RECENT DEVELOPMENTS IN TITLE INSURANCE LAW

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I. INTRODUCTION

We dissected about 110 decisions relevant to title insurance this year. Many were favorable to the title industry. However, omitting the word "in" from a closing protection letter was fatal to an insurer in Michigan. In addition, the ghost of *Citicorp Savings*[1] trudged unchallenged in two opinions.

II. INSURED VERSUS INSURER

A. *Policy Terms*

1. Who Is the Insured?

In a minority opinion, the Supreme Court of Wyoming addressed the appropriate test for determining an "insured successor" under an American Land Title Association (ALTA) policy.[2] A husband and wife purchased five separate properties and later conveyed the properties to a limited liability limited partnership created explicitly for estate planning purposes.[3] The husband and wife purchased title insurance from First American and were named personally as insureds.[4] The husband and wife submitted a claim to First American for failure to disclose a county road encumbrance over the property.[5] The appellate court reversed a summary judgment in favor of First American, finding that the transfer of the properties to the

1. Citicorp Sav. of Ill. v. Stewart Title Guar. Co., 840 F.2d 526 (7th Cir. 1988).
2. N. Fork Land & Cattle, LLP v. First Am. Title Ins. Co., 362 P.3d 341, 352 (Wyo. 2015).
3. *Id.* at 342.
4. *Id.*
5. *Id.*

partnership did not include an exchange of money or other valuable consideration and was therefore a transfer by "operation of law."[6] The court held that where the insured parties transferred property to a limited partnership made up only of the insured parties and their legal heirs for the express purpose of estate planning, the limited partnership was an insured under the ALTA policy.[7]

In a unique situation where the collateral described in a deed of trust included not only the subject property, but also all insurance proceeds paid in connection with the land and all recoveries from any diminution in value of the land or improvements, a court found a first position lienholder had a superior claim to title insurance settlement proceeds, based on the insurance contract, in a dispute against a judgment holder that held a second position deed of trust.[8]

The New York Appellate Division upheld the Surrogate Court's grant of a motion to dismiss the petition against a title insurer.[9] The court stated that a title company is not, absent evidence of fraud or other special circumstances, subject to suit for negligent performance by one other than the party who contracted for its services.[10] Upon finding that the petition consisted of bare, conclusory allegations, which were insufficient to meet the fraud specificity requirements, the court affirmed the dismissal of the petition.

2. What Is Insured?

A purchaser of real property and a purchaser's owner brought an action against a title insurer for declaratory judgment and against the title examiner for negligence.[11] The court found that because the policy excluded coverage for taxes and assessments not due and payable at the time of closing, the insurer was not liable for taxes reassessed after the insured transaction.[12] The court noted that at the time the insurance policy became effective, there were no unpaid taxes shown as existing liens in the records.[13] The court acknowledged that the covered risk was not invoked because the reassessed taxes became a lien only after the tax appeals board issued a final decision.[14] As an additional matter, the undisputed facts in-

6. *Id.* at 346–49, 351–52.
7. *Id.* at 352.
8. Van Buren Estates Lenders, LLC v. Fiegl, 2015 WL 4931502 (Cal. Ct. App. Aug. 18, 2015) (unpublished).
9. *In re* Woodson, 136 A.D.3d 691, 693 (N.Y. App. Div. 2016).
10. *Id.*
11. Lone Star Equities, Inc. v. Dimitrouleas, 34 N.E.3d 936, 939–43 (Ohio Ct. App. 2015).
12. *Id.* at 953–55.
13. *Id.*
14. *Id.* at 955.

dicated that the title examiner did not deviate from accepted standards of care when examining the title and was therefore not liable for the failure to discover the pending action before the Board of Tax Appeals.[15]

Another case dealing with a dispute over coverage under a title insurance policy against loss from any defect in or lien or encumbrance on such title to property found that if the land was not described in the owner policy or in the description contained in the deed, the insured had no coverage for the failure to acquire it.[16] The court found that when a deed contains the restrictive covenant for adjoining properties to be treated "as joint and never severed," and the deed is subsequently conveyed by the same transferors to different transferees, such a restrictive covenant is deemed abandoned, and the lots could be severed if intended by the parties.[17]

When the title insurance policy contains a homeowner extended coverage endorsement, the endorsement does not cover the insured's loss where the property was subject to a "conservation commission order of conditions" that was properly recorded, but not discovered by the title search prior to the purchase.[18] The "order of conditions" at issue was not referenced anywhere in the property description or in the title insurance policy.[19] Further, the "order of conditions" contained a restriction from building that significantly limited the insured's use and value of the property. The trial court held that (1) the "order of conditions" did not affect the title because it did not affect the marketability of title, (2) there was no actual conservation restriction on the land; and (3) the risk was excluded from coverage where the conservation restriction did not exist at the time the policy was created.[20] The court further concluded that the "order of conditions" was not a restrictive covenant because the order was silent as to what would actually be restricted.[21] The court concluded that where the terms of the insurance policy are unambiguous, "we do not look beyond the four corners of the policy concerning whether coverage is customarily available."[22]

3. Exclusions

A South Carolina court disagreed with a title insurer's arguments that an unrecorded "spoil easement" and "no-build resolution" in favor of the

15. *Id.* at 953.
16. Krajewski v. Fid. Nat'l Title Ins. Co., 2016 WL 2754435 (Pa. Super. Ct. May 11, 2016).
17. *Id.* at *5.
18. Veeder v. Old Republic Nat'l Title Ins. Co., 36 N.E.3d 79, 2015 WL 5102856 (Mass. App. Ct. Sept. 1, 2015) (table).
19. *Id.* at *1.
20. *Id.*
21. *Id.* at *2.
22. *Id.* at *3.

government that did not show up in the real property records of the property should bar the insured's coverage where the insured was prevented from building on the property.[23] The court concluded that the title policy's exclusion for "governmental police power" did not exclude coverage for a government regulation that was inherently a public record, as was the case where the government held an easement over the insured's property.[24] The court noted that the title policy provided broad coverage for title problems created by laws and regulations addressing land use and improvements on land.[25] Because the title company drafted the policy, it could have easily defined the term "public record" to exclude zoning laws and regulations.[26] The court held that the insured was covered under the policy because the "spoil easement" and "no-build resolution" were matters of public record, and the title company failed to locate them during the title search.[27] In addition, the policy failed to define the term "single-family residence" and construed the policy to include a mobile home, further reinforcing coverage in favor of the insureds since they were unable to build a "single-family residence" because of the undiscovered spoil easement.[28]

Title insurance, as opposed to other types of insurance, does not insure against future events.[29] When a party claims that the ambiguity in an insurance contract arises from the exclusions to the policy, the court must first determine if the claims are covered by the policy.[30] In *BV Jordanelle LLC*, the court found that where an assessment was levied against the insured property over a year after the title insurance policy was issued, the policy did not cover the assessment because the lien was created after the date of the policy and such an assessment does not constitute a defect, lien, or encumbrance on the title to the insured property.[31] The policy provided that it was effective "as of Date of Policy"[32] and unless explicitly stated, exceptions to the policy cannot expand the risks covered by the policy.[33] Subject to certain exceptions, the policy protected the insured and the insurer against the liens created as of the date of the policy and listed in the policy.[34] Accordingly, the policy could cover liens that did

23. Lyons v. Fid. Nat'l Title Ins. Co., 781 S.E.2d 126 (S.C. Ct. App. 2016).
24. *Id.* at 131.
25. *Id.* at 132.
26. *Id.*
27. *Id.*
28. *Id.* at 135–36.
29. BV Jordanelle, LLC v. Old Republic Nat'l Title Ins. Co., 2015 WL 4647894, at *2 (D. Utah Aug. 5, 2015).
30. *Id.*
31. *Id.* at *3–4.
32. *Id.* at *5.
33. *Id.* at *6.
34. *Id.*

not exist as of the date of the policy.[35] Holding the title company responsible for an assessment created after the date of the policy would give the insured rights not provided for in the contract, contradict the express terms of the contract, and compel the title insurer to involuntarily benefit the insured to its own detriment.[36]

In a case involving a claim by insureds against their lawyer alleging legal malpractice, the court held that the lawyer did not commit malpractice because he had provided notice of the claim to the title insurer by serving notice on the insurer's registered agent.[37] The court further found that the policy did not provide coverage because the insured was sued for violating county zoning ordinances and restrictions; the insurer has no duty to defend such a claim because it falls under the police powers exclusion.[38]

Under Missouri law, an insurer is not obligated to defend suits that were brought about by the consequences of the acts of the insured.[39] Pursuant to Exclusion 3(b) of the 1992 ALTA policy, there is no coverage under a title insurance policy for matters that are not recorded and not known by the insurer but for which the insured or its agents have actual knowledge.[40] As to matters that are outside the public record and not normally discoverable via standard title examination (wild deeds, frauds, forgeries, etc.), the title insurance policy normally provides coverage, but not if an insured has knowledge of these matters.[41] In *Howard v. Fidelity National Title Insurance Co.*, the plaintiff knew of the fraudulent transactions that were allegedly insured by the title insurance company.[42] As such, the claims by the plaintiff were barred under Exclusion 3(b). Further, the plaintiff did not suffer any losses. Rather, the plaintiff gained money from the fraudulent scheme and was barred from recovery under Exclusion 3(c), which excludes coverage for matters resulting in no loss to the insured claimant.[43]

4. Exceptions

A recent Tennessee case addressed the issue of whether a title insurer faces liability for breach of contract where the insured claims a lien listed in the insurance policy exceptions should have been released.[44] The court

35. *Id.*
36. *Id.*
37. Gibbs v. Williams, 2015 WL 5440628, at *4 (W.D. Wis. Sept. 14, 2015).
38. *Id.* at *4–5.
39. Howard v. Fid. Nat'l Title Ins. Co., 2015 WL 5021768, at *9 (E.D. Mo. Aug. 24, 2015).
40. *Id.* at *10.
41. *Id.*
42. *Id.* at *11.
43. *Id.*
44. Peoples Bank v. Troutman, 2015 WL 4511540 (Tenn. Ct. App. July 27, 2015).

held that where a title insurance policy specifically and unambiguously exempted a lien from coverage and listed as a requirement for coverage that the lien must be released, the title insurance could not be held liable for breach of contract where the lien was never released or reconveyed.[45]

B. *Claims Procedure*

1. Notice/Limitations

Homeowners brought an action against title insurer for breach of contract and breach of the insurer's duty of good faith and fair dealing.[46] The title policy required that the insured promptly notify the title insurer in writing of any potential claims of which the insured had knowledge and which may cause loss to the insurer.[47] The property was sold at a tax sale for failure to pay a special tax assessment. The insured homeowners were previously contacted by the purchasers notifying them of the sale twice, but failed to notify the title insurer of the tax lien when they received notice.[48] After the loss of their home, the homeowners made a claim to the title insurer for failure to include in the title search the special assessment that was recorded in the public records.[49] The title insurer denied coverage because the homeowners failed to notify the insurer when they first received notice of the tax sale and again when they received the second notice of the tax sale deed.[50] The court found that the duty to notify an insurance company of the potential liability is a condition precedent to the company's liability to the insured.[51] The court further stated that noncompliance with material notice of claim provisions in the policy, resulting in an unreasonable delay, triggers a presumption of prejudice to the insured's ability to prepare an adequate defense.[52] Therefore, the motion for summary judgment was affirmed in favor of the insurer.[53]

As discussed earlier in *Gibbs v. Williams*,[54] notice of a potential claim to a title agent constitutes notice to the insurer in Wisconsin.[55]

In *Wells Fargo Bank, N.A. v. First American Title Insurance Co.*, Wells Fargo refinanced a loan that was insured so that the lien would operate as a first priority lien against the property.[56] Wells Fargo made a claim

45. *Id.* at *6–8.
46. Pike v. Conestoga Title Ins. Co., 44 N.E.3d 787 (Ind. Ct. App. 2015).
47. *Id.* at 788.
48. *Id.*
49. *Id.* at 789.
50. *Id.*
51. Pike v. Conestoga Title Ins. Co., 44 N.E.3d 787, 790 (Ind. Ct. App. 2015).
52. *Id.*
53. *Id.* at 791.
54. 2015 WL 5440628 (W.D. Wis. Sept. 14, 2015).
55. *Id.* at *4.
56. 2016 WL 1366078, at *1 (D. Md. Apr. 6, 2016).

to the title insurer when its interest was wiped out from a foreclosure of an indemnity deed of trust that was not excepted to in the title policy.[57] The insurer denied Wells Fargo's claim based on failure to provide timely notice because it waited until after the foreclosure sale and a final judgment was entered before tendering its claim.[58] The court held that a title insurance policy is breached only after notice of an alleged defect in title is tendered to the insurer and the insurer fails to do the following: (1) pay the insured's loss, (2) clear the defect within a reasonable time, or (3) show that the defects do not exist.[59] The statute of limitations for a breach of contract claim, therefore, began to run on the date the title insurer denied Wells Fargo's claim.[60]

2. Duty to Defend

Under Idaho law, an insurer's duty to defend arises upon the filing of a complaint, when the allegations in the complaint, in whole or in part, read broadly, reveal a potential for liability that would be covered by the insured's policy.[61] In *Yarbrough*, the policy required the insurer to provide for the defense of the insured in litigation in which any third party asserted a claim covered by the policy.[62] The court held that, absent language to the contrary in the insurance contract, under normal circumstances an insurer's duty to defend an insured is not implicated when the insured is a plaintiff in an action in which a defendant pleads an affirmative defense that relates to subject matter that may otherwise fall within the scope of coverage.[63] Under ordinary duty-to-defend language, an insurer has no duty to defend an affirmative defense asserted against the insured in an insured-initiated action, but a set-off affirmative defense could implicate a duty to defend if it (1) would unquestionably have been a suit for damages if asserted in a court of law and (2) fell within the scope of the contractual obligation.[64] The court held that a duty to defend is triggered when the allegations in the complaint reveal a potential for liability that would be covered by the insured's policy.[65] Absent language to the contrary in the policy, an affirmative defense raised in opposition to a suit initiated by the insured does not trigger the insurer's duty to defend, unless

57. *Id.*
58. *Id.*
59. *Id.* at *2–3.
60. *Id.* at *3.
61. Yarbrough v. First Am. Title Ins. Co., 2015 WL 7451193 (D. Or. Nov. 23, 2015), *appeal pending*, No. 15-35984 (9th Cir. 2015).
62. *Id.* at *5.
63. *Id.*
64. *Id.*
65. *Id.* at *6.

the affirmative defense reveals a potential for liability on the part of the insured.[66]

A title insurance contract required a title insurer to indemnify and defend an insured in litigation in which any third party asserted a claim adverse to the title or interest as insured.[67] Coverage was triggered if the complaint in the underlying action averred facts that would support a recovery covered by the policy.[68] The court held that there was no duty to defend in an action by the insured's lender to reform the legal description in lien documents.[69]

Chicago Title denied an insured's claim based on the exclusions listed in the policy, including any title risks that were created, allowed, or agreed to by the insured, or that were known to the insured but not to Chicago Title as of the policy date.[70] The insured was sued by her siblings who alleged that they had an agreed upon interest in the insured's real property prior to the insured's purchase, but that they were not included on title because of their poor credit ratings.[71] The court ruled that Chicago Title had no duty to defend the insured in the quiet title action instituted by the siblings against the insured.[72] The court noted that the policy clearly excluded coverage for such claims because those claims pertained to a title risk created by the insured and known to her, but not disclosed to the insurer before the policy was issued.[73]

Insureds brought an action against a title insurance company, seeking a declaration that it was obligated to defend them in separate action brought by the insureds' neighbors, who sought to prevent them from building a driveway on an easement benefitting their property and burdening their neighbors.[74] The title insurance policy specifically excluded coverage for terms and provisions described in the easement deed in favor of the insured, which provided for the ingress and egress to the insured's property.[75] The court found that the insured would be effectively denied the easement granted in the deed without the ability to gain ingress and egress rights to the property.[76] Therefore, the lawsuit placed at issue

66. *Id.*
67. Stewart Title Guar. Co. v. McClain, 2016 WL 1436613, at *6 (Penn. Super. Ct. Apr. 12, 2016).
68. *Id.*
69. *Id.* at *6–7.
70. Carrington v. Chicago Title Ins. Co., 2015 WL 6758365 (N.J. Super. Ct. App. Div. Nov. 6, 2015).
71. *Id.* at *1.
72. *Id.* at *2.
73. *Id.* at *3–4.
74. Perry v. Fid. Nat'l Title Ins. Co., 48 N.E.3d 1168 (Ill. App. Ct. 2016).
75. *Id.* at 1170.
76. *Id.* at 1172–73.

whether the easement rendered the title unmarketable. The court ruled the insurer had the duty to defend the insured.[77]

In another easement case dealing with access rights, a California court ruled that an insurer was not liable to the insured's neighbors for planning and initiating litigation against the neighbors to establish the insured's easement rights over the neighbors' property.[78]

An insurer was sued for abuse of process for funding, allegedly improperly, a land developer's litigation to confirm easement rights over the insured land developer's property.[79] The court found that as a matter of law, the title insurance policy did cover the land developer's losses as it related to the easement claims and any funding by the title insurer in accordance with the title insurance policy does not constitute an abuse of process.[80]

In a well-reasoned opinion, an Arizona court addressed whether a title insurance company is liable for damages agreed to by its insured in a settlement agreement resolving a third-party mechanics' lien claims against the insured's real estate development.[81] The court cited *United Services Automobile Association v. Morris*, which held that when an insurer agrees to defend its insured against a third-party liability claim under a reservation of rights, the insured may independently settle with the third-party claimant without violating its duty of cooperation under the insurance contract.[82] The court distinguished *Morris* in that the *Morris* settlement agreement was made at arm's-length between two parties with divergent interests—i.e., the insureds and the third party mechanics' lien claimants.[83] In contrast, the parties' interests here were aligned because the settlement agreement was between the insured and an entity they wholly owned and controlled.[84] Moreover, the settlement agreement was for an amount significantly greater than the amount paid to purchase the mechanics' lien claims and significantly expanded the insured's rights under the insurance contract without the insurer's approval.[85] Accordingly, the only loss for which the title insurer could be liable was the potential lia-

77. *Id.* at 1173.
78. Regan v. First Am. Title Ins. Co., 2016 WL 97899 (Cal. Ct. App. Jan. 8, 2016) (unpublished).
79. Denton v. First Am. Title Ins. Co., 2015 WL 3537267 (Mont. June 2, 2015) (unpublished).
80. *Id.* at *2–3.
81. Fid. Nat'l Title Ins. Co. v. Centerpoint Mech. Lien Claims, LLC, 357 P.3d 170 (Ariz. Ct. App. 2015).
82. *Id.* at 172 (citing *Morris*, 741 P. 2d 246 (Ariz. 1987)).
83. *Id.* at 176.
84. *Id.*
85. *Id.* at 177.

bility for defect in title contained in the insurance contract, and not the other expenses the insured agreed to in the settlement agreement.[86]

3. Claims Handling

After reaching an oral settlement agreement with the title insurer, an insurer sent the insured a settlement check along with a letter stating that the check was to be held in escrow pending the later mailing and execution of a written settlement agreement; however, the insured accepted the check and cashed it.[87] After receiving the written settlement agreement, the insured altered portions of it relating to the payment of legal fees.[88] When the title company received the altered, but signed, settlement agreement, the title insurer sent a letter to the insured stating its position that the insured either return the funds or its acceptance of the settlement proceeds would deem the original, unaltered terms of the settlement agreement to be binding.[89] The court found that the title insurer had established that it tendered a check in full settlement of the pending claims between the parties. The insured deposited the check, never returned the check, and did not promptly raise a dispute until it was too late—three years later.[90]

4. Arbitration

An owner's policy of title insurance was issued by Mississippi Valley Title Insurance Company and Old Republic National Title Insurance Company. That policy contained an arbitration agreement.[91] The arbitration agreement mandated that once either party to the policy demanded arbitration in connection with any claim arising out of the policy, the parties must submit to arbitration.[92] Under Mississippi law, the court ruled that the parties were compelled to arbitrate their claims and defenses in accordance with the terms of the applicable arbitration agreement and therefore dismissed the lawsuit.[93]

5. Subrogation

A former employee of Chicago Title stole $1.6 million in escrow funds and transferred the funds to relatives, business associates, and friends.[94] The

86. *Id.*
87. Higbie v. Stewart Title Guar. Co., 2015 WL 7270751 (Conn. Super. Ct. Oct. 23, 2015) (unpublished).
88. *Id.* at *1–2.
89. *Id.*
90. *Id.* at *10.
91. Perdue Props., LLC v. United States, 2016 WL 2858889 (S.D. Miss. May 16, 2016).
92. *Id.*
93. *Id.* at *3.
94. Chicago Title Ins. Co. v. Sinikovic, 125 F. Supp. 3d 769 (N. D. Ill. 2015).

court granted partial summary judgment in favor of Chicago Title on its claims for breach of fiduciary duty, unjust enrichment, and accounting where the parties asserted their Fifth Amendment privileges.[95] The court also found that punitive damages against the employee were appropriate, but the amount was a question to be decided by a jury.[96] The court also imposed a constructive trust on the funds invested in real property, and which could be traced from the escrow accounts to the purchase of the property.[97]

In another Illinois case, the insured sought for a buyer a title insurance policy from First American covering certain property subject to known defects so the insured could sell it to the buyer.[98] Because the insured wanted First American to issue the insurance policy without mentioning a prior mechanic's lien against the property, the insured entered into an indemnity agreement with First American. Under the indemnity agreement, the insured agreed to fully protect, defend, and hold First American harmless against damages or loss caused by the mechanic's lien.[99] Once the purchase and sale were completed, the insured kept the net sale proceeds, but failed to pay off the mechanic's lien. The purchaser tendered a claim for defect in title to First American, which in turn made a demand on the insured under the indemnity agreement to return the net proceeds it had received.[100] The court ruled that First American could pursue remedies against the insured because, as the party that paid for the losses under the title insurance policy, it was subrogated to the purchaser's right to proceed against the insured.[101] Subrogation presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment under circumstances entitling him to contribution or indemnity.[102]

In a similar case, First American issued a title insurance policy to finance the construction of a hotel property in Palm Springs.[103] Before it would issue the policy, First American required the financing parties to agree to indemnify it if any mechanics' liens due to the contractor's or the owners' failure to pay for work furnished to the project were recorded against the property.[104] When the project was not completed on time, the

95. *Id.* at 781.
96. *Id.* at 777–80.
97. *Id.* at 780–81.
98. First Am. Title Ins. Co. v. Dundee Reger, LLC, 2016 WL 1359374 (N. D. Ill. Apr. 5, 2016).
99. *Id.* at *2.
100. *Id.*
101. *Id.* at *5.
102. *Id.*
103. First Am. Title Ins. Co. v. Spanish Inn, Inc., 239 Cal. App. 4th 598 (2016).
104. *Id.* at 600.

lender declared the loan in default and multiple mechanics' liens were recorded against the property.[105] The lender assigned its interest to another party, which tendered a claim to First American.[106] First American retained counsel to defend against the foreclosure action and to seek indemnity under the agreement for any costs it would incur as a result of the mechanics' liens.[107] The court ruled that First American was entitled to recovery under the indemnity agreement for any liability incurred as a result of the mechanics' liens.[108]

In a recent Maryland case, the court acknowledged an insurer's subrogation rights may bar recovery when the party asserting the right was inexcusably negligent.[109] However, where the insurer, under the doctrine of subrogation, claims remedies for breach of a warranty, such claims cannot be defeated by the alleged negligence of its title agent.[110]

An Indiana court addressed whether a title insurer was entitled to summary judgment on the question of subrogation.[111] The court provided an extensive survey of the law regarding the three types of subrogation: conventional, legal, or subrogation arising by statute.[112] The court determined that where the insurance contract language is broad enough to confer upon the insurer a contractual right to subrogation, and the insurer has paid the insured's entire loss under the insurance policy and has attained the right to pursue all causes of action associated with the loss, the insured can no longer sue in its own name.[113] Instead, the insurer stands in the shoes of its insured with respect to those potential causes of action.[114]

A land developer made an agreement with the City of Henderson in Nevada to construct a water drainage facility in exchange for the rights to build a master planned community.[115] The agreement required the land developer to pay an impact fee, which was never paid to the city.[116] Seven years later, the developer sold a portion of the development to a third party, and the sale was insured by First American.[117] The purchase and sale agreement required the land developer to remove all deeds of

105. *Id.* at 601.
106. *Id.*
107. *Id.*
108. *Id.* at 604–06.
109. Glesner v. Baer, 2015 WL 7162010, at *9 (Md. Ct. Spec. App. Nov. 13, 2015).
110. *Id.*
111. Puente v. Beneficial Mortg. Co., 9 N.E.3d 208 (Ind. Ct. App. 2014).
112. *Id.* at 215–17.
113. *Id.* at 218–19.
114. *Id.*
115. First Am. Title Ins. Co. v. Commerce Assocs., LLC, 2015 WL 7188387 (D. Nev. Nov. 13, 2015).
116. *Id.* at *1.
117. *Id.*

trust, mortgages, mechanic's liens, notices of lis pendens, and/or other monetary liens.[118] The title policy further provided that First American was entitled to pursue any claim that the purchaser had against any person or property.[119] The developer failed to disclose that the city had a lien against the property due to the failure to pay the impact fee. Under Nevada law, the court ruled that the developer had a duty to disclose its nonpayment of the impact fee because the nonpayment was material to the purchase and sale agreement.[120] The court denied a motion to stay discovery because the title insurer had a valid claim for fraud against the developer.[121]

A title insurer submitted a proof of claim in a bankruptcy action asserting the debtors were unjustly enriched when the title insurer had to pay off a loan made by the debtors, which should have been previously satisfied.[122] The sole issue was whether the insurer's claim against the debtors was barred by the applicable statute of limitations.[123] The court ruled that the statute of limitations began to run when the debtor drew down on the loans that the insurer became obligated to pay and not upon the date when the insurer satisfied its contractual obligation to its insured.[124] Once the insurer was informed of the existence of the mortgage, which it had believed was previously satisfied, any right it had to bring suit against debtors arose and the statute began to run.[125]

C. *Damages*

1. Owner Policies

In connection with the purchase of real property, the Marchettis obtained a loan for the entire price of the property, plus an amount for improvements they had planned to make.[126] The lender agreed to finance the transaction, despite the fact that three months earlier, Mr. Marchetti had been indicted for mortgage and wire fraud regarding other real estate transactions.[127] The property, which the Marchettis nominally acquired from Seville Development Corporation, was owned by an Illinois land trust.[128] A series of sham transactions made it appear that Seville held title.[129] Chicago Title had issued a policy of title insurance in the amount

118. *Id.*
119. *Id.*
120. *Id.* at *3.
121. *Id.*
122. *In re* Leone, 2015 WL 4939868 (Bankr. M.D. Pa. Aug. 18, 2015).
123. Id. at *1.
124. *Id.* at *2.
125. *Id.*
126. Marchetti v. Chicago Title Ins. Co., 829 F.3d 498 (7th Cir. 2016).
127. *Id.* at 499.
128. *Id.*
129. *Id.*

of $198,000, promising to indemnify the Marchettis if they suffered a loss from a defect in title.[130]

After the fraud came to light, the lender submitted a claim to the title insurer, claiming damages as a result of the fact that the Marchettis did not actually receive title to the property as intended. The property was appraised at $110,000, which the lender agreed to accept from Chicago Title in full satisfaction of the loan.[131] The court found that the payment of the loan allowed Chicago Title to subrogate in for the Marchettis' claims against Seville and the other tortfeasors.[132] After the fraudulent parties were convicted, Chicago Title was able to obtain $37,500 in restitution. The Marchettis then brought suit against Chicago Title and the lender seeking the restitution and any remainder of the policy limits.[133] The court rejected the claim, holding that the policy covers only actual monetary loss sustained by the insured and that the Marchettis suffered no loss because they had no equity interest in the property.[134]

A mother purchased property in her individual capacity and as trustee of three trusts for her children.[135] The trusts had expired before the subsequent sale of the property in 2009 by the mother to D'Anna.[136] There was no recorded notice that the trusts had terminated, however.[137] One of the children challenged the sale to D'Anna, who then filed a chapter 13 bankruptcy.[138] D'Anna sued the insurer and the mother's estate to recover for losses she sustained.[139] The court held that D'Anna could recover the full policy amount after satisfaction of the deductible, despite the fact that the child could only establish a claim to 16.7 percent of the property.[140] Additionally, the court ruled that the insurer must pay the fees of the firm it engaged to clear title, but not the law firm D'Anna hired without the insurer's consent.[141]

The Millies purchased a secluded piece of property in Washington and contracted with Land America for an owner's title policy covering loss or damage up to the purchase price of $250,000.[142] LandAmerica overlooked an easement that authorized public use of a road bisecting the Millies's property that could render the property far less secluded because their

130. *Id.*
131. Marchetti v. Chicago Title Ins. Co., 829 F.3d 498, 499 (7th Cir. 2016).
132. *Id.*
133. *Id.*
134. *Id.* at 500.
135. *In re* D'Anna, 548 B.R. 155 (Bankr. E.D. La. 2016).
136. *Id.* at 161.
137. *Id.* at 165–66.
138. *Id.* at 162–63.
139. *Id.*
140. *Id.*
141. *Id.* at 185–86.
142. Millies v. LandAmerica Transnation, 372 P.3d 111, 113 (Wash. 2016).

neighbor intended to use the road for public access to a planned fifty-unit condominium development.[143] LandAmerica conceded that the easement had been overlooked in the title search, conceded coverage for the omission, and tendered a check for $25,000, the value of its appraisal of the diminution in value of the property due to the easement.[144] After the two sides could not agree on the proper amount of compensation, the Millies sued LandAmerica. At trial, the Millies' experts found the diminution in value to be $125,000, while the insurer's experts set damages between $25,000 to $37,500.[145] However, the jury was not asked to determine the diminution in value of the property absent a finding of liability and thus awarded nothing to the Millies.[146] The court concluded that the jury instructions provided to the jury became the law of the case and that the Millies forfeited their opportunity to have the jury decide any diminution in value.[147]

In *Kessee v. First American Title Co.*, the plaintiff unknowingly purchased a property that was built out of compliance with both a final tract map and the Subdivision Map Act.[148] Two years after her purchase, the city notified her and presented her with a new, accurate final tract map to correct the legal description of the property.[149] To record the new final tract map, the signatures of all affected property owners of record were necessary, but the plaintiff refused to sign.[150] The plaintiff tendered a claim to her title insurer, which was denied. The court ruled that the plaintiff failed to introduce any evidence that the subdivision map error affected her in any way or that any terms of the policy were breached.[151]

In another easement case, the parties agreed that under the title insurance policy issued by Old Republic, the plaintiffs were entitled to recover the diminution in value of the property caused by an undisclosed easement, measured as of the date the easement was discovered.[152] Old Republic challenged the relevance and reliability of the plaintiff's expert, who had developed his own model to determine the diminution in value instead of the approach commonly used by real estate appraisers.[153] The court found the testimony as it pertained to the diminution in value

143. *Id.*
144. *Id.*
145. *Id.* at 113–14.
146. *Id.* at 114.
147. *Id.* at 117.
148. 2015 WL 5842957 (Cal. Ct. App. Oct. 7, 2015) (unpublished).
149. *Id.* at *1.
150. *Id.*
151. *Id.* at *1–2.
152. Feduniak v. Old Republic Nat'l Title Co., 2015 WL 1969369, at *2 (N. D. Cal. May 1, 2015).
153. *Id.*

caused by the easement to be relevant.[154] The court questioned the expert's reliability, however, because he was not a real estate appraiser, but rather a certified public accountant and chartered financial analyst.[155] The court applied the *Daubert* test to determine whether the expert's methodology could be presented at trial. The court found that the methodology was not reliably or independently verified, the methodology was not peer reviewed, there was no evidence of the potential error rate, and there was no evidence his methodology was generally accepted in the relevant scientific community.[156] The court concluded that the expert's methodology itself was not sufficiently reliable to pass muster and that the expert did not demonstrate the requisite expertise nor a reliable basis for determining the diminution in value.[157]

2. Loan Policies

A construction lender, which held the second mortgage on a hotel development property, brought an action against Stewart Title after the first mortgagee foreclosed on its mortgages due to construction lien claims.[158] The construction lender redeemed and resold the property and made a claim to Stewart Title for reimbursement of the paid-off mechanic's liens plus interest and attorney fees.[159] Stewart Title denied the claim and the lender brought a breach of contract action for failing to indemnify the lender for the mechanics' lien judgments that the lender satisfied before selling the property. The court held that a mortgagee suffers actual loss under a lender's title insurance policy only to the extent to which the insured debt is not repaid because the value of security is diminished or repaired by outstanding lien encumbrances or title defects covered by the title insurance.[160] Further, in order for a junior mortgagee to sustain an actual loss under a policy of lender's title insurance, the junior mortgagee must retain equity in the mortgaged property, notwithstanding any defects in title covered by the policy.[161] If the junior mortgagee has already lost all equity in the property due to the presence of a senior lienholder whose interest is excluded under the title policy, the junior mortgagee does not suffer an actual loss for when a covered title defect further reduces the property's value.[162]

154. *Id.*
155. *Id.*
156. *Id.* at *3–4.
157. *Id.* at *5.
158. Twin Cities Metro-Certified Dev. v. Stewart Title Guar. Co., 868 N.W. 2d 713 (Minn. Ct. App. 2015).
159. *Id.* at 715.
160. *Id.* at 718.
161. *Id.* at 719.
162. *Id.*

In *First American Title Insurance Co., v. Johnson Bank*, an insured lender brought an action against its insurer after obtaining a lender's title insurance policy, alleging certain undisclosed covenants, conditions, and restrictions existed that prohibited commercial development of two properties and that were not listed exceptions to the policy.[163] The parties brought suit, seeking declaration of the starting date for calculation of diminution in value to the foreclosed properties.[164] The court held that in Arizona, where the undisclosed defect in title caused the borrower's default, the date of the loan was the proper date to measure a property's diminution in value as a result of the undisclosed title defect.[165] The court concluded that liability under a lender's policy was the difference between the value of the property without the insured defects at the time of the loan and the value of the property with the insured defects at the time of the loan.[166]

After a title insurer successfully litigated on behalf of a lender, the insurer provided a quitclaim deed to the lender free from any defects in title.[167] The lender subsequently brought suit for damages suffered due to the diminution in the fair market value of the property during the period of litigation.[168] The lender's policy provided that if the title insurer established the title by any method, it would have fully performed its obligations with respect to that matter and should not be liable for any loss or damage caused thereby. The court granted summary judgment in favor of the title insurer, finding that its contractual obligations were performed once the property was conveyed to the lender and that the insurer was not liable for the decline in market value while successfully defending title.[169]

3. Bad Faith

In Hawaii, an insured brought a bad faith and breach-of-contract claim against Fidelity for its alleged delay in making payments to the insured under a title insurance policy.[170] The insured alleged that Fidelity knew within four months of receiving the claim that the warranty deed issued to the insured was a forgery and unreasonably delayed in paying the insured by pursuing meritless litigation, despite knowing the insured's claim was proper. In addition, the insured alleged that Fidelity demonstrated a greater concern for its own monetary interest than for the insured's financial risk in

163. 353 P.3d 370 (Ariz. Ct. App. 2015), *vacated*, 239 Ariz. 348 (Ariz. 2016).
164. *Id.* at 371–72.
165. *Id.* at 373.
166. *Id.* at 374.
167. Premier Cmty. Bank v. First Am. Title Ins. Co., 2015 WL 3949327 (W.D. Wash. June 29, 2015).
168. *Id.* at *2.
169. *Id.* at *3–5.
170. Anastasi v. Fid. Nat'l Title Ins. Co., 366 P.3d 160 (Haw. 2016).

violation of Hawaii's enhanced standard of good faith.[171] The court acknowledged that title companies are not excluded from the enhanced standard of good faith when claims are defended under a reservation of rights.[172] The court concluded that the enhanced standard of good faith may be breached if Fidelity pursued a meritless defense of a third party suit in order to delay payment to the insured.[173] The case was remanded to determine whether Fidelity acted improperly.[174]

D. *Closing Protection Letters*

In a Michigan case, the Bank of America made four loans featuring inflated appraisals and straw buyers.[175] The insurer issued four closing protection letters (CPLs).[176] The Bank of America ultimately foreclosed on all four loans, making full credit bids. The bank then sold the collateral properties to bona fide purchasers and sued its insurer, the two title agents involved, and certain individuals involved in the closings.[177] This appeal concerned the insurer and one of the agents, both of which were granted summary judgment by the trial court.[178] The Michigan Supreme Court held in pertinent part that (1) the closing instructions were a contract between the lender and the agent that was not modified by the CPL,[179] and (2) the omission of the word "in" from the CPL's phrase "[f]raud or dishonesty of the Issuing Agent [in] handling your funds or documents in connection with such closings" served to broaden the insurer's liability to include any acts of fraud or dishonesty by the agents—not just acts in handling the lenders funds or documents.[180] The causes of action for breach of contract under the closing instructions and CPL were remanded.[181]

The Federal Deposit Insurance Corporation, as the receiver for a failed bank, sought title coverage under a CPL over a closing instruction violation, but the title insurer prevailed on summary judgment because that the borrower had notified the lender of the violation six-and-a-half years before the claim was made. Under Florida law, the ninety-day notice re-

171. *Id.* at 170–71.
172. *Id.* at 171.
173. *Id.* at 171–72.
174. *Id.*
175. Bank of Am., N.A. v. First Am. Title Ins. Co., 878 N.W.2d 816, 819 (Mich. 2016); *see also* Fifth Third Mortg. Co. v. Kaufman, 2016 WL 2851554, at *8–9 (N.D. Ill. May 14, 2016) (where closers for two agents had information indicating the buyers would not occupy the properties and had provided false information to the lender, the trial court ruled the case against the insurer under the CPL could go to trial).
176. *Bank of Am.*, 876 N.W.2d at 819.
177. *Id.*
178. *Id.* at 819–20.
179. *Id.* at 830–31.
180. *Id.* at 834.
181. *Id.* at 831, 834.

quirement contained in the lender's policy is triggered upon "discovery of facts giving rise to potential coverage," which had occurred in May 2008; no notice was provided to the insurer until June 13, 2014.[182]

In an Alabama case interpreting Florida law, an insurer's motion for summary judgment was denied where its lender insured sued for breach of contract under a CPL in connection with a title agent's failure to record the insured mortgage.[183] The insurer, which had agreed to provide the insured coverage, initiated curative litigation to establish first-lien priority and obtained a judgment entitling the insured to an equitable lien as to one of two properties intended to be collateralized.[184] Litigation ensued after the insured demanded the insurer indemnify it for its actual loss pursuant to the CPL's terms.[185] The court held that summary judgment was not warranted, even though the insured had not alleged fraud or dishonesty by the agent, because the damages potentially recoverable under the CPL were beyond what was payable under the title policy and questions of fact existed as to the actual losses arising from the agent's failure to follow the closing instruction.[186]

E. *Insurer's Liability for Agent's Acts*

A title agent closed a short sale on April 26, 2012, but did not send the funds to the lender until August 9, 2012.[187] On August 16, the lender sent the funds back to the agent and filed a foreclosure action.[188] In November 2013, the agent turned the funds over to the insurer, which held the proceeds until August 2014, when it transferred the money to the lender's servicer.[189] During the time the funds were held by the insurer, the lender and servicer proceeded with collection activities.[190] The lender eventually dismissed its foreclosure claim, but the borrower/seller sued the agent, insurer, lender, and servicer.[191] In an opinion dealing with two claims against the insurer, the U.S. District Court for the Southern District of Florida denied the insurer's motion to dismiss as to negligence

182. Fed. Deposit Ins. Corp. v. Chicago Title Ins. Co., 137 F. Supp. 3d 1331, 1332–33 (S.D. Fla. 2015).
183. Regions Bank v. Commonwealth Land Title Ins. Co., 2016 WL 3753146 (N.D. Ala. July 14, 2016).
184. *Id.* at *4.
185. *Id.*
186. *Id.* at *7–9
187. Bank of Am., N.A. v. Zaskey, 2016 WL 2907732 (S.D. Fla. May 18, 2016).
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*

in the delayed tender of the funds to the lender,[192] but granted the motion to dismiss as to vicarious liability.[193]

III. INSURER VERSUS AGENT

A. *Limitations*

Several cases dealt with the title insurer-title agent relationship. Two of them held that the contract, rather than tort, statute of limitations applied to suits by insurers against agents under an agency agreement.[194] In another case, the Eleventh Circuit reversed a summary judgment for the insurer. The court remanded the case to the trial court to determine if the insurer versus agent actions were for breach of contract or legal malpractice.[195]

B. *Arbitration*

A federal court found that an arbitration clause in an agency agreement was enforceable under the Federal Arbitration Act because the agreement and ensuing issuance of the title policy affected commerce.[196] Modes of interstate commerce, such as the telephone and the postal service, among others, were used in resolving the claim made on a policy issued by the agent.[197]

C. *Adventures with E&O Carriers*

A title agency applied for errors and omissions insurance. One of its principals was the subject of a pending grievance concerning a settlement company. The agency did not disclose this matter in the application, allegedly because the matter did not affect the title agency.[198] The court found that the non-disclosure voided the E&O policy.

D. *Third-Parties Involved*

An agent did not pay off an existing lien at a refinance closing. The insured lender filed a foreclosure suit and brought a third-party claim for

192. Id. at *2–3.

193. Id. at *3–4 (quoting Cameron Cty. Sav. Ass'n v. Stewart Title Guar. Co., 819 S.W.2d 600 (Tex. App. 1991) ("[T]he fact that a closing agent such as a lawyer or title company might 'wear two hats' in selling the title insurance and closing the sale, does not make the title insurance company liable for the mishandling of the real estate closing.")).

194. Fid. Nat'l Title Ins. Co. v. B & G Abstractors, Inc., 2015 WL 6472216, at *9–11 (W.D. Pa. Oct. 27, 2015); Fid. Nat'l Title Ins. Co. of N.Y. v. Crowley, 35 N.E.3d 447, 2015 WL 4887598, at *2 (Mass. App. Ct. 2015) (table).

195. Miss. Valley Title Ins. Co. v. Thompson, 802 F.3d 1248 (11th Cir. 2015).

196. Hawkins v. Fid. Nat'l Title Ins. Co., 2016 WL 2866352 (D.S.C. May 17, 2016).

197. *Id.* at *3–4.

198. Zurich Am. Ins. Co. v. Expedient Title, Inc., 2015 WL 9165875 (D. Conn. Dec. 16, 2015).

breach of the closing instructions against the agent.[199] The insurer settled with the prior lender. The insured lender secured a default judgment against the agent. Subsequently, the insurer sued the agent. The agent asserted this action was barred under *res judicata* by the lender's judgment.[200] The agent further argued that its liability for the claim ended when the agency agreement was mutually terminated. The court ruled in favor of the insurer. First, *res judicata* did not apply because the actions were different. The lender sued the agent for breach of the closing instructions. The insurer was suing for breach of the agency agreement.[201] Second, relevant provisions in the agency agreement expressly survived its termination.[202]

E. *Attorney-Client Privilege*

A title examination company, Holland, missed a prior lien. The attorney-agent, Hines, closed the transaction relying on Holland's report.[203] When a prior lienholder filed a foreclosure action, the insurer settled and sued Hines,[204] whose defense was that Holland was the cause of the claim.[205] The Georgia Court of Appeal held that Hines could not use Holland as a shield[206] and was still responsible to the insurer under the agency agreement. Hines may be able to pursue Holland in a subsequent action, however.[207] In a similar case, a Massachusetts court did not allow an agent to transfer liability to a title examiner.[208]

An insurer secured a default judgment against a Michigan title agent, Metro Title. The principal of the agency transferred assets of the company to a new agent, Metro Equity, and placed Metro Title into bankruptcy.[209] The insurer sued to enforce the judgment against Metro Title. The appellate court held for the insurer, finding the "mere continuation" exception to the successor non-liability rule under Michigan law applied.[210]

An insurer hired Harken to defend its insureds in a lien priority case. When that case was lost, the insurer sued the agent. The agent then

199. Fid. Nat'l Title Ins. Co. v. Home Equity Title Servs., Inc., 2016 WL 3249097 (Ill. App. Ct. June 10, 2016).
200. *Id.* at *3.
201. *Id.* at *8.
202. *Id.* at *14.
203. Hines v. Holland, 779 S.E.2d 63 (Ga. Ct. App. 2015).
204. *Id.* at 65–66.
205. *Id* at 68.
206. *Id.* at 68–69.
207. *Id.* at 69.
208. Stewart Title Guar. Co. v. Kelly, 49 N.E.3d 697, 2016 WL 1741537 (Mass. App. Ct. May 3, 2016) (table).
209. Commonwealth Land Title Ins. Co. v. Metro Title Corp., 2016 WL 1829634 (Mich. Ct. App. May 3, 2016).
210. *Id.* at *4.

sought discovery of communications between the insurer and Harker. The trial court held that the attorney-client privilege applied to such communications.[211]

IV. DUTIES OF TITLE/ESCROW AGENTS

A. *Handling Escrow Funds*

The Michigan Court of Appeals held that a title agent making construction loan disbursements for a lender had no tort duty to borrowers and was thus not liable to the borrowers when a contractor stole the loan funds.[212]

The Texas Court of Appeals considered the appeal of a title agent that had been sued by a purchaser after the agent failed to pay off an existing lien or record the deed as part of the rental house purchase.[213] The agent still carried the loan proceeds in its escrow account for four months. The loan was foreclosed and, because the deed was never recorded, the purchaser never received notice of the foreclosure.[214] The purchaser sued the agent in tort, seeking punitive damages. The agent stipulated it had breached the contract and agreed to reimburse the purchaser the amount of her escrow fees and lost rental profits in the amount of $2,800.[215] The trial court granted the purchaser's motion for a directed verdict on her breach of fiduciary duty claim and sent the issue of damages to the jury.[216] The jury awarded $30,000 for past damages to credit reputation and $100,000 for the agent's gross negligence.[217] The appellate court concluded there was no evidence to support the damages relating to the loss of credit reputation or exemplary damages, but affirmed the $2,800 judgment.[218]

In another escrow matter, a Florida law firm was appointed escrow agent in connection with a construction loan to develop assisted living housing for seniors.[219] A private equity firm agreed to invest $660,000 in the project and the developer agreed to invest $1.2 million.[220] The pri-

211. Commonwealth Land Title Ins. Co. v. Funk, 2015 WL 3863192 (Del. Super. Ct. June 17, 2015) (unpublished).

212. Elsebaei v. Phillip R. Seaver Title Co., Inc., 2015 WL 7079068, at *4–5 (Mich. Ct. App. Nov. 12, 2015) (unpublished) (holding that the title agent was acting in its role as title agent when disbursing the loan proceeds and was therefore not liable in tort) (citing Wormsbacher v. Seaver Title Co., 772 N.W. 2d 827 (Mich. Ct. App. 2009)).

213. Country Title, L.L.C. v. Jaiyeoba, 2016 WL 66616, at *1–2 (Tex. App. Jan. 5, 2016).

214. *Id.*

215. *Id.* at *2.

216. *Id.* at *2–3.

217. *Id.*

218. Id. at *3.

219. Covey Run, LLC v. Wash. Capital, LLC, 2016 WL 3747529 (D.D.C. July 11, 2016).

220. *Id.* at *2.

vate equity firm and developer also agreed that the developer's funds would be held in escrow and used first for the payments of the project's costs.[221] Unbeknown to the developer, the same day it funded the escrow account, the escrow law firm transferred that money to the private equity firm, pursuant to instructions from the private equity firm.[222] After it became clear that the private equity firm had absconded with the money, the developer sued the parties involved, including the law firm and individual attorney handling the escrow.[223] The law firm and attorney moved to dismiss the complaint, but the U.S. District Court for the District of Columbia declined to dismiss the complaint, holding that both the firm and the individual attorney could have liability as fiduciaries, and that the escrow instructions provided by the private equity firm did not exculpate them from liability to the developer.[224]

B. *Handling Documents*

1. Recording

A title agent sued the company with which it had contracted to record documents after the company failed to record thirty-one deeds for which the title agent paid the company $33,036.[225] The trial court granted summary judgment in favor of the title agent for breach of contract and conversion.[226] The appellate court overturned summary judgment on the conversion claim because the title agent provided the company with batch checks, rather than individual ones, to record multiple documents and, as such, "there can be no obligation on the part of [the company] to return a specific *check* upon the failure to file any particular document."[227] The court did, however, uphold summary judgment on breach of contract and upheld the trial court's decision to allow piercing the corporate veil to find individual liability as to the company's individual principal, holding "the trial court's findings regarding the sheer sloppiness and informality of [the principal's] operation of her business, as well as the fact that the missing deeds were ultimately found at her per-

221. *Id.*
222. *Id.* at *3.
223. *Id.* at *4–5.
224. *Id.* *11–13 (providing that "[u]nder Fla. Stat. Ann. § 621.07, the corporate form of professional services organization 'does not automatically shield the attorneys from individual liability,' and an attorney can be held personally liable for negligent or wrongful acts that he committed while providing professional services on behalf of the company to the person for whom such professional services were being rendered").
225. 1st State Title v. LP Recordings, LLC, 2015 WL 7750297 (Mich. Ct. App. Dec. 1, 2015).
226. *Id.*
227. *Id.* at *3.

sonal residence . . . shows that whatever corporate form she employed was effective in name only."[228]

Failure to record a trust deed was not a violation of closing instructions, however, where the escrow never closed.[229] Two years after a lender obtained a first lien on a Utah property, it negotiated an agreement with the borrowers to pay the loan off within a month, as well as provide a first trust deed secured by two additional parcels, in exchange for lender's subordination of its first lien to two other liens.[230] After the trust deed was signed and the documents deposited into escrow, the lender agreed to accept a partial payment on the loan in exchange for recording the subordination agreement.[231] The borrowers failed to make any further payments, and escrow never closed.[232] After the borrowers defaulted, the lender sued the borrowers and the escrow company.[233] The appellate court upheld the district court's order granting summary judgment for the escrow company based upon the fact that the lender had admitted no closing had ever occurred.[234]

The married trustees of a living trust wished to obtain a loan secured by their home so they executed a quitclaim deed of the property to themselves individually as joint tenants and acquired a mortgage loan, secured by a deed of trust.[235] The escrow agent recorded the deed of trust, but not the deed.[236] Upon discovery that the deed had not been recorded, the lender made a title claim, and the insurer recorded a facsimile copy of the deed.[237] After the trustees died, their daughter became trustee and sued to have the deed declared void.[238] The trial court granted summary judgment in favor of the lender and insurer and, on appeal, the Arizona Court of Appeals upheld the decision, holding that the quitclaim deed

228. *Id.* at *5.

229. Spring Gardens Inc. v. Sec. Title Ins. Agency of Utah, Inc., 374 P.3d 1073 (Utah Ct. App. 2016).

230. *Id.* at 1075.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 1075, 1077–78 (while the lender declared the closing occurred, it failed to answer an admission that no closing had occurred, and the admission was deemed admitted; the appellate court provided that "because of [lender's] admissions that no closing occurred and no instructions of any kind were given to [agent] directing it to record the trust deed, [agent] could not have a duty to record premised upon the occurrence of such a closing and the giving of such instructions").

235. Estate of Myrman v. U.S. Bank, N.A., 2016 WL 3264120, at *1 (Ariz. Ct. App. June 14, 2016).

236. *Id.*

237. *Id.*

238. *Id.* (Interestingly, the trustee first sued herself rather than lender or insurer, seeking to have the deed voided because it did not contain certain trust-related disclosures required under Arizona law.).

was a valid instrument whether recorded or not, and that the insurer's recordation of a copy of the deed of trust did not violate Arizona law.[239]

2. Lien Payoffs and Subordinations

In an Illinois case, the borrower "refinanced" his original loan, providing a fraudulent payoff statement on his prior mortgage, along with fake wiring instructions.[240] The closing agent recorded a certificate of release after the loan was funded, but the parties later learned the funds were wired to an account the borrower controlled.[241] Both lienholders filed actions to foreclose, each asserting a first position mortgage on the collateral property.[242] The trial court granted the new lender's motion for summary judgment on the theory that it was a bona fide mortgagee, but the appellate court vacated the ruling and remanded the case, holding that the question was whether the new lender and/or closing agent "should have checked with MERS to determine the holder of the note . . . or whether they could have reasonably relied on [the borrower's] payment statement," making the case unsuitable for summary judgment.[243]

In a dispute spanning four lawsuits regarding the construction financing of a North Carolina retirement home, the general contractor filed a mechanic's lien and obtained a large judgment against the developer.[244] The lender later sought a declaration that its lien was superior to various other previously recorded liens, including the contractor's judgment.[245] The appellate court affirmed the trial court's order granting summary judgment in favor of the lender on the basis of a subordination agreement, which was executed by the contractor, but which was missing the recording data for the construction mortgage it was to subordinate.[246]

Experienced real estate investors/borrowers bought three Jiffy Lubes as the last part of a "double escrow" or "flip" transaction.[247] When their lender sued them on the three notes, the borrowers brought in the escrow agent and title insurer.[248] The borrowers alleged myriad tort claims, as well as a RICO claim, claiming that the agent and insurer should have warned them about the nature of "double escrow" transactions, and the fact that the purchase prices were inflated for the second stage sales.[249]

239. *Id.* at *2, *4.
240. M&T Bank v. Mallinckrodt, 43 N.E.3d 1039, 1041 (Ill. App. Ct. 2015).
241. *Id.* at 1041.
242. *Id.*
243. *Id.* at 1042, 1050.
244. Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co., 785 S.E.2d 185, 2016 WL 1321139 (N.C. Ct. App. Apr. 5, 2016) (table).
245. *Id.* at *2.
246. *Id.* at *4–5.
247. Resh v. Realty Concepts, Ltd., 2016 WL 593809 (S.D. W. Va. Feb. 12, 2016).
248. *Id.* at *2.
249. Id. at *5–6.

The court granted summary judgment in favor of the third-party defendants as to all of the claims, holding that the nature of the transactions was disclosed to the borrowers in the contracts.[250]

C. *Fiduciary Duty*

In Nevada, a title agent was sued as an insurance broker, rather than as an escrowee, in order to avoid Nevada's economic loss doctrine, which bars escrow negligence claims, but not claims where an insurance professional breached a fiduciary duty.[251] The court dismissed some, but not all claims, in response to the motions to dismiss filed by the agent, holding that the economic loss doctrine does not bar intentional tort claims and that while negligence does fall within the scope of the economic loss doctrine, the agent could be an excepted real estate professional under the doctrine.[252]

D. *Duties to Third Parties*

The purchasers of condominium units sued various parties, including (via a seventh amendment to their complaint) their escrow companies, after discovering construction defects and water damage.[253] The purchasers alleged the escrow agents violated their closing instructions by failing to verify that a certificate of occupancy had been issued.[254] The court held that the purchasers' breach of fiduciary duty claim against the agents was misplaced because the purchasers were not parties to the contract between the lender and the escrow agent.[255]

The California Court of Appeal affirmed the dismissal of a lawsuit filed by the seller of property against a title agent for "negligent" refusal to issue a clean title insurance policy.[256] The agent had issued a title commitment, but the seller did not satisfy the commitment conditions required for the policy's issuance.[257]

250. Id. at *6–12.
251. Bank of Am., N.A. v. Bailey, 2016 WL 3410174, at *4 (D. Nev. June 15, 2016).
252. *Id.* at *4–5.
253. Sarnecky v. Fid. Nat'l Title Ins. Co., 2015 WL 6438635 (Cal. Ct. App. Oct. 23, 2015) (unpublished), *reh'g denied* (Nov. 12, 2015), *review denied* (Jan. 13, 2016).
254. *Id.* at *2.
255. *Id.* at *4. *See also* Estate of Gaspar, 2016 WL 1733626 (Cal. Ct. App. Apr. 28, 2016) (unpublished), *review denied* (July 13, 2016) (dismissal affirmed where attorney sued title agent for personal harm alleged caused to him—rather than the estate he represented—when the agent closed on the sale of certain estate property without his consent).
256. Abikasis v. Provident Title Co., 2016 WL 3611016 (Cal. Ct. App. June 28, 2016) (unpublished).
257. *Id.* at *6.

V. GOVERNMENTAL REGULATION OF THE TITLE INDUSTRY

A. *Federal*

The plaintiffs filed a class action against four insurers asserting that their contracts with Illinois attorney-agents violated the Real Estate Settlement Procedures Act (RESPA)[258] because the agents did not perform core title agent services.[259] The insurers provided preliminary title commitments to the agents. The appellate court found that the agents did provide services: they cleared title, suggested changes to the commitment, and attended closings. Since the agents did provide services, RESPA did not apply.[260] Relying upon *Freeman v. Quicken Loans, Inc.*,[261] the court noted, ". . . if the attorney agent in fact rendered services in exchange for the fee . . . then the reasonableness of the amount of the fee is irrelevant."[262]

B. *State*

South Carolina attorneys must supervise disbursement of loan funds in residential closings.[263] The South Carolina Supreme Court held that this obligation can be satisfied by attorneys disbursing through their escrow accounts or by explaining to the clients that someone else is handling the funds and verifying in real time that the disbursement is correct.[264] Sanctions were imposed upon the attorney in one case because he did not disclose to his clients that a Florida title company was handling the funds and he did not know the details of the funding until disbursement was complete. [265]

VI. BANKRUPTCY

Suresh Koosyial sold a property to Kishore and Chandrawatie Charles in 2004.[266] The title company missed Koosyial's lien to Citibank. At closing, Koosyial executed an affidavit stating he was not defrauding any creditors. Charles sold to Mohammed Hadi and Mohammed Kahn in 2006. Commonwealth Land Title Insurance Company (CLT) insured that transaction.[267]

258. 12 U.S.C. § 2601 (2000).
259. Chultem v. Ticor Title Ins. Co., 46 N.E. 3d 340 (Ill. App. Ct. 2015).
260. *Id.* at 351.
261. 132 S. Ct. 2034 (2012).
262. *Id.* at 352. The Court also held that absent a RESPA violation, there was no violation of the Illinois Title Act (215 ILL. COMP. STAT. 155/21(a)(5). *Id.* at 354.
263. *In re* Breckenridge, 787 S.E.2d 466 (S.C. 2016).
264. *Id.* at 482.
265. *Id.* at 482–83.
266. *In re* Koosyial, 2016 WL 106507 (Bankr. E.D. Tex. Jan. 8, 2016).
267. *Id.* at *2.

Subsequently, Citibank filed for foreclosure. CLT settled that claim and acquired the Citibank note. [268] CLT sued Koosyial in New York state court. Koosyial filed a Chapter 7 action in Texas. CLT sought to have its debt excepted for discharge under 11 U.S.C. § 523 (a)(2)(A). The court held that the debt was dischargeable because the lien was missed by the title company, not concealed by Koosyial.[269] Moreover, CLT could not show it relied on his 2004 affidavit in the 2006 transaction.[270]

In *In re Crawford*, George Crawford, an attorney, settled a title recoupment claim with the insurer.[271] He then spent years willfully failing to comply with the settlement agreement and court orders enforcing it.[272] After he went to jail for contempt, the court imposed a new sanctions order. Crawford then filed a Chapter 13 bankruptcy.[273] The insurer sought to have its debt excepted from discharge as a debt "for willful and malicious injury by the debt to another entity or the property of another entity."[274] The bankruptcy court held that the sanctions order was excepted from discharge.[275]

VII. TECHNOLOGY

Fidlar is a technology company that licenses software to counties to digitize land records, maintain them in a database, and provide access to the database and record images via the Internet.[276] LPS Real Estate Data Solutions, Inc. contracted with eighty-two Illinois counties, which were Fidlar customers, for unlimited access to their records.[277] LPS then developed its own software to access the databases and records running on Fidlar's licensed software to copy this data en masse and add it their own larger national database. Upon discovery, Fidlar sued LPS under the Computer Fraud and Abuse Act and the Illinois Computer Crime Prevention Law. Fidlar also sued LPS for trespass to chattels. LPS was granted summary judgment, and Fidlar appealed to the Seventh Circuit.[278]

The Seventh Circuit upheld summary judgment. The court found, based on the facts presented at trial, that "no reasonable jury could infer that LPS had an intent to defraud."[279] These facts included a lack

268. *Id.*
269. *Id.* at *7.
270. *Id.* at *8.
271. 2016 WL 502014 (Bankr. D.C. Feb. 8, 2016).
272. *Id.* at *1–2.
273. *Id.* at *4.
274. 11 U.S.C. § 523(a)(6).
275. *In re Crawford*, 2016 WL 502014, at *9.
276. Fidlar Techs. v. LPS Real Estate Data Sols., Inc., 810 F.3d 1075 (7th Cir. 2016).
277. *Id.* at 1078.
278. *Id.* at 1079.
279. *Id.* at 1081

of prohibition in the terms of use, testimony from developers of LPS's software stating that speed and efficiency were their goal, and internal emails from Fidlar discussing how it could choose to make other copying techniques against their terms of use. Furthermore, the contract to access documents was with each individual county, not Fidlar. The only contract with Fidlar was for the use of its client software to access the database, which had no bearing on the use of other software. The court summed it up nicely: "Fidlar attempt[ed] to convert its failure to prohibit LPS's action by contract into an allegation of criminal conduct."[280]

In a counterpart to the previous case, Data Tree copied a county records database running on Fidlar software.[281] In that case, there was a miscommunication within Data Tree leading to the searches taking place on software requiring payment of $5.95 per search and not using a software program with free unlimited searches.[282] Data Tree received a $417,942 bill from Fidlar and refused to pay, after which Fidlar sued.[283] The court's opinion focused on the remaining summary judgment claims that the contract was illegal under FOIA and the Illinois state equivalent as well as the Illinois Uniform Real Property Electronic Recording Act. The court pointed out that Data Tree did not dispute their liability under the contract as written. The court found that nothing in any of the statutes cited barred Fidlar from charging $5.95 per search. Therefore, Data Tree was held liable for the full amount.[284]

In a third case on land records, the Texas Court of Appeals considered whether Integrity Title could compel Harris County Appraisal District (HCAD) via a writ of mandamus to produce certain information under the Texas Public Information Act (PIA).[285] Integrity requested deed document numbers and filing dates from HCAD. HCAD sought to withhold this information and requested an opinion from the Texas attorney general as to whether the information Integrity was requesting fell under either the MLS exception or trade secret exception to the PIA.[286] The Texas Court of Appeals affirmed the lower court's ruling in favor of Integrity.[287] The court reasoned that the Texas attorney general's opinion, while persuasive, was not binding and that HCAD did not provide all the facts necessary when requesting the opinion. Although HCAD did receive

280. *Id.* at 1083.
281. Fidlar Acquisition Co. v. First Am. Data Tree, LLC, 2016 WL 1259377 (C.D. Ill. Mar. 29, 2016).
282. *Id.* at *3.
283. *Id.*
284. *Id.* at *10.
285. Harris Cty. Appraisal Dist. v. Integrity Title Co., LLC, 483 S.W.3d 62, 64 (Tex. App. 2015).
286. *Id.*
287. *Id.*

some deed document numbers and filing dates from a private entity, that private entity received its information from the Harris County clerk; furthermore 20 percent to 30 percent of that information was received from other sources.[288] Taking these factors together, the court determined that the information was not protected under the MLS exception.[289] The court also found that HCAD did not offer any evidence to support the conclusion that the information constituted a trade secret.[290] Thus, the appraisal district could not protect the data provided by the private entity.

288. *Id.* at 70.
289. *Id.*
290. *Id.* at 71.