" under 40 P.S. § 310.11, and was punished by one of the measures enumerated in "penalties" under 40 P.S. 310.93. Under these circumstances, the Court concludes that the consent order represents a disciplinary action taken by the Insurance Commissioner against Mr. Randall. See Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 298 (1973) (holding that a cease and desist order constitutes a disciplinary action when taken by the Secretary of Agriculture); Am. Guar. & Liab. Ins. Co. v. Mongelli, 2006 U.S. Dist. LEXIS 44387, *14 (D.N.J. June. 29, 2006) (denying a motion to dismiss when defendant argued that a letter of admonition was not a "disciplinary action" for rescission purposes).

Mr. Randall was president of Lexington. While a cease and desist order is not as severe as a suspension of license, he was still obligated to inform Seneca of this sanction. Failure to inform Seneca of this sanction deprived Seneca of material information and increased Seneca's risk.

2. Lexicon's Relation to Lexington

The Lexicon application asked, "Has the name of the applicant ever been changed or has any other business been purchased, merged, or consolidated with the applicant? If Yes, explain on separate paper." Mr. Randall responded in the negative.

Mr. Randall admits in his deposition that Lexicon was eventually going to take over the Lexington business.[17] However, at least two months after the Lexicon policy application had been submitted, Lexington was still operating independent of Lexicon. Regardless of the future relationship between Lexington and Lexicon, there is a genuine issue of material fact as to whether the former had been assimilated by the latter at the time Mr. Randall signed the policy application for Lexicon. Thus summary judgment in favor of Seneca is inappropriate on this ground.

* * *

Regardless, even though Lexicon's relationship with Lexington is in dispute, as described above, Seneca is entitled to rescind its policy with Lexicon.

III. CONCLUSION

For the above reasons, the Seneca policies issued to both Lexington and Lexicon shall be rescinded. An appropriate order follows.

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[17] Randall Dep. 95:23, Aug. 17, 2007. (Q: Because Lexicon was essentially going to take over the L & C business? A: Correct.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SENECA INSURANCE CO., INC., Plaintiff,	:	CIVIL ACTION NO. 07-714
v.	:	
LEXINGTON AND CONCORD SEARCH AND ABSTRACT, LLC, et al. Defendants.	:	

O R D E R

AND NOW, this **19th** day of **May, 2008,** it is hereby **ORDERED** that Plaintiff's Motion for summary judgment (doc. no. 36) is **GRANTED** and defendants' motion for summary judgment (doc. no. 38) is **DENIED.**

AND IT IS SO ORDERED.

S/Eduardo C. Robreno

EDUARDO C. ROBRENO, J.