RECENT DEVELOPMENTS IN TITLE INSURANCE LAW

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I. INTRODUCTION

The past year provided a plethora of cases for the title insurance industry nationwide. This article highlights the notable decisions that impact the practice of title insurance litigation and coverage.

II. INSURED VERSUS INSURER

A. *Policy Terms*

1. Who Is Insured?

In *Fidelity National Title Insurance Co. v. Ruggiri*,[1] Fidelity National Title issued a title insurance policy to Cynthia Ruggiri for property purchased at a foreclosure sale. The policy protected the insured, individually, or "anyone who received [her] title because of [her] death" from any title warranties as long as she owned the title or mortgage on the property. Ruggiri later discovered that the property had no grant of legal access nor did it have any physical access.[2] Fidelity filed an action against Ruggiri and a subsequent motion for summary judgment seeking a declaratory judgment that it complied with all of the obligations under the policy. Ruggiri passed away before the disposition of the case. However, three days prior to her death, Ruggiri quitclaimed the property to her husband.[3]

The court held that under the clear and unambiguous contract language, the death provision was applicable only upon Ruggiri's death and the passing of title through her estate or through specific provisions in the deed itself. Because Ruggiri conveyed the property to her husband before her death, she did not own the property when she died and thus it was not an asset of the estate.[4] The husband argued that his interest was protected by the death transfer provision in the policy because the quitclaim was granted in anticipation of Ruggiri's death. However, because the quit-

1. No. CV106004033, 2013 WL 812502 (Conn. Super. Ct. Feb. 4, 2013).
2. *Id.* at *1.
3. *Id.*
4. *Id.* at *2–3.

claim deed did not grant any title warranties to the husband, the court agreed that Fidelity was not obligated to cover him under the policy.[5]

In *Knispel v. Transnation Title Insurance Co.*,[6] the insured, as trustee, purchased 3,000 acres of land. The land was described in the offer as being "all property" owned by the logging company and referenced by the tax assessor map numbers.[7] One of the maps depicted land previously owned by the logging company but sold to another prior to the sale to the insured.[8] The disputed parcel was erroneously included in the preliminary title, warranty deed, and title insurance policy. The logging company filed suit against the insured to correct the deed to exclude the disputed parcel.[9] The insured filed suit against Transnation.[10] The court found that even though it was depicted on the map, the logging company did not own the disputed land at the time of the offer and counteroffer and thus could not contract to sell the disputed land. Accordingly, the insured never had an actual right to the disputed parcel and never held an insurable interest, and the title policy was void as to the disputed parcel.[11] Because the policy was void as to the disputed parcel, failure to provide coverage was not a breach of the insurance contract.[12]

The court in *Gumapac v. Deutsche Bank National Trust* found that the owner's policy terminated at foreclosure.[13] As a condition of a mortgage loan, the homeowners obtained a policy of title insurance for the benefit of the lender.[14] Under the policy, it was the insured's duty to notify the insurer of any title defects.[15] The homeowners defaulted on their mortgage and confusion over the rights and responsibilities claimed over the property prompted them to investigate possible title defects.[16] The lender foreclosed and acquired the property; subsequently, a title report revealed a defect of title by virtue of an executive agreement between President Grover Cleveland and Queen Lili'uokalani of the Hawaiian Kingdom that rendered any notary actions unlawful. Thus, the deed of conveyance to the homeowners was nullified.[17] The lender recorded its mortgagee's quitclaim deed pursuant to power of sale and the homeowners filed a breach of contract suit against Deutsche Bank for, among other things,

5. *Id.* at *3.
6. No. B223870, 2012 WL 5334083 (Cal. Ct. App. Oct. 30, 2012).
7. *Id.* at *1.
8. *Id.*
9. *Id.*
10. *Id.* at *2.
11. *Id.* at *3.
12. *Id.*
13. No. 2:11-CV-10767-ODW (CWx), 2012 WL 3150657 (C.D. Cal. July 30, 2012).
14. *Id.* at *1.
15. *Id.*
16. *Id.* at *2.
17. *Id.*

breach of contract under the title insurance policy.[18] In granting Deutsche Bank's motion to dismiss, the court held that the title insurance policy terminated upon foreclosure.[19]

In *Keys v. Chicago Title Insurance Co.*, the court allowed the insured to pursue her claim even though she later quitclaimed the property to her son.[20] Chicago Title Insurance Company issued a title insurance policy to the buyer. Under the policy's continuation of insurance, coverage was effective as of the date of the policy, but only as long as the insured retained an estate or interest in the land. Thus, under the continuation of insurance, "once the insured's interest in the land ceases, the [policy] coverage . . . terminates."[21]

When the insured attempted to sell the home, she discovered a federal tax lien that was levied against the property before her purchase.[22] Unable to move forward with the sale, she submitted a claim.[23] She later conveyed the property by quitclaim deed to herself as trustee.[24] After Chicago Title denied the claim, the insured filed an action for "(1) specific performance, (2) breach of contract, (3) breach of duty to investigate/gross negligence, (4) breach of good faith and fair dealing, (5) tortuous breach of contract, (6) fraud and fraud inducement, and (7) bad faith and outrageous conduct."[25] The court rejected Chicago Title's argument that the insured, as an individual, lacked standing to bring an action based on a claim of loss that predated the insured's conveyance to the trust.[26] The court noted that although the policy remained effective as to the insured, as an individual, until she conveyed the property to herself as trustee, the title policy was still in effect when she mailed the notice of claim.[27] Because the loss occurred before the conveyance, the insured had standing to continue the action.[28]

In *First American Title Insurance v. 273 Water Street, LLC*,[29] First American issued a title insurance policy to Two Seventy Three Water Street, LLC, which included a disputed strip of land.[30] Another party claimed ownership of the strip of land and the insured tendered a claim. First American tendered a check to the insured for the loss covered by the policy, but the

18. *Id.* at *3.
19. *Id.* at *7.
20. No. 3:11-cv-617-CWR-FKB, 2012 WL 4510471 (S.D. Miss. Sept. 28, 2012).
21. *Id.* at *4.
22. *Id.* at *1.
23. *Id.*
24. *Id.*
25. *Id.* at *2.
26. *Id.* at *7.
27. *Id.*
28. *Id.*
29. No. HHDCV084041234S, 2013 WL 811878 (Conn. Super. Ct. July 5, 2013).
30. *Id.* at *1.

insured rejected it and demanded additional amounts.[31] First American filed an action seeking declaratory judgment on its obligations under the policy, and sometime thereafter, the disputed strip was conveyed to the insured.[32] The insured then quitclaimed the disputed strip to another entity. First American filed a motion to dismiss alleging that defendants no longer retained any interest in the land that contained the defect.[33] The issue was whether a claim for damages sustained and submitted before termination of the policy is justiciable. The court agreed that, under the language of the insured's title insurance policy, coverage ended upon the transfer to another distinct legal owner.[34] However, it denied First American's motion to dismiss because the policy was ambiguous as to the parties' intention for preexisting claims prior to termination, and there was conflicting case law as to whether claims asserted within the policy period are defeated by subsequent transfer to a third party.[35]

2. What Is Insured?

In *Hoy v. Niemela*,[36] the insured purchased a condominium that included a separate garage unit in the listing and purchase agreement. The legal description attached to the deed to the insured, however, did not include the garage unit.[37] The garage unit was not listed on Schedule A of the policy.[38] The appellate court affirmed summary judgment in favor of the insurer finding that because the garage unit was not listed in Schedule A, the policy did not provide coverage for it and there was no defect in title.[39]

In *Nationwide Life Insurance Co. v. Commonwealth Land Title Insurance Co.*,[40] the issue was whether or not "the failure to expressly except a ¶ 1(b)(2) restriction in Schedule B for purposes of ALTA 9 endorsement [covers] only losses arising from th[e] specific restriction" or whether the endorsement covers losses arising from any provisions of the instruments listed in Schedule B.[41] Here, the endorsement covered the declaration of restrictions and the master declaration, but no specific restrictions were found within the listed documents.[42] The Third Circuit affirmed the district court's holding that under its plain language, the endorsement defines the types of instruments that are covered and insures against losses

31. *Id.*
32. *Id.*
33. *Id.* at *4.
34. *Id.* at *6.
35. *Id.* at *7–8.
36. No. A12-1806, 2013 WL 2926975 (Minn. Ct. App. June 17, 2013).
37. *Id.* at *1.
38. *Id.*
39. *Id.* at *3.
40. 687 F.3d 620 (3d Cir. 2012).
41. *Id.* at 624.
42. *Id.*

caused by the instrument itself.[43] If the endorsement did not intend to cover losses caused by entire instruments, then the phrase "any instrument" would have been omitted.[44]

In *Saul v. Fidelity National Title Insurance Co.*,[45] the court found fixtures that were subject to a UCC-1 fixture filing were real property and covered by the policy. The insured purchased the property but was unaware that prior to the purchase a vendor recorded a UCC-1 fixture filing, which created a security interest in the fixtures on the premises.[46] The court found that under UCC § 9-109(d)(11), when there is a security interest in the fixtures, the fixtures are real property. Because the security interest in the fixtures constituted a lien or encumbrance on the property's title and the insurer failed to show that the policy expressly excluded fixture liens, the court denied the insurer's motion to dismiss.[47]

In *FDIC v. Commonwealth Land Title Insurance Co.*,[48] Commonwealth's agent prepared a title insurance policy in anticipation of a property purchase. However, there was no record of the agent receiving payment for the policy and the agent stated a policy was not issued.[49] Title problems arose after the lender initiated foreclosure proceedings and submitted a claim. The insurer sent a "happy foreclosure" letter stating it would insure the purchaser over the alleged defects.[50] A lawsuit followed and the court found that the insurer was estopped from denying claim due to nonpayment of the premium because the "happy foreclosure" letter was a misrepresentation of a material fact of coverage, the lender reasonably relied on the letter for the proposition that its mortgage was a valid first lien on the title, and plaintiff (as lender's receiver) was prejudiced thereby.[51]

In *Kimble v. Land Concepts, Inc.*,[52] the insured purchased a parcel of land that could only be accessed by a private road. When the insured attempted to sell the land, it was discovered that there was no access based on a specific easement. The insured submitted a claim for lack of access and unmarketability of title, but the claim was denied because of the availability of other access points. The insured subsequently settled with the prior owner in exchange for an assignment of the insured's rights under the policy. Under Wisconsin law, insurance policies may not limit the assignment of an insured's causes of action after loss. Additionally, Wisconsin's Supreme

43. *Id.*
44. *Id.*
45. No. CV-012529-11, 2012 WL 3029672 (N.Y. City Civ. Ct. 2012).
46. *Id.* at *1.
47. *Id.* at *2.
48. 902 F. Supp. 2d 1048 (N.D. Ohio 2012).
49. *Id.* at 1055.
50. *Id.*
51. *Id.* at 1066.
52. 823 N.W.2d 839 (Wis. Ct. App. 2012).

Court noted that an "assignment of . . . insured's bad faith claim . . . is a common occurrence," and the assignee could prosecute the insured's claims.[53]

In *Kondaur Capital Corp. v. Fidelity National Title Insurance Co.*,[54] the insurer issued a lender's policy and Old Republic issued a trustee's sale guarantee (TSG), but "the deed of trust listed two incorrect tax parcel numbers."[55] After foreclosure, the insurer and Old Republic refused to issue an owner's policy due to the ambiguous tract designations. The court affirmed the summary judgment in favor of Old Republic because the TSG did not specifically cover the "accuracy on the legal description of the documents" and plaintiff did not provide authority for a cause of action for a title company's refusal to issue a policy.[56] Additionally, the court affirmed summary judgment in favor of the insurer because the lender's policy did not obligate it "to independently verify the legal description" of the policy and plaintiff failed to establish any defect of cloud on the title of the property.[57]

3. Exclusions

a. Created, Suffered, Assumed, or Agreed to—Several cases addressed the "created, suffered, assumed or agreed to" exclusion found in paragraph 3(a) of the standard American Land Title Association (ALTA) title insurance policy.

In *JBGR, LLC v. Chicago Title Insurance Co.*,[58] plaintiffs commenced an action against Chicago Title alleging "they were unaware of [a] 1997 declaration that restricted development of [land] to 140 homes and that they detrimentally relied on the . . . title search" that failed to discover the declaration.[59] However, because the individual who created the declaration acted as plaintiffs' agent when plaintiffs purchased the property, "knowledge of the declaration [was] imputed to the plaintiffs."[60] Because the affidavit of the declaration's creator stated that he did not recall executing the declaration when he acted as plaintiffs' agent, there was a factual issue as to "whether the declaration was in [the agent]'s mind in 2006 and whether his knowledge [of the declaration] could be imputed."[61]

In *CDJ Builders LLC v. Fidelity National Title Insurance Co.*,[62] the insurer's title search revealed a construction lien, but the examiner mistakenly

53. *Id.* at *4 (quoting Kranzush v. Badger State Mut. Cas. Co., 103 Wis. 2d 56, 67 (1981)).
54. No. 1 CA-CV 12-0295, 2013 WL 1908018 (Ariz. Ct. App. May 7, 2013).
55. *Id.*
56. *Id.* at *3.
57. *Id.* at *4.
58. 966 N.Y.S.2d 346 (Sup. Ct. 2013).
59. *Id.* at *1.
60. *Id.* at *3.
61. *Id.* at *4.
62. No. 12-10772, 2012 WL 6150208 (E.D. Mich. Dec. 11, 2012).

determined that the lien had expired.[63] The title commitment failed to "note or require a discharge of the lien."[64] The insurer issued an owner's title insurance and the insured submitted a claim when the lien was discovered. The insurer denied coverage under exclusion (3)(a) as a lien "created suffered assumed or agreed to by insured."[65] The insurer argued that because two of plaintiff's family members were involved in the construction project, knowledge of the earlier construction activities should be imputed to plaintiff.[66] At the time of the sale, however, plaintiff believed, as did the title searcher, that the lawsuit had been dismissed and the lien expired.[67] Thus, because the insurer failed to present evidence that plaintiff's relatives were aware of the lien before the sale of the property, exclusion 3(a) did not apply.[68]

In *Cynergy, LLC v. First American Title Insurance Co.*,[69] a short-term lender loaned funds to a development group with the knowledge that the land lacked legal access. The lender also obtained a title insurance policy that covered loss or damage incurred due to lack of right to access. The development group formed a new company to acquire the note from the lender and through this transaction plaintiff became successor in interest to the lender under the insurance policy. The court found that under exclusion 3(a) "assume" means that the bank "must have had actual, subjective knowledge of the access issue and appreciated its effect."[70] Thus, the appellate court affirmed the district court's grant of summary judgment in favor of the insurer because the bank had actual notice of the lack of access before it made the loan and, therefore, it was an assumed condition.[71]

In *Deutsche Bank National Trust Co. v. Stewart Title Guaranty Co.*,[72] the seller owned two parcels of land, one improved and the other unimproved. The seller intended to sell the improved land to his son; however, the warranty deed and the lender's title insurance described the unimproved lot. When the seller filed bankruptcy, the trustee found that the seller was the record owner of the improved lot that was unencumbered and sold it as part of the bankruptcy.[73] The seller filed a quiet title action claiming superior interest over the lender, Deutsche Bank, to the unim-

63. *Id.* at *3.
64. *Id.*
65. *Id.* at *4.
66. *Id.* at *8.
67. *Id.* at *7.
68. *Id.* at *9.
69. 706 F.3d 1321 (11th Cir. 2013).
70. *Id.* at 1325.
71. *Id.* at 1333.
72. No. 12-cv-106-JD, 2013 WL 425126 (D.N.H. Jan. 31, 2013).
73. *Id.* at *1–2.

proved lot. Deutsche Bank filed an action for declaratory relief against the insurer, demanding that it provide a defense and indemnity to the quiet title action.[74] The lender argued, and the court agreed, that exclusion 3(a) did not apply to the parties' negligence or mistake about which property was being sold and mortgaged because the record did not support that the lender "intended to obtain a mortgage on the [v]acant lot or [that lender] created, intended, or agreed to the alleged mistake."[75]

The court in *Associated Bank v. Stewart Title Guaranty*[76] held that that the meanings of "created, " "suffered," "assumed," and "agreed to" require some level of intent by the insured for the defect to occur.[77] Additionally, for exclusion (3)(a) to apply, the applicable defect "must have been created by the insured."[78] The court denied the insurer's motion to dismiss because the underlying lawsuit did not clearly allege that the insured participated in the fraud, knew about it, or intended for it to occur. The court reasoned that neither the underlying complaint nor the answer alleged that the insured was involved in the deceptive acts. Additionally, exclusion (3)(a) did not apply to failure by the insured's loan officer to comply with the insured's policies because the mishandling of the file did not rise to the level of an intent to defraud.[79]

b. Post-Policy Date Matters—In *Ruisi v. Connecticut Attorneys Title Insurance Co.*,[80] the insured obtained a policy in connection with the purchase of the property. One month later, when the insured gave the attorney funds to pay off the mortgage, the attorney stole the funds.[81] The court held that exclusion 3(d) excludes coverage for events that take place after the policy is issued, i.e., the theft of the money and resulting foreclosure after the policy was issued. Thus, there was no coverage under the policy and the insurer had no duty to defend.[82]

In *Moreno v. Wells Fargo Bank*,[83] the insured issued an owner's policy for multiparcel property that was purchased in 2003. In 2004, one of the parcels was refinanced, but the legal description erroneously listed two parcels. When the insured submitted a claim under the policy asserting that the erroneously listed parcel was unmarketable, the claim was denied.[84]

74. *Id.* at *2.
75. *Id.* at *4–5.
76. 881 F. Supp. 2d 1058 (D. Minn. 2012).
77. *Id.* at 1068 (quoting Chi. Title Ins. v. Resolution Trust Corp., 53 F.3d 899, 905 (8th Cir. 1995)).
78. *Id.* at 1068–69 (quoting Resolution Trust Corp. v. Ford Mall Assocs. Ltd. P'ship, 819 F. Supp. 826, 840 (D. Minn. 1991)).
79. *Id.*
80. No. FSTCV125013845S, 2012 WL 3854407 (Conn. Super. Ct. Aug. 3, 2012).
81. *Id.* at *1.
82. *Id.* at *3–4.
83. No. A12-1620, 2013 WL 1395629 (Minn. Ct. App. Apr. 8, 2013).
84. *Id.* at *1.

The court held that the exclusion 3(d) "excluded coverage for matters occurring after the effective date of the policy."[85] Because the alleged erroneous legal description attached to the 2004 refinance mortgage was after the effective policy date, the exclusion applied.[86]

The Massachusetts appellate court in *Weinhold v. Chicago Title Insurance Co.* affirmed judgment in favor of the insurer because the claims in the underlying action arose from renovation work and did not implicate the title to the property.[87] Even though the underlying action led to the foreclosure of the property, the foreclosure did not implicate title issues.[88] Thus, coverage was not triggered under the policy and there was no duty to defend.[89]

In *Nastasi v. County of Suffolk*,[90] the previous property owners entered into a boundary line agreement with the State of New York and County of Suffolk in 1996, which was recorded in 2003. In 2002, unaware of the agreement, the insured purchased the property and obtained a policy of title insurance. Under the boundary line agreement, the insureds owned less than half of the property they believed they purchased.[91] Under exclusion 3(d), the policy did not provide coverage for defects "attaching or created subsequent to" the date of the policy.[92] The lower court found that the boundary line agreement "attached" or "created" a defect when the agreement was entered into in 1996, not when it was recorded in 2003.[93] The court was silent as to whether the title insurance policy expressly excluded rights or claims of parties in possession not shown by the public records. The appellate division reversed the lower court's grant of summary judgment in favor of the insurer because "the boundary line agreement constitute[d] a defect in [the] title."[94]

c. Police Powers—In *First American Title Insurance v. McGonigle*,[95] the insurer issued a title insurance policy to the original homeowners for land with a dam on site.[96] The policy did not include the 1981 agreement between the original homeowners and the Division of Water Resources, which governed the landowner's maintenance responsibilities.[97] The McGonigles purchased the land and First American issued a title policy that did not exempt the coverage.[98] After the close, the McGonigles learned of the 1981 agreement and

85. *Id.* at *12.
86. *Id.*
87. No. 11-P-1669, 2013 WL 776685 (Mass. App. Ct. Mar. 4, 2013).
88. *Id.* at *1.
89. *Id.*
90. 106 A.D.3d 1064 (N.Y. App. Div. 2013).
91. *Id.* at 1065.
92. *Id.* at 1066–67.
93. *Id.* at 1067.
94. *Id.* at 1066.
95. Civ. No. 10-1273-MLB, 2013 WL 1087353 (D. Kan. Mar. 14, 2013).
96. *Id.* at *1.
97. *Id.*
98. *Id.*

that $850,000 in repairs to the dam was needed in order for the dam to comply with Kansas law.[99] The McGonigles submitted the claim, which was denied.[100] The court granted the insurer's summary judgment finding the demand to repair the dam was not a covered risk because the notices of violations were not recorded in the public records as required under the policy.[101] Furthermore, the court found the dam was not an encumbrance on the title because the 1981 agreement was unenforceable.[102] Lastly, the court found that the McGonigles should have been aware of the dam's existence and the insurer had no duty "to point out . . . [the] dam on the property" or "to inform the [insured] of all laws and regulations pertaining to the use of [the] property."[103]

d. Settlement Without Insurer's Consent—A construction lender ran afoul of exclusion 9(c) by settling with a mechanic's lien claimant without the insurer's consent in *Wilmington Savings Fund Society, FSB v. Stewart Title Guaranty Company*.[104] The policy contained a consent-to-settle provision and the court held that the insurer was "not liable for [any] loss by [the lender] [which was] assumed by its unilaterally settling [the] claim."[105]

e. Knowledge of the Insured—In *Guilford v. First American Title Insurance*,[106] the insurer issued a title insurance policy to the insured based on a mortgage and note that represented that the insured loaned $200,000 to Cherrystone Bay, LLC to purchase a foreclosed property. The policy included an exception for parties in possession. However, in reality, the insured loaned only $100,000, but his brother also loaned $150,000; the loan was personal in nature and made to the sole owner and shareholder of Cherrystone; the loan was made a year before the mortgage and note were executed; and the former owners were "in possession of the [p]roperty at the time the mortgage was issued."[107]

The lower court granted the insurer's summary judgment motion seeking dismissal of the complaint and rescission of the insurance contract through equitable fraud. The insured appealed arguing that there were genuine issues of facts regarding the mortgage, title insurance, and loan amounts. The appellate court affirmed holding that the insured's "ignorance" of the false statements "[do] not preclude a finding of equitable fraud" when the misstatements are objective facts—the amount of the

99. *Id.*
100. *Id.*
101. *Id.* at *4.
102. *Id.*
103. *Id.*
104. No. 11C-04-031 FSS/6735-JS, 2012 WL 5450830 (Del. Super. Ct. Aug. 31, 2012).
105. *Id.* at *2.
106. No. L-9629-08, 2012 WL 3030250 (N.J. Super. Ct. July 26, 2012).
107. *Id.* at *2.

loan, the date of disbursal, and the identity of the lenders, i.e., information needed to secure title insurance.[108]

In *First American Title Insurance v. Columbia Harbison, LLC*,[109] the insurer issued title insurance to Columbia Harbison, LLC for a commercial development that did not cover loss or damage arising from a violation of an easement. However, the insurer later included an endorsement providing for "affirmative coverage for certain losses or damages related to [the] violation of the easement."[110] Under the endorsement, the insurer would insure against a court order requiring removal of structures from the site. The underlying action was instituted as a result of the easement violation and ultimately a permanent injunction was issued against Columbia Harbison. The insurer filed suit asserting no coverage for the underlying action and arguing that the policy provided no coverage for actions seeking monetary judgment.[111] However, the court found that coverage applied to the underlying action because the policy did not limit coverage by causes of actions, but only the types of relief a court may order. The relief issued was a permanent injunction, which was covered despite being premised on Columbia Harbison's breach and trespass.[112]

4. Exceptions

In the case of *Fischer v. First American Title Insurance*,[113] the parties in possession exception did not apply to a neighbor's adverse possession claim. First American issued title insurance for property purchased by the insured that contained an exception for parties in possession.[114] The insured's surveyor discovered that the fence was located three feet inside the insured's property line, but the disputed parcel was used by the adjoining property owner prior to the insured's purchase. The insured tendered the neighbor's adverse possession claim to First American, which denied the claim based on the parties in possession exception.[115] Based on the denial, the insurer brought suit against the insured and judgment was entered in the insured's favor. First American filed a motion for judgment notwithstanding the verdict, which the trial court granted; in addition, the court vacated the jury's verdict and entered judgment in favor of the insurer.[116] The appellate court affirmed, finding the parties in possession exception was not ambiguous and, under the plain and ordinary

108. *Id.* at *5–6.
109. No. 3:12-CV-00800-JFA, 2013 WL 1501702 (D.S.C. Apr. 11, 2013).
110. *Id.* at *3.
111. *Id.* at *1.
112. *Id.* at *5–6.
113. 388 S.W.3d 181 (Mo. Ct. App. 2012).
114. *Id.* at 184–85.
115. *Id.* at 185.
116. *Id.* at 186.

meaning, the policy did not insure against unrecorded property possessory claims.[117]

In *Hansen v. Fidelity National Title Insurance Co.*, a "public records" exception similar to parties in possession preempted coverage.[118] The insureds obtained a title insurance policy from Fidelity National, which included a public records exception, for land purchased in 2004. In 2010, a trust sued the insureds alleging that the trust owned a portion of insureds' land. The insureds' claim was denied coverage under the public records exception. The court granted First National's motion for summary judgment, finding that under the public records exception of the policy, the duty to defend arises only when the alleged ownership is by public record.[119]

B. *Claims Procedure*

1. Notice of Claim

The importance of timely providing notice of a claim was discussed in *Barker v. Jantzen Beach Village Condominium Association*.[120] Following a convoluted series of transfers of real property, Woodstock Financial Corporation acquired the property and purchased an owner's policy from the insurer, Fidelity. The property was subsequently conveyed to plaintiff, who, in pro per, sued Fidelity seeking relief on the basis that the insurer allegedly breached a duty under the policy of title insurance issued to Woodstock Financial Corporation. The court granted Fidelity's motion to dismiss finding that the claim was not ripe because the insurer had not yet denied the claim.[121]

2. Duty to Defend

The Massachusetts Supreme Judicial Court delivered a monumental decision holding that the "in for one, in for all" rule does not apply to the defense of mixed actions in the context of title insurance in *GMAC Mortgage, LLC v. First American Title Insurance Co.*[122] In answering certified questions from the U.S. District Court for the District of Massachusetts, the Supreme Judicial Court held that when there is an overlap between one or more of the counts of the complaint and the terms of a standard title insurance policy, the insurer does not have a duty to defend the insured against all claims in the action.[123]

117. *Id.* at 188.
118. No. 03:12-cv-00183-HZ, 2013 WL 424437 (D. Or. Jan. 31, 2013).
119. *Id.* at *4–5.
120. No. 3:12-CV-01828-BR, 2013 WL 244474 (D. Or. Jan. 18, 2013).
121. *Id.* at *3.
122. 985 N.E.2d 823 (Mass. 2013).
123. *Id.* at 825.

The court found that "the 'in for one, in for all' rule is inapplicable in the title insurance context because title insurance is fundamentally different from general liability insurance."[124] Noting that

> because title issues are discrete, they can be bifurcated fairly easily from related claims . . . [and] thus, the central policy behind "in for one, in for all" that parsing multiple claims is not feasible is not implicated to the same extent in the title insurance context as in the general liability insurance context.[125]

Furthermore, "[w]ith the possible exception for compulsory counterclaims," the court held that "when a title insurance contract gives the insurer the right to engage in litigation to cure a defect covered by the policy," the "insurer initiating litigation [does not] have a duty to defend the insured against all reasonably foreseeable counterclaims."[126] The court added, "[a]title insurer should not be penalized (in the sense of having to assume broad defense obligations) for doing what it may do under the contract—what not only may be the wise and prudent course, but also the course that is in the best interests of the insured."[127]

The case of *Home Federal Savings Bank v. Ticor Title Insurance Co.*[128] arose out of a failed construction project. Home Federal Savings Bank was the construction lender for the development of an ethanol plant and committed to loan up to $95.5 million. To protect its security interest in the property, the bank purchased a policy of title insurance from Ticor Title Insurance Co., including a mechanic's lien endorsement. When the developer ran into serious problems, "the bank did not disburse the final $8 million."[129] The developer then fired the general contractor, which in turn recorded a $6 million mechanic's lien against the property.[130] The bank tendered the mechanic's lien claim to Ticor Title. Under the "created, suffered, assumed or agreed to" exclusion from coverage under the policy, Ticor Title denied the claim. The bank subsequently settled with the general contractor and filed suit against the title company alleging bad faith and breach of its duties to defend and indemnify. On cross-motions for summary judgment, the district court ruled in favor of Ticor Title finding that the exclusion applied because the bank withheld a disbursement of funds that could have paid the lien claimant.[131] On appeal, the Seventh Circuit reversed holding that the bank was not bound to disburse

124. *Id.* at 828.
125. *Id.* at 829 (internal citation omitted).
126. *Id.* at 825 (emphasis omitted).
127. *Id.* at 830.
128. 695 F.3d 725 (7th Cir. 2012).
129. *Id.* at 727.
130. *Id.* at 728.
131. *Id.* at 729.

all of its loan commitment and that Ticor Title did have a duty to defend.[132]

In *Williams v. North American Title Insurance Co.*, the California Court of Appeal held that the insured was bound by a release of the insurer and thus the insurer had no duty to defend the insured in a subsequent lawsuit over the pipeline.[133] The insurer had negotiated a settlement and release with its insured over a pipeline on the insured's property that was not disclosed at the time he had purchased the property.[134] Years later, a neighbor filed a lawsuit against the insured for interference with the pipeline. The insurer denied the claim based on the earlier release and was in turn sued for bad faith. The trial court granted summary judgment in favor of the insurer.[135] The appellate court affirmed holding that the release canceled the insurer's duty to defend and indemnify.[136]

The Appellate Division of the Supreme Court of New York held that an insurer had no duty to defend a landlord in an eviction suit where the tenant had unsuccessfully raised a title issue.[137] In response to an eviction, the tenant made assertions "that he was an heir of a prior owner of the property and that the plaintiff's grantor did not have [good] title."[138] The insurer was notified of the assertions but did not have time to complete its investigation before the tenant's claims were dismissed. The landlord nevertheless filed suit against the insurer claiming it had an obligation to provide a defense to the claims.[139]

3. Claims Handling

The California Court of Appeal affirmed the tripartite attorney-client relationship among the insured, the insurer, and outside counsel retained to represent the insured in *Bank of America, N.A. v. Superior Court of Orange County*.[140] The court confirmed that the attorney-client privilege applies when the insurer hires counsel "to prosecute an action on behalf of the insured" and whether there has been a reservation of rights is irrelevant for the purposes of the existence of the privilege.[141]

Insurers in New York and New Jersey were protected by the court's decision in *Stein, LLC v. Lawyers Title Insurance Co.* that the insured can-

132. *Id.* at 732, 734.
133. No. A131968, 2012 WL 2705027 (Cal. Ct. App. July 9, 2012).
134. *Id.* at *3–4.
135. *Id.* at *5.
136. *Id.* at *10.
137. Sands Point Partners Private Client Grp. v. Fid. Nat'l Title Ins. Co., 99 A.D.3d 982 (N.Y. App. Div. 2012).
138. *Id.* at 983.
139. *Id.* at 984.
140. 212 Cal. App. 4th 1076 (2013).
141. *Id.* at 1083.

not recover attorney fees in a direct action against the insurer.[142] None of the policy provisions addressed the recovery of attorney fees. The court found that, consistent with common law, "an insured may not recover . . . expenses incurred" in suing the insurer to resolve rights under the policy.[143]

4. Subrogation

The holding in *Marchetti v. Chicago Title Insurance Co.*[144] is a reminder that subrogation rights must be specified when settling a claim between the insurer and the insured. In 2008, the Marchettis purchased property for $180,000 and were insured by Chicago Title.[145] They made improvements to the property that increased its value to $198,000.[146] Shortly thereafter, they were sued for quiet title based on fraud of a third party, and Chicago Title provided a defense.[147] The state court determined that the Marchettis did not have title to the property. Although Chicago Title paid $110,000 for claimed losses under the policy, the Marchettis claimed that they were not fully compensated for their loss.[148] A criminal action was filed based on the fraud against the Marchettis that culminated in a restitution order in favor of Chicago Title based on claimed subrogation rights.[149] Claiming that the restitution order should have been in their favor because the subrogation rights were not ripe, the Marchettis sued for breach of contract, among other things. In denying Chicago Title's motion to dismiss, the court found that the Marchettis had alleged sufficient facts to state a claim for breach of contract on the basis that they had not been fully compensated for their losses and the subrogation rights were not ripe.[150]

C. *Damages*

Several troublesome cases for title insurers were handed down this year. One such opinion is *State Resources Corp. v. Security Union Title Insurance Co.*, in which the Eastern District of Oklahoma denied the insurer's motion to dismiss the complaint as premature.[151] After a loan was made to the borrowers, secured by a mortgage on a Hughes County parcel of property, it was discovered that a prior recorded mortgage existed. The

142. 100 A.D.3d 622 (N.Y. App. Div. 2012).
143. *Id.* at 623 (quoting N.Y. Univ. v. Cont'l Ins. Co., 87 N.Y.2d 308, 624 (1995)).
144. No. 12-CV-5985, 2013 WL 317014 (N.D. Ill. Jan. 28, 2013).
145. *Id.* at *1.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 2.
151. No. CIV-12-419-FHS, 2013 WL 209564 (E.D. Okla. Jan. 17, 2013).

lender had obtained a loan policy, which did not except the mortgage. When the insurer declined to accept and pay the claim, the suit was filed. The court reasoned that the allegation that the lien position is subordinate "constitutes a 'loss or damage' under the plain language of the policy" and that this "position is not of sufficient value to satisfy the debt the property secures."[152] The court specifically rejected the insurer's argument that there was no loss or damage until borrowers default, the lender must pay off the superior lien, or the property is sold to satisfy creditors. The decision is contrary to most case law.[153]

In re Evans[154] was discussed last year in the context of bad faith, but the court's subsequent opinion relating to the determination of damages to be awarded to the lenders is also instructive. The adversary proceeding arose from the bankruptcy of former Mississippi attorney Chris Evans, who pled guilty to money laundering in 2011. Evans, as president of an LLC, purchased several acres of commercial real estate and used it, among others, as security for repeat loans. After discovering title defects relating to their collateral, including improper vesting and the existence of prior liens, the lenders submitted title insurance claims.[155] The insurers purchased the property, paid off certain lenders, conveyed individual lots to the remaining lenders, and filed this proceeding. The court held that the insurers' method of subdividing the property into lots rendered it valueless and constituted a breach of the duty of good faith and fair dealing. In a lengthy opinion, in which it reviewed the question of damages, the court ultimately held that the insurers' valuation of the lots was flawed because it assumed there were no marketability problems, or that all owners of the property would join together in a subsequent sale of the lots. The court stated that this "violated the fundamental concept of Mississippi law that [the] party who breaches a contract may not take advantage of its own wrong."[156] The proper approach would have been to evaluate the property under the impediment presented by the subdivision ordinance, which did not exist at the time the policies issued, and which the insurers themselves created. "The Title Companies' own violation should not allow them to limit or reduce their obligations under the Policies."[157]

First American Title Insurance Co. v. Columbia Harbison, LLC[158] is instructive because it indicates consequential damages may be considered

152. *Id.* at *2.
153. Falmouth Nat'l Bank v. Ticor Title Ins. Co., 920 F.2d 1058 (1st Cir.1990).
154. 492 B.R. 480 (S.D. Miss. Apr. 26, 2013).
155. *Id.* at 486–87.
156. *Id.* at 510.
157. *Id.* at 510–11.
158. No. 3:12-cv-00800-JFA, 2013 WL 1501702 (D.S.C. Apr. 11, 2013).

for breach of an affirmative coverage endorsement. The insurer provided "an endorsement directed to violation of [an] easement" by the insured's proposed commercial development.[159] After the easement was violated and suit was brought by the adjoining landowner, the insured sought coverage. The insurer brought suit seeking a declaration of no coverage, after which the insured sued for breach of contract and bad faith. The adjoining landowner won the ancillary suit, which required the insured to remove its construction. The insured "claim[ed] approximately $4.5 million in losses" based on the insurer's failure to indemnify it.[160] The court found no coverage under the endorsement and that consequential damages and attorney fees could not be sought under the policy, but as a result of the insurer's breach of contract.[161]

D. *Closing Protection Letters*

This year's closing protection letter (CPL) case law also has favored the insured. In *Wells Fargo Bank, N.A. v. Bank of America, N.A.*,[162] the agent's closing instructions required that the subject loan be secured by a first lien. The insurer also issued a CPL, which provided that the insurer would reimburse the insured "for actual losses incurred . . . as a result of failure of the Policy Issuing Agent to comply with written closing instructions relating to priority of the lien."[163] After discovering a prior lien, the loan policy was issued with exception to the prior lien. When the prior lienholder filed a foreclosure action, the insured cross-claimed against its insurer. On the basis of the policy exception, the insurer moved to dismiss the action filed against it, but the court denied that motion, deciding instead to construe the loan policy and CPL as one agreement.[164] The court did provide that the two documents when read together are "facially at odds," and therefore it would be "inappropriate to determine the meaning of the agreement as a matter of law at this stage of the litigation."[165]

Two cases concerned with time limitations within the CPL are *Fifth Third Mortgage Co. v. Lamey*[166] and *FDIC v. Stewart Title Guaranty Co.*[167] In *Lamey*, the U.S. District Court for the District of Minnesota was

159. *Id.* at *1.
160. *Id.*
161. *Id.* at *9–10.
162. No. 11 Civ. 4062(JPO), 2013 WL 372149 (S.D.N.Y. Jan. 31, 2013).
163. *Id.* at *5.
164. *Id.* at *5–6 (the opinion cited two infamous CPL cases, *JP Morgan Chase Bank, N.A. v. First American Title Insurance Co.*, 795 F. Supp. 2d 624 (E.D. Mich. 2011), and *Sears Mortgage Corp. v. Rose*, 634 A.2d 74 (N.J. 1993), which served to integrate the CPL into the title policy).
165. *Id.* at *6.
166. Civ. No. 12-2923(JNE/TNL), 2013 WL 1976042 (D. Minn. May 13, 2013).
167. No. 12-10062-CV, 2013 WL 1891307 (S.D. Fla. May 6, 2013).

faced with an action brought by a lender claiming it was injured in a mortgage fraud scheme.[168] The lender sued the borrowers, mortgage brokers, appraiser, closing agent, title company, and title insurance company.[169] The insurer moved to dismiss the case on the basis that the CPL provided a one-year limitation for bringing a claim.[170] The court pointed out that the late notice is fatal to a claim only if the insurer is prejudiced by the failure to comply.[171] In the *FDIC* case, the insured sued the insurer seeking coverage, but the insurer alleged the notice of claim was untimely under the ninety-day requirement included in the CPL.[172] Discussing prior Florida case law on the subject, the court acknowledged the prejudice test for late notice and declined to dismiss the case in favor of the insurer.[173]

Lastly, in *Fifth Third Mortgage Co. v. Kaufman*,[174] the U.S. District Court for the Northern District of Illinois handled a matter where the title agent who handled the closings of three different loans was involved in putting up straw buyers. "The goal . . . was to have the straw buyers close on several properties, with several different banks, in a short period of time, before the various mortgage servicers discovered the straw buyers' buying histories."[175] After the inevitable defaults on the loans, the insured was able to foreclose but sought damages from the insurer for the loss.[176] The insured pointed to a closing protection contract (CPC) with the insurer, which protected the insured from "actual losses arising out of the failure of [title agent] to comply with [closing] instructions."[177] The court reasoned that the insured bargained for a bona fide borrower and that, "[w]ithout that, an immediate default was all but guaranteed . . . [and as such], [p]laintiff has adequately pled an actual loss for which [the insurer] could be liable under the CPC."[178]

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

A counterpoint to *Kaufman*, which held that the bad acts of the agent can be held against the insurer under a CPL or CPC, is the decision in *4-J*

168. 2013 WL 1976042, at *1.
169. *Id.*
170. *Id.*
171. *Id.* at *2.
172. 2013 WL 1891307, at *4.
173. *Id.* at *5.
174. No. 12 C 4693, 2013 WL 474506 (N.D. Ill. Feb. 7, 2013).
175. *Id.*at *1.
176. *Id.*at *2.The loans were "acquired by the Federal Home Loan Mortgage Corporation . . . as part of the bank 'bail-out.'" However, after discovering the fraud, "Freddie Mac required [the insured lender] to buy them back [and] indemnif[y] Freddie Mac for . . . losses stemming from the loans." *Id.*
177. *Id.*
178. *Id.*at *3.

L.P. v. Scarbrough & Weaver, PLC.[179] In that case, after the title agent stole the seller's net sales proceeds, the seller sued both the title agent and the insurer.[180] The insurer moved for summary judgment, which was granted and affirmed on appeal based on the reasoning that ". . . there is no express escrow agency between (Insurer) and (agent)."[181] Additionally, the issuance of a CPL did not make the insurer liable for the agent's acts as an escrow agent. According to the court, "[b]y issuing the CPL to [the buyer's] lender, [the insurer] did not clothe [the agent] with the appearance of authority to act as its agent with regard to closing and escrow."[182]

Recent opinions also have provided that an insurer is not liable for an agent's negligent search,[183] an agent's two-year delay in recording documents (though there may be loan policy liability),[184] apparent authority grounds,[185] or an agent's fraudulent transactions involving Costa Rican real estate.[186]

However, an agent's knowledge of a fraudulent scheme may be imputed to the insurer. In *Sher v. Luxury Mortgage Corporation*,[187] "Luxury closed on a $2 million loan secured by a mortgage on real property located [in] Water Mill, New York."[188] After receiving a title report listing two prior mortgages on the property, Luxury obtained assurance from insurer's title agent that the two mortgages were satisfied. The insurer also confirmed that the agent was a duly authorized title agent and "can act fully in our stead and has complete authority to issue Certificates and Reports of Title; omit objections to title; collect and charge premiums and fees and to issue Policies of Title Insurance and Endorsements thereto."[189] A loan policy was issued "insuring [the] mortgage as a first priority lien" and the mortgage was later sold.[190] After the buyer filed bankruptcy, the trustee discovered a prior mortgage, demanded repurchase of the mortgage, and filed a lawsuit. The trustee also requested the insurer tender a defense on behalf of the subsequent mortgagor, but the insurer refused.

179. No. M2012-00284-COA-R3CV, 2013 WL 411447 (Tenn. Ct. App. Jan. 31, 2013). *But see* EnTitle Ins. Co. v. Darwin Select Ins. Co., No. 1:11-CV-01193, 2013 WL 422712 (N.D. Ohio Feb. 1, 2013) (insurer sued its professional liability carrier to recover for CPL losses caused by the agent stealing the escrow fund; the court held that CPL liability was not a title policy loss as defined in the liability policy).

180. *Id.* at *3.

181. *Id.*

182. *Id.* at *4.

183. 100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co., 60 A.3d 1 (Md. 2013).

184. Chase Home Fin., LLC v. Islam, 961 N.Y.S.2d 357 (Sup. Ct. 2012).

185. DLJ Mortg. Capital, Inc. v. Kontogiannis, 102 A.D.3d 489 (N.Y. App. Div. 2013).

186. Stinespring v. Fid. Nat'l Fin., Inc., No. 12 C 5866, 2013 WL 1626203, at *1 (N.D. Ill. Apr. 15, 2013).

187. Civ. No. ELH-11-3656, 2012 WL 5869303 (D. Md. Nov. 19, 2012).

188. *Id.* at *2.

189. *Id.*

190. *Id.*

The court determined that the agent "enjoyed actual or apparent authority to act on behalf of insurer" and accordingly denied the insurer's motion to dismiss.[191]

III. INSURER VERSUS AGENT

When do limitations commence on an insurer's claim against an agent under the agency agreement? In *Old Republic National Title Insurance Co. v. Darryl J. Panella, LLC*,[192] a Georgia court held that limitations did not start until the agent refused to indemnify the insurer after the insurer had paid the claim. The court construed the agency agreement as an indemnity contract even though the word "indemnify" did not appear in it.[193] Georgia has a longer limitations period for indemnities.[194] A second Georgia case this year followed *Panella*.[195] A federal court in Illinois also agreed that the agent's refusal to reimburse the insurer triggers limitations.[196]

In a Wisconsin case, the title agent misappropriated over $3.5 million from an escrow account.[197] The insurer sued the bank where the agent had its escrow account alleging that the bank improperly used funds from the account to pay bank fees.[198] After more than 1,000 overdrafts, the court found that the bank may have a duty to investigate and held the case could proceed to trial.[199]

In a Connecticut case, a law firm/title agent held funds in escrow to pay a prior lien once the amount due was resolved in a bankruptcy court action.[200] Before the court order was final, the law firm disbursed the funds to its client,[201] leaving no funds in escrow to pay the claim.[202] The insurer

191. *But see* Rosenberg v. B.H. Kahan & Assoc., No. 1-11-3690, 2013 WL 3015860, at *12 (Ill. App. Ct. June 13, 2013) (Agent closed two fraudulent sales, which purchaser discovered were fraudulent post-closing; purchaser sued the insurer under the Illinois Insurance Code, alleging it created an agency relationship for closing activities. The court affirmed the insurer's motion to dismiss, noting that state law requires insurers to register agency agreements as an attachment to the application, and therefore the application does not "somehow 'trump' the agency agreement.").

192. 734 S.E.2d 523 (Ga. Ct. App. 2012).

193. *Id.* at 526–27.

194. *See* GA. CODE ANN. § 9-3-24.

195. Old Republic Nat'l Title Ins. Co. v. Studstill & Perry, LLP, No. 7:12-CV-83 HL, 2013 WL 1625123 (M.D. Ga. Apr. 15, 2013).

196. First Am. Title Ins. Co. v. Res. Real Estate Serv., LLC, Civ. No. 11 C 8095, 2012 WL 3245971 (N.D. Ill. Aug. 7, 2012).

197. First Am. Title Ins. Co. v. Westbury Bank, No. 12-CV-1210, 2013 WL 1677911 (E.D. Wis. Apr. 17, 2013).

198. *Id.* at *5.

199. *Id.* at *10.

200. Fid. Nat'l Title Ins. Co. v. Harlow, Adams & Freidman, P.C., No. CV116021869S, 2013 WL 3770709 (Conn. Super. Ct. June 27, 2013).

201. *Id.* at *1.

202. *Id.*

paid the lienholder and sued the law firm/agent.[203] When the insurer sought discovery of the agent's disbursement records, the agent asserted the data were protected under the attorney-client privilege.[204] The court held for the insurer, finding that the agency agreement gave the insurer the right to audit the agent[205] and that the information sought concerned transfer of funds, not legal advice.[206]

In a case in the Northern District of Texas, an agent allegedly failed to give borrowers benefit of a discounted reissue note.[207] The borrowers brought a class action against the insurer, which filed a third-party claim against the agent.[208] The court held that the agent was liable for the insurer's litigation costs under the agency agreement, but the amount of the damages must be determined at trial.[209]

IV. DUTIES OF THE TITLE/ESCROW AGENT

A. *Handling Escrow Funds*

A significant number of cases deal with escrow funds this year. In *TCC Historic Tax Credit Fund VII, LP v. Levenfeld Pearlstein, LLC*,[210] an investor sent funds to a law firm, directing it to distribute most of the funds to a hotel developer. Instead, the law firm disbursed the funds to related entities of the developer. The investor sued the law firm on a variety of claims, including for breach of escrow agreement, but the U.S. District Court for the Northern District of Illinois held this was not an escrow agreement because there was no agreement to hold funds until a contingency or condition occurred.[211]

In another escrow funds matter, *Choice Escrow & Land Title, LLC v. Bancorpsouth Bank*,[212] when a hacker stole $440,000 from an agent's escrow account, the agent sued the depository bank. Construing Missouri's version of the Uniform Commercial Code, the court held that the risk of an unauthorized transfer was on the agent. In this case, the bank had offered a safer dual-control system, but the agent declined. "[E]xperts . . .

203. *Id.* at *2.
204. *Id.* at *4.
205. *Id.* at *3.
206. *Id.* at *5.
207. Hancock v. Chi. Title Ins. Co., No. 3:07-CV-1441-D, 3:08-CV-1916-D, 2013 WL 139547 (N.D. Tex. Jan. 11, 2013).
208. *Id.* at *2.
209. *Id.* at *11.
210. No. 11 C 8556, 2012 WL 5949211 (N.D. Ill. Nov. 27, 2012).
211. For another case dealing with the specific duties and roles of agents, see *Jarvis v. K&E RE ONE, LLC*, 390 S.W.3d 631, 640–41 (Tex. Ct. App. 2012) (where the loan servicer had apparent authority to accept lien payoff the title agent was not negligent in paying the loan servicer, who subsequently stole the funds).
212. No. 10-03531-CV-S-JTM, 2013 WL 1121339 (W.D. Mo. Mar. 18, 2013).

agree[d] that the fraud would not likely have occurred if [the agent] had [chosen] the 'Dual Control' [system]."[213]

Finally, E&O carriers successfully denied liability to title agents this year in two cases, on the basis of "customer funds" or "escrow funds" exclusions.[214]

B. *Handling Documents*

In *AREI Colonnade 1, LLC v. Stewart Title Guaranty Co.*,[215] plaintiff investors "purchased ownership interests in senior housing facilities" operated by Koening, who stole plaintiffs' money and allowed the facility to be foreclosed by the first lienholder.[216] Plaintiffs sued various parties including a California agent and the underwriter, which was involved because the property was in Pennsylvania.[217] The court found the underwriter as subagent had limited duties to plaintiffs, none of which they could show were breached.[218] "Appellants were harmed by AREI, not [the underwriter]."[219] Moreover, the underwriter "had no duty to evaluate the entire transaction."[220] In another documents case, a buyer alleged her signature was forged on several documents by the title agent.[221] She sued both the lender and the agent but eventually admitted in her deposition to signing all the documents.[222] An Illinois appellate court held that the agent could recover its defense costs from the buyer.[223]

C. *Duty to Search Title*

The Maryland Court of Appeals held that while an agent has a duty to search title records, the insurer is not vicariously liable for the agent's search.[224]

213. *Id.* at *9. *See also* K2 Settlement, LLC v. Certain Underwriters at Lloyd's London, Civ. No. 11-0191, 2012 WL 5990038 (W.D. Pa. Nov. 30, 2012) (where agent sued bonding company over $482,000 in losses caused by employee moving and disbursing escrow funds without proper authority; the court granted summary judgment to bonding company on grounds that agent failed to present evidence employee personally received a financial benefit from the misapplied funds).

214. Cornerstone Title & Escrow, Inc. v. Evanston Ins. Co., Civ. No. WMN-12-746, 2013 WL 393286 (D. Md. Jan. 30, 2013); Bethel v. Darwin Select Ins. Co., Civ. No. 11-2242 DSD/FLN, 2012 WL 4372574 (D. Minn. Sept. 25, 2012).

215. No. A131734, 2013 WL 637231 (Cal. Ct. App. Feb. 21, 2013).

216. *Id.* at *1.

217. *Id.*

218. *Id.* at *6.

219. *Id.* at *12.

220. *Id.* at *11.

221. Yan v. Burnet Title, No. 1-11-1747, 2012 WL 6962163, at *1 (Ill. App. Ct. Sept. 27, 2012).

222. *Id.* at *10.

223. *Id.* at *11.

224. 100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co., 60 A.3d 1 (Md. 2013).

D. *Duty to Disclose*

Many of the duty to disclose cases this year center upon either lack of knowledge or the limited character of the insurer in the transaction. In *Alliance Bank v. Dykes*, the borrower presented no evidence that the insurer who closed the pertinent loans knew that the lender had misrepresented the loan terms and therefore had no duty to disclose that which it did not know.[225] In the *AREI Colonnade 1, LLC* case,[226] as well as in another California Court of Appeal case, *Wood River Capital Resources, LLC v. Stewart Title Guaranty Company*,[227] the insurer acting as a subagent/escrowee was found to have no duty to discover the seller's fraud in a case where the insurer had followed the closing or escrow instructions.

E. *Duties to Third Parties*

Several important cases this year center upon a title agent's duties to third parties. In *Bedrock Financial, Inc. v. United States*,[228] Fuentes owned a home subject to a first lien of $171,000 and a federal tax lien of $42,000.[229] The agent closed a refinance loan of $243,000, which went to pay off the first lienholder, lower-priority creditors, and closing costs with the balance to Fuentes.[230] Two years after closing, the refinance lender sued the IRS to establish lien priority.[231] After the court recognized subrogation to payoff of the first lien, the IRS brought a third-party complaint against the agent, alleging it should have paid the IRS the funds in excess of the first lien payoff.[232] The court denied the agent's motion to dismiss and held the IRS can proceed to trial on conversion and waste theories.[233]

In another seminal case, a lienholder sued a Michigan agent because it did not contact the lienholder to secure a partial release on nine lots prior to writing title.[234] The lienholder subsequently foreclosed. The Court of Appeals of Michigan held that because the lienholder had made a full credit bid—"a credit bid . . . equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure"—it was not entitled to

225. Nos. A12-0455, A12-0485, A12-0486, 2012 WL 6734457 (Minn. Ct. App. Dec. 31, 2012).

226. AREI Colonnade 1, LLC v. Stewart Title Guar. Co., No. A131734, 2013 WL 637231 (Cal. Ct. App. Feb. 21, 2013). *See also* text at note 215.

227. No. A131736, 2013 WL 637903 (Cal. Ct. App. Feb. 21, 2013).

228. No. 1:10-CV-01055-MJS, 2013 WL 2244402 (E.D. Cal. May 21, 2013).

229. *Id.* at *1.

230. *Id.*

231. *Id.*

232. *Id.* at *11.

233. *Id.* at *12.

234. C&D Capital, LLC v. Colonial Title Co., Nos. 306927, 308262, 2013 WL 2278127, at *4 (Mich. Ct. App. May 23, 2013). *See also* TSF 53419, LLC v. Fid. Nat'l Title Ins. Co., No. B232445, 2013 WL 1750981 (Cal. Ct. App. Apr. 24, 2013) (agent had no duty to existing lienholder).

bring suit.[235] The court provided that "the full credit bid rule bars recovery because [lienholder] did not suffer any damages. . . . Because [it] made a full credit bid, its mortgage debt was satisfied and its mortgages were extinguished as a matter of law."[236]

Two more cases hold that an agent has no duty to (1) the holder of an option to purchase or (2) a majority shareholder where a minority shareholder sold real estate without proper authority. In *Best v. Security Title Agency, Inc.*,[237] the holder of an option to purchase a tract in Phoenix sued the buyer and the seller of the property, as well as the title agent, claiming tortious interference with the contract and negligence. The court granted the agent's motion for summary judgment under an estoppel argument, but also provided that where a "professional has no control over whether the non-client is injured, then no special relationship exists and the professional owes no duty to the non-client."[238] The agent's sole duty was "to facilitate the close of escrow between the parties," creating no such special relationship that could create any duty to the option holder.[239]

Lastly, in *Hu v. Lowbet Realty Corp.*,[240] the minority shareholder of a corporation whose sole asset was a residential apartment building, "purporting to act on the [corporation's] behalf," sold the apartment building. Months before the sale, the corporation had begun winding up its affairs as part of the dissolution process. The title agent issued a title insurance policy and "admits it was aware [the corporation] had been dissolved."[241] The majority shareholder brought the title agent and others into the dissolution action on the basis that the sale was based upon fraud and negligence. The sole count against the agent was for negligence. The court provided that the agent was not in privity with the majority shareholder or the corporation and thus owed no duty of care to either.

V. GOVERNMENTAL REGULATION

In 2005, the Washington State Office of the Insurance Commissioner investigated violations of the state antikickback regulations in the title industry.[242] A report detailing abuses was published, but the commissioner filed no actions. Two years later, the commissioner reviewed the records of Land Title Insurance Co., which was an exclusive agent for Chicago

235. *C&D Capital*, 2013 WL 2278127, at *5 (citing New Freedom Mortg. Corp. v. Globe Mortg. Corp., 281 Mich. App. 63, 68 (2008)).
236. *Id.*
237. No. 1 CA-CV 11-0564, 2012 WL 5923806 (Ariz. Ct. App. Nov. 27, 2012).
238. *Id.* at *2.
239. *Id.*
240. 956 N.Y.S.2d 400 (Sup. Ct. 2012).
241. *Id.* at 403.
242. Chi. Title Ins. Co. v. Office of the Ins. Comm'r, 309 P.3d 372 (Wash. 2013).

Title Insurance Company (CTIC) in four counties. The commissioner submitted a consent order to CTIC detailing Land's violations of the anti-kickback regulations. CTIC declined to sign the order, which included a $114,500 fine for CTIC,[243] asserting that Land's actions were "outside the scope of the agency agreement and [beyond] CTIC's control."[244] A disciplinary action was filed and "[t]he [c]ourt of [a]ppeals held that CTIC was not vicariously liable for Land Title's actions."[245]

The Washington Supreme Court reversed, holding that Land was acting on behalf of CTIC when it marketed title insurance products.[246] "As far as these four counties were concerned, Land Title was an integrated part of CTIC's operations."[247] Moreover, CTIC took no steps to stop the kickbacks. CTIC is vicariously liable for Land's actions under the insurance statutes and common law. The agency agreement was an "undisclosed private contract" that did not limit Land's authority.[248]

In an Indiana case, three agents were determined not to be following the promulgated rate rules.[249] One agent in particular seemed to be deciding what to charge on a subjective file-by-file basis. The administrative hearing officer issued an order requiring the insurer to refund the excessive premiums to consumers, monitor and regulate what the agents charge, and pay unpaid premium taxes.[250] A district court reversed the order, and on appeal, the court of appeals held for the insurance commissioner. "[The insurer] had no procedures in place to ensure that its agents were quoting, charging and collecting title insurance premiums as set forth in [the insurer's] rate book."[251]

In a third case, a borrower brought a class action case in North Carolina against a title agent and insurer alleging violation of the refinance rate and excessive charges for closing fees.[252] The defendants sought to compel arbitration as set forth in the loan policy. The appellate court found the borrower was not a party to the loan policy.[253] Consequently, she was not subject to arbitration.[254]

243. *Id.* at 383.
244. *Id.* at 378.
245. *Id.* at 377.
246. *Id.* at 381–82.
247. *Id.* at 382.
248. *Id.* at 379.
249. Robertson v. Ticor Title Ins. Co. of Florida, 982 N.E.2d 9 (Ind. Ct. App. 2012).
250. Interestingly, the Indiana hearing officer held that, contrary to the *CTIC* case, the insured was not liable for the agent's RESPA violations.
251. *Robertson*, 982 N.E.2d at 23.
252. Hamilton v. Mortg. Info. Serv., Inc., No. COA12-584, 2012 WL 6590718 (N.C. Ct. App. Dec. 18, 2012).
253. *Id.* at *1.
254. *Id.* at *4.

VI. BANKRUPTCY

In *In re Green*, a lender held an unrecorded deed of trust and filed a state court action seeking a declaratory judgment that its lien was enforceable.[255] A month later, the borrower filed a Chapter 13 bankruptcy. The trustee filed an adversary action to have the state court suit lis pendens set aside as an avoidable preference. The bankruptcy court found that the lis pendens provided notice of the lender's claim so the trustee had notice of the claim as of the date the petition was filed.[256] The lender was subrogated to the position of the former lienholder it paid.[257]

The plaintiff in *Farahzad v. Lawyers Title Insurance Co*.[258] invested $1.4 million in like-kind exchange proceeds with LandAmerica Exchange Services (LES) in July 2008. When LES filed bankruptcy in November 2008, the plaintiff pursued his claim in bankruptcy court. Meanwhile, the bankruptcy court approved the sale of Lawyers Title Insurance Corporation (LTIC), which was a sister company of LES, to Fidelity National Title Insurance Company (FNT). When the plaintiff received $359,496 (approximately 24 percent of his loss) under the confirmed Chapter 11 Plan for LES, he sued LTIC and FNT as LES's successors in interest for breach of contract and conversion.[259] The defendants moved to dismiss his complaint because it is barred by res judicata.[260] The district court held the claim was barred because it involved the same facts and liabilities central to the claim made in the LES bankruptcy.[261] Further, to allow the plaintiff to proceed would impair the bankruptcy plan.[262] FNT's purchase of LTIC included FNT tendering shares of its stock to the court, which were used to pay creditors. FNT would not have purchased LTIC according to the plan's terms if FNT was subject to claims from the LES creditors.[263]

255. *In Re* Green, 474 B.R. 790 (Bankr. D. Md. July 25, 2012).
256. *Id.* at 799.
257. *Id.* at 795.
258. No. 10-CV-6010 JS AKT, 2012 WL 4344325 (E.D.N.Y. Sept. 21, 2012).
259. *Id.* at *2.
260. *Id.*
261. *Id.* at *4.
262. *Id.*
263. *Id.*