

RECENT DEVELOPMENTS IN TITLE  
INSURANCE LAW

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## I. INTRODUCTION

This year featured slightly fewer cases involving title insurance law, but these cases involved more diverse subjects than in previous years. We saw that insured closing letters are blanket indemnities to the FDIC; there are different dates to calculate loss under loan policies; what happens if a title agent or the DEA grab the purchase funds before closing; and a void judgment canceling a mortgage does not protect an otherwise bona fide purchaser.

## II. INSURED VERSUS INSURER

### A. Policy Terms

#### 1. Who Is the Insured?

In *McRae v. Westcor Land Title Insurance*,<sup>1</sup> a lessee alleged that he was a third-party beneficiary of the title insurance policy and that the insurer had breached the policy by refusing to establish title in the name of the lessor insured. The closing agent who handled the purchase transaction “mistakenly conveyed” the property to a third party, depriving the lessee of the leased property. The court held that the lessee of an insured property was not an intended third-party beneficiary of the policy.<sup>2</sup> There was no indication in the record that the parties to the insurance contract intended that the lessee benefit from the policy or that the lessee was the primary party in interest. The court reasoned that an incidental beneficiary of a contract acquires no rights against the parties thereto.

In another case addressing whether parties who are not named insureds may recover, a New Jersey court concluded that a lender that funded a mortgage loan as part of a “table-funding” arrangement, but was not the mortgagee or the named insured, could recover under a title insurance policy.<sup>3</sup> The lender made a claim against the insurer after the insured mort-

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1. 2017 WL 1239682 (D. Md. Mar. 17, 2017).

2. *Id.* at \*2.

3. *Aries Invs., LLC v. First Am. Title Ins. Co.*, 2015 WL 11237041, at \*5 (N.J. Super. Ct. App. Div. Aug. 2, 2016).

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gage was declared void as a result of fraud. After trial, the jury rendered a verdict in favor of the lender. On appeal, the court addressed the issue of whether the lender had an insurable interest in the property that had been fraudulently mortgaged. The court held that a party has an insurable interest if it would be “benefited by its preservation and continued existence or suffer a direct pecuniary loss from its destruction or injury by the perils insured against.”<sup>4</sup> The court noted that an insurable interest has been found on the basis of equitable title without a showing of legal title. The court reasoned that the lender had a “cognizable relationship” to the property and therefore had an insurable interest.<sup>5</sup>

## 2. What Is Insured?

In *Shah v. Fidelity National Title Insurance Co.*,<sup>6</sup> a title insurance policy was issued in favor of a trust for a property it purchased. It was later discovered that the seller possessed only a life estate in the property. In the intervening years before discovery of the title problem, the property had been conveyed between the trust and various family members before ultimately being conveyed back to the trustee in his individual capacity.<sup>7</sup> The insurer denied coverage, asserting that the numerous conveyances between the insured trust and family members had terminated coverage under Section 2(b) of the insurance policy. The court ruled that it was unable to conclude as a matter of law that coverage under the policy was terminated based upon the multiple transfers of title.<sup>8</sup>

The Tenth Circuit held that a revocable right-of-way obtained by an insurer on behalf of its insured satisfied the insurer’s cure obligations under the policy.<sup>9</sup> The insured purchased two parcels of land separated by another tract of land owned by a third party. The insured believed it had access to the more remote of the two parcels by virtue of the road that traversed the tract of land between the two parcels.<sup>10</sup> No express easement had ever been granted for the road. The insurer appointed counsel to represent the insured and filed a lawsuit to quiet title. Prior to a conclusion on the merits in that action, counsel was able to secure an agreement for a thirty-year revocable right-of-way. The insured contended that it nonetheless suffered a loss due to the lack of permanent and irrevocable access, which allegedly resulted in a significantly diminished value of the more re-

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4. *Id.* at \*5 (quoting *Arthur Anderson LLP v. Fed. Ins. Co.*, 3 A.2d 1279 (N.J. Super. Ct. App. Div. 2010); internal quotation marks, citation, and emphasis omitted).

5. *Id.*

6. 2016 WL 4987150 (Cal. Ct. App. Sept. 19, 2016).

7. *Id.* at \*1–2.

8. *Id.* at \*4.

9. *Fid. Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC*, 830 F.3d 1209, 1214–15 (10th Cir. 2016).

10. *Id.* at 1210.

mote parcel. In ruling for the insurer, the court concluded that because the insured was unable to demonstrate that the right of access meant *only* permanent and irrevocable access, the insured had no current covered claim under the policy.<sup>11</sup>

In *First American Title Insurance Co. v. Silbiger*,<sup>12</sup> an insured purchased a parcel of land in a new residential development. In connection with the construction of the development, the builder had also constructed two underground stormwater retention vaults to collect runoff. In order to do so, the builder entered into an indemnity agreement on its own behalf as well as its successors in title, indemnifying the city for any damages or claims arising out of the vaults. After the insured acquired title, the vault collapsed during a period of heavy rainfall. The insurer argued that the collapse was a post-policy event for which there was no coverage, and that coverage was excluded because the loss was the subject of a recorded covenant.<sup>13</sup> The court denied the insurer's motion for summary judgment and reasoned that the builder's violation of the recorded indemnity agreement pre-existed the policy. Therefore, the insured had coverage under the indemnity agreement.<sup>14</sup>

A court in Pennsylvania ruled that even though the legal description in a title insurance policy did not include the property that was the subject of the insured's claim, there remained material questions of fact as to whether the insured's "reasonable expectation" that the property was covered could give rise to coverage.<sup>15</sup> It was undisputed that the legal description in the deed by which the seller had previously taken title included only one of the two parcels the seller contracted to convey. The legal description in the title insurance policy under which the seller sought recovery was identical.<sup>16</sup> However, the deed and the policy schedule each included a reference to a parcel tax identification number that encompassed both parcels. The court held that while the title insurance policy did not include the legal description for the property, there remained material issues of fact related to the estoppel argument raised by the seller in favor of coverage and her "reasonable expectation" that both parcels were covered under the policy.<sup>17</sup>

In *Gillard v. Fidelity National Title Insurance Co.*,<sup>18</sup> the court held that an insured's claim was barred under the doctrine of collateral estoppel be-

11. *Id.* at 1214–15.

12. 2016 WL 5394112 (N.D. Ga. Sept. 27, 2016).

13. *Id.* at \*3.

14. *Id.* at \*3–4.

15. *Michael v. Stock*, 162 A.2d 465, 479 (Pa. 2016).

16. *Id.* at 470.

17. *Id.* at 479; *see also* *Evans v. City of Warrenton*, 388 P.3d 1167, 1169 (Or. Ct. App. 2016) (even though the deed by which the insured took title did not include the insured property, extrinsic evidence would permit a factual finding that the insured had an insurable interest).

18. 2017 WL 345086 (Cal. Ct. App. Jan. 24, 2017).

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cause of a prior adjudication in a separate suit that there was no title defect. The insured had sued the insurer for alleged title defect. After trial, the court granted declaratory relief and found the insurer liable for the title defect. The appellate court reversed, however, citing the prior adjudication to the contrary.<sup>19</sup>

### 3. Exclusions

In a broad-ranging discussion of Exclusion 3(a), the court in *LjW Land, LLC v. Old Republic National Title Insurance Co.* ruled that an insurer had no duty to defend its insured for a claim “created, suffered, assumed or agreed to” by the insured.<sup>20</sup> The insured lender presented a claim to its insurer after being sued in a quiet-title action filed by a junior lienholder. The principal of the insured lender was also the owner of the property. The junior lienholder claimed that the insured had participated in a conspiracy to eliminate the junior lienholder’s interest in the property, engaged in unfair and deceptive trade practices, and disregarded corporate formalities. In granting the insurer’s motion for summary judgment, the court stated that it is “the essence” of Exclusion 3(a) “to make clear that the insurer is not assuming the risks for defects and loss caused by the insured’s own conduct.”<sup>21</sup>

In another case applying an exclusion for defects created, allowed, or agreed to by the insured, the Washington Court of Appeals ruled that the policy in question provided no coverage because there was no dispute that the insureds knew of the existence of the septic system complained of, as evident from their express agreement to grant an easement for the system.<sup>22</sup> The agreement to provide the easement was made a part of the purchase contract by which the insureds took title. The agreement provided that the insureds would provide a “recorded easement agreeable to both parties.”<sup>23</sup> The existence of the addendum was not disclosed to the title agent or the insurer and the required easement was never recorded by the insureds. When the insurer finally learned of the addendum, it denied coverage and the insured filed suit. The appellate court affirmed the judgment in favor of the insurer because the insured allowed or agreed to the risk.<sup>24</sup>

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19. *Id.*; see also *Swinger v. Vanderpol*, 2016 Wash. App. LEXIS 3075, at \*7–13 (Wash. Ct. App. Dec. 27, 2016) (holding that the insured was barred from re-litigating a title issue that was decided in a prior suit).

20. 2016 WL 4370052 (W.D.N.C. Aug. 12, 2016).

21. *Id.* at \*33; *Cf. Plantation Bay, LLC v. Stewart Title Guar. Co.*, 2016 U.S. Dist. LEXIS 115155 (D.N.J. Aug. 29, 2016) (insured’s acceptance of the modified deed restriction was properly viewed as an attempt to mitigate).

22. *Eleazar v. First Am. Title Ins. Co.*, 2017 WL 1137215, at \*8 (Wash. Ct. App. Mar. 27, 2017).

23. *Id.* at \*1.

24. *Id.* at \*8–9.

In *Northwest Savings Bank v. Fidelity National Title Insurance Co.*,<sup>25</sup> a closing agent acted as both the agent of the insurer and that of the lender. The closing agent misappropriated funds intended to pay off prior liens. The insurer raised Exclusion 3(a) as a defense to the insured's claim. The insured argued that it must have demonstrated some "degree of intent" to assume the defect and that mere "negligent or innocent conduct" should not result in a denial of coverage.<sup>26</sup> The trial court rejected those arguments, finding in favor of the insurer, and the appellate court affirmed.<sup>27</sup>

Consistent with the court's opinion in *Northwest Savings Bank*, the court in *Bank of America, N.A. v. Chicago Title Insurance Co.*<sup>28</sup> declined to require an insurer to plead intentional or wrongful acts on the part of the insured in order to sustain a defense based upon Exclusion 3(a). The court cited *Home Federal Savings Bank v. Ticor Title Insurance Co.*<sup>29</sup> to support its conclusion that while intentional misconduct or inequitable dealings by the insured would support a defense under Exclusion 3(a), such a showing is not required.<sup>30</sup> A showing that the insured "expressly or impliedly" assumed or agreed to the defect alone would be sufficient.<sup>31</sup>

After discovering that the insured mortgage was in a third position and not first as insured, the insured in *Wells Fargo Bank, N.A. v. Stewart Title Guaranty Co.* presented a claim to the insurer.<sup>32</sup> The insurer denied the claim as premature, however, because the insured had suffered no loss. The insured alleged it was "forced to mitigate its damages" and entered into a settlement without the consent of the insurer, by which it accepted partial payment in exchange for the satisfaction of the insured mortgage.<sup>33</sup> The court ruled that the term "voluntary" does not have a clear and unambiguous meaning and that there was an issue of fact as to whether the settlement entered into by the insured was a result of free choice or agreement and was, instead, "compelled by an attempt to mitigate its damages."<sup>34</sup> The court cited to the insurer's "refusal to cure the title defect or otherwise perform under the Policy" as having necessitated the insured's settlement.<sup>35</sup>

In *Banner Bank v. First American Title Insurance Co.*, the U.S. District Court for the District of Utah held that an insurer breached the policy when it failed to defend and indemnify the insured, despite the apparent ap-

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25. 2017 WL 253080 (Pa. Super. Ct. Jan. 20, 2017).

26. *Id.* at \*2.

27. *Id.* at \*3.

28. 2017 WL 2215012 (N.D. Ill. May 18, 2017).

29. 695 F.3d 725, 732-33 (7th Cir. 2012).

30. *Bank of America*, 2017 WL 2215012, at \*4.

31. *Id.*

32. 2016 WL 4455070 (D.S.C. Aug. 28, 2016).

33. *Id.* at \*1.

34. *Id.* \*3-4.

35. *Id.* at \*4.

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plicability of an exclusion to coverage.<sup>36</sup> The insured was sued in a U.S. Securities and Exchange Commission (S.E.C.) enforcement action brought to recover for creditors and investors who suffered losses arising out of an alleged Ponzi scheme. The receiver who brought the action sought to avoid the transfer of the insured deed of trust as a fraudulent transfer. The insurer denied the claim, and thereby any duty to defend, based on the exclusion for losses resulting from fraudulent conveyance or fraudulent transfer pursuant to any creditor's rights action. The court nevertheless held that the claim fell within a covered risk and that the insurer had a duty to defend and indemnify the insured.<sup>37</sup>

#### 4. Exceptions

In *Schram v. Fidelity National Title Insurance Co.*,<sup>38</sup> an insured presented a claim to the insurer after being sued by the owner of a neighboring property for legal access over the insured's property by way of an easement. The owner of the neighboring property failed to attach to the complaint a deed that referenced the easement, and the insurer did not discover or consider it in its investigation of the claim. The court held that the insurer's investigation could not be reasonable if the insurer failed to identify the deed referencing the easement in the public records.<sup>39</sup> The court concluded that even if the claim against the insured lacked merit, the insurer still had a duty to defend and indemnify.<sup>40</sup>

In another case addressing whether an exception abrogated an insurer's duty to defend, the Minnesota Court of Appeals held that the insurer did not have a duty to defend the insured where the insurer included a defective legal description exception in the title insurance policy.<sup>41</sup> Subsequent litigation between the insured and the owner of a neighboring parcel regarding the boundary line between the properties was, therefore, not arguably within the scope of the policy's coverage.<sup>42</sup>

### B. *Claims Procedure*

#### 1. Notice/Limitations

On the issue of notices and statutes of limitations, the California Court of Appeal held that an insured's 2008 lawsuit was barred by California's two-year statute of limitations, even though the lawsuit had been filed only a

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36. 2017 WL 1378021 (D. Utah Apr. 12, 2017).

37. *Id.* at \*5.

38. 2017 WL 168920 (N.D. Ind. Jan. 17, 2017).

39. *Id.* at \*7.

40. *Id.* at \*7–8.

41. *Fischer Sand & Aggregate, LLP v. Old Republic Nat'l Title Ins. Co.*, 2017 WL 1316130 (Minn. Ct. App. Apr. 10, 2017).

42. *Id.* at \*4–7.

year after the insured suffered a permanent loss of access to the property.<sup>43</sup> The insured originally presented a claim in 1992 based on lack of access to the insured property. The insurer retained counsel for the insured who initiated a lawsuit to secure access across land managed by the U.S. Forest Service. That action resulted in the insured receiving a special use permit in 1998, which provided access to the property and had a ten-year term, subject to renewal. In 2000, the insurer advised the insured that, having secured the required access, the insurer was closing its file on the matter. In 2007, the permit expired on its own terms, and the U.S. Forest Service declined to extend it. The insured submitted a new claim to the insurer claiming that the resolution of the claim was inadequate because it did not grant irrevocable access. The court rejected the insured's arguments that the limitations period was equitably tolled and held that any tolling period ended in 2000 when the insurer indicated it was closing its file.<sup>44</sup>

In *Green Tree Services, LLC v. Chicago Title Insurance Co.*,<sup>45</sup> an insured ignored notice of foreclosure proceedings in which another lienholder foreclosed the insured deed of trust. The foreclosing lienholder had agreed to have its lien subordinated to the insured lien, but the subordination agreement was never recorded. When the insured submitted a claim following the foreclosure, the insurer denied the insured's claim due to lack of timely notice. The trial court granted the insurer's motion to dismiss. On appeal, however, the Missouri Court of Appeals reversed. The appellate court reasoned that the issue of whether an insured provided prompt notice to an insurer is typically an issue of fact.<sup>46</sup> The court concluded that not all reasonable persons would agree that the notice provided by the insured was made within a reasonable time pursuant to the title insurance policy and remanded for further proceedings below.

In *US Bank N.A. v. HLC Escrow Inc.*,<sup>47</sup> an insured lender intended that the insured mortgage cover its borrower's house. However, the legal description in the mortgage erroneously identified only the vacant lot adjacent to the house, which the borrower also owned. The lender first submitted a claim under the policy, which was denied in May 2010. After foreclosing on the mortgaged property in 2015, the lender submitted a second claim, which was also denied. The lender then brought suit against the insurer in August 2016, seeking coverage under the title policy. The court held that the insured's claim was barred by Maine's six-year limita-

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43. *Grill v. Ticor Title Co.*, 2017 WL 344326 (Cal. Ct. App. Jan. 24, 2017).

44. *Ticor Title Co.*, 2017 WL 344326, at \*8.

45. 499 S.W.3d 771 (Mo. Ct. App. 2016).

46. *Id.* at 776.

47. 2016 WL 7480269 (D. Me. Dec. 29, 2016).

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tions statute.<sup>48</sup> The court concluded that the limitations period for the lender's claim against the insurer began to run when the insurer denied the lender's first claim in 2010, and the limitations period was not tolled or extended by the lender's subsequent claim.<sup>49</sup>

## 2. Duty to Defend

According to the court in *Lupu v. Loan City*, Pennsylvania law requires that if any claim in a lawsuit against an insured is covered, the insurer must defend all claims asserted against the insured.<sup>50</sup> The court acknowledged "tension" between the language of the title insurance policy and Pennsylvania's law governing an insurer's duty to defend.<sup>51</sup> The policy language cited by the court provides that the insurer is required to defend only against "causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy."<sup>52</sup> Nevertheless, the court held that because no Pennsylvania cases permitted the language of the policy to "supplant the public policy" of the state, the insurer had a duty to defend the insured as to all claims.<sup>53</sup>

In *Kabama VI, LLC v. H7H, LLC*,<sup>54</sup> an insured purchased beachfront property. When faced with adverse claims of ownership, the insured presented a claim to the insurer. The insurer appointed counsel to defend the insured. The counsel retained for the insured successfully established the insured's fee simple ownership of the property in litigation. However, it was also determined that the public had a right to access the beach as a result of a post-policy change to the city's land use regulations. The insurer contended that by defending the insured and securing fee-simple title it had satisfied its obligations under the policy. The court determined that the right of the public to use the beach was not an "interest in title" and that the insured's damages were caused by a non-covered post-policy change in building codes.<sup>55</sup>

In *RA Southeast Land Company LLC v. First American Title Insurance Co.*,<sup>56</sup> an insured purchased a twenty-three-acre parcel of land for development of a shopping mall. The title insurance policy purchased in connection with the parcel included an endorsement that specifically covered

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48. *Id.* at \*3-4.

49. *Id.* at \*3

50. 244 F. Supp. 3d 455, 464-65 (E.D. Penn. Mar. 27, 2017).

51. *Id.* at 465.

52. *Id.*

53. *Id.*

54. 2017 WL 7104175 (M.D. Fla. Dec. 6, 2016)

55. *Id.* at \*7-9; see also *Osprey Landing, LLC v. First Am. Title Ins. Co.*, 157 A.3d 247 (Me. 2017) (a "potential future claim" by members of public to use path over the insured property does not impact marketability).

56. 2017 WL 4591740 (D. Nev. Sept. 2, 2016).

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certain rights to develop the insured property. A predecessor in title later claimed that it owned those development rights, and litigation ensued. The insured claimed that, despite the fact that the insurer successfully established its ownership of the development rights, it suffered a loss during the extensive litigation to establish its ownership of those rights. The insured argued that the policy provision that provides that the insurer is not liable for loss or damage if the insurer removes the defect did not apply to its endorsement for the development rights.<sup>57</sup> The court disagreed, however, and ruled that the insurer was not liable to the insured for such losses.<sup>58</sup>

### 3. Claims Handling

In *Joglor, LLC v. First American Title Insurance Co.*,<sup>59</sup> a borrower and insured lender entered into a settlement agreement. The settlement agreement provided that the insured lender accepted the settlement amount as “full payment” from the borrower.<sup>60</sup> In exchange, the lender released the borrower from all liability. The lender assigned the promissory notes to the borrower in the settlement, and the borrower presented a claim to the insurer based on the lender’s title insurance policies based on an alleged title defect. Section 9(c) of the policies provided that payment in full to the insurer or a voluntary satisfaction of the insured mortgage terminates coverage. The court held that the loan policies terminated under Section 9(c) when the lender executed the settlement agreement.<sup>61</sup>

In *Wade v. Stewart Title Guaranty Co.*,<sup>62</sup> an insured failed to present evidence establishing that the insurer’s conduct in curing the title defect was a breach of the title insurance policy provision requiring reasonable diligence. The insured claimed that the insurer’s delay resulted in the demolition of the insured property. The court held that the insurer complied with the policy when it cleared title within two years.<sup>63</sup>

### 4. Subrogation

In *Fidelity National Title Insurance Co. v. Harlow, Adams & Friedman, P.C.*,<sup>64</sup> the insurer sought equitable relief to recover amounts it paid to cure a title defect for the insured. During pending bankruptcy proceedings, the borrower obtained financing to pay off a prior mortgage that was in default.

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57. *Id.* at \*5.

58. *Id.*; cf. *CH Prop., Inc. v. First Am. Title Ins. Co.*, 204 F. Supp. 3d 416, 423 (D.P.R. 2016) (insurer not liable for the fees incurred by the additional counsel hired by the insured).

59. 2016 WL 5394696 (D.P.R. Sept. 27, 2016).

60. *Id.* at \*8.

61. *Id.*

62. 82 N.E.3d 763 (Ill. App. Ct. 2017).

63. *Id.* at 778–79.

64. 2016 WL 4507356 (Conn. Super. Ct. July 25, 2016).

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The refinance mortgagee obtained a title insurance policy from the insurer. The prior lender, however, refused to accept the payoff in connection with the closing on the insured mortgage. After extensive litigation, the prior lender was compelled to accept the payoff amount, but by that time, the borrower's counsel had disbursed the funds to the borrower. The insurer made payment to satisfy the prior mortgage and, the insurer argued, the borrower was unjustly enriched as a result.<sup>65</sup> The court agreed and awarded the insurer equitable relief.<sup>66</sup>

A federal court in Alabama ruled that a title insurer's claim for common-law indemnification was premature until the insurer paid a loss.<sup>67</sup> The court likewise held that, for the same reason, the claim was not barred by the applicable statute of limitations because the action has not yet accrued.<sup>68</sup>

### C. Damages

#### 1. Owner Policy

In *Wade v. Stewart Title Guaranty Co.*, the court held that an insured could not recover under the title policy for costs of demolition, new windows, or architectural fees.<sup>69</sup> A residential building owner sued Stewart Title, alleging it failed to timely remove defects on the property's title, including undisclosed building code violations and a junior mortgage. The plaintiff claimed that Stewart Title's delay in curing the title defects resulted in the demolition of the property because the plaintiff was unable to obtain a loan to rehabilitate the property to comply with the building code. The court entered judgment in favor of Stewart Title, finding that the plaintiff failed to provide evidence of breach of contract.<sup>70</sup> The court also affirmed the trial court's holding that the plaintiff's rehabilitation expenses were not recoverable damages for the alleged breach of the title policy. The court noted that a title insurer protects only against damages caused by undisclosed defects in title to the property.<sup>71</sup>

#### 2. Loan Policy

The Arizona Supreme Court addressed the question of how to calculate damages under a lender's title insurance policy that failed to disclose encumbrances substantially affecting the value of real property.<sup>72</sup> The par-

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65. *Id.* at \*4.

66. *Id.* at \*7; *see also* *Glassick v. Wells Fed. Bank*, 2016 WL 7337087, at \*4 (Minn. Ct. App. Dec. 19, 2016) (affirming trial court's judgment granting title insurer equitable relief).

67. *Fid. Nat'l Title Ins. Co. v. Wooden*, 2017 WL 2243032, at \*2 (N.D. Ala. May 23, 2017).

68. *Id.*

69. 82 N.E.3d 763 (Ill. App. Ct. 2017); *see also* Part II.B.3.C, *supra*.

70. *Wade*, 82 N.E.3d at 778.

71. *Id.*

72. *First Am. Title Ins. Co. v. Johnson Bank*, 372 P.3d 292 (Ariz. 2016).

ties could not agree on the date for calculating the diminution in value. The insurer argued it should be the foreclosure date, but the insured contended the policy date was controlling. The court noted that the foreclosure date is appropriate when the title defect is an undisclosed lien because the lender's damage results from not having priority in the foreclosure proceeds.<sup>73</sup> However, when the title defect is an undisclosed covenant or restriction that prevented the borrower from developing the property and causing default, the date to determine loss is the policy date. The court reasoned that the insurer is in the best position to avoid such risks and prevent loss by conducting accurate title searches.<sup>74</sup> Because the insurer did not discover and disclose the title defect that prohibited the known, intended use of the property, it could not avoid the insured's consequential damages.<sup>75</sup>

The Arizona Supreme Court also recently tackled the impact of a lender's full credit bid at a foreclosure sale on an insurer's liability under an American Land Title Association (ALTA) policy.<sup>76</sup> The policy provisions at issue were Sections 2, 7, and 9. Section 2 provides that coverage continues in force when an insured acquires the property in a foreclosure sale, but the amount of coverage is reduced by all payments made. Section 7 explains how the insurer's liability is calculated. Finally, Section 9 specifies that payments of principal or the voluntary satisfaction or release of the mortgage reduce available insurance coverage. The court held that Section 2 is applicable when a lender purchases property by full or partial credit bid at a trustee's sale.<sup>77</sup> Further, the court stated that a full or partial credit bid at a trustee's sale is not a "payment" or a "payment made" under Section 2 or 9 of the policy, and that the full credit bid neither terminates nor reduces coverage under Section 2 or 7.<sup>78</sup> The court recognized that the foreclosure process can terminate or reduce an insurer's coverage under Sections 2 and 7. However, it held that the "payment" a lender receives on the debt constitutes the fair market value of the property it acquires as a result of foreclosure, not the amount of the credit bid.<sup>79</sup>

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73. *Id.* at 296.

74. *Id.* at 297.

75. *Id.* at 297-99; *see also* Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC, 788 S.E.2d 542, 549 (Ga. Ct. App. 2016) (holding that a title insurer's liability to a mortgagee is measured using the foreclosure date; that is when the insured incurs a loss covered under the title policy).

76. *Equity Income Partners, LP v. Chi. Title Ins. Co.*, 387 P.3d 1263 (Ariz. 2017).

77. *Id.* at 1264-65.

78. *Id.* at 1267-68, 1270.

79. *Id.* at 1270.

### 3. Bad Faith

In *Bank of America N.A. v. Chicago Title Insurance Co.*,<sup>80</sup> the U.S. District Court for the Northern District of Illinois held that an Illinois statute<sup>81</sup> does not provide a statutory basis for claims for bad faith denial of coverage. On a motion to dismiss filed by Chicago Title, the district court held that a claim for common law bad faith is barred by Illinois law.<sup>82</sup> The district court held that an independent tort claim for breach of the covenant of good faith and fair dealing arises only if there is an allegation of fraud or a violation of the Illinois Consumer Fraud Act underlying such a claim.

#### D. Closing Protection Letters

The U.S. District Court for the Western District of Washington denied competing motions for summary judgment in an action brought by the Federal Deposit Insurance Corporation (as a receiver for AmTrust Bank) against a title insurer for breach of the terms of the supplemental closing instructions.<sup>83</sup> The court found that a deed in lieu of foreclosure did not terminate closing protection letter (CPL) liability.<sup>84</sup> A trial on the merits was necessary to determine the underlying factual disputes, although the court did note that “[i]t is unclear how a title company could breach the closing instructions, the borrower engage in mortgage fraud, and the lender be damaged in a more direct way.”<sup>85</sup>

In *Regions Bank v. Commonwealth Land Title Insurance Co.*, an insured lender initiated a breach of contract action against the insurer, alleging that the title agent failed to record two mortgages following the closing of a refinance transaction and issuance of a CPL.<sup>86</sup> The lender sent closing instructions directing the title company to take action to ensure it would have an enforceable first priority mortgage on the real property, including that the security instrument be recorded in all applicable counties and states.<sup>87</sup> However, the security instrument was never recorded. The court denied Commonwealth’s motion for summary judgment on the grounds that the title company may be liable for the lender’s actual loss arising from the agent’s failure to comply with the written closing instructions. The court held that liability under a CPL is not necessarily the same as liability under the title policy.<sup>88</sup>

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80. 2017 WL 2215012 (N.D. Ill. May 18, 2017).

81. Illinois Title Insurance Act, 215 ILL. COMP. STAT. 5/451.

82. *Bank of America*, 2017 WL 2215012, at \*3.

83. *FDIC v. Ticor Title Co.*, 2016 WL 7231455 (W.D. Wash. Dec. 14, 2016).

84. *Id.* at \*5.

85. *Id.*

86. 2016 WL 3753146 (N.D. Ala. July 14, 2016).

87. *Id.* at \*2–3.

88. *Id.* at \*7–8.

Noting that the CPL was unclear regarding the method of calculating the “actual loss,” the Connecticut Court of Appeals held that actual loss under the terms of the CPL was the loan balance at the time of foreclosure, plus foreclosure costs, less the appraised value of the property on the foreclosure date.<sup>89</sup> The trial court had held that there was insufficient evidence to support an award of post-foreclosure carrying costs, and that the value of the property to be awarded was the then current market (appraisal) values of the property, rather than the outstanding loan amount.<sup>90</sup>

Georgia mortgage lender James B. Nutter & Co. commenced an action against Old Republic arising out of a mortgage-fraud scheme involving title agents who were acting as agents of both the insurer and the insured lender.<sup>91</sup> The insurer refused to pay the title insurance claim because of the fraud. The insurer moved for summary judgment. The trial court ruled that the CPL covers only losses that actually affect the status of title to the property; the possibility that there may be a future issue of validity, enforceability, or priority of the mortgages does not support a finding that title is affected.<sup>92</sup> The court also held that the negligence claim failed because the insurer could not be liable for the negligence of the dual agent unless it actually participated in the mortgage fraud scheme, which it did not.<sup>93</sup>

In the U.S. District Court for the Eastern District of Michigan, the Federal Deposit Insurance Corp. filed an action as receiver for Washington Mutual Bank in connection with twenty-four mortgage loan closings.<sup>94</sup> The insurer issued CPLs to Washington Mutual Bank in connection with the loan transactions indemnifying the lender for losses related to the title agent’s misconduct at closing.<sup>95</sup> It was later discovered that the mortgage loans were obtained as part of a fraudulent loan scheme. The parties filed cross-motions for summary judgment. The court found that the issue of whether the closing agent’s fraud or dishonesty caused the lender’s losses was for the trier of fact to decide and not appropriate for summary judgment.<sup>96</sup> In addition, the court reasoned that although Washington Mutual may have suspected some of the loans were fraudulent, it did not have actual notice of the fraud until the orchestrator of the fraudulent

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89. *Aurora Loan Servs., LLC v. Hirsch*, 154 A.3d 1009 (Conn. Ct. App. 2017).

90. *Id.* at 1015–16.

91. *James B. Nutter & Co. v. Old Republic Nat’l Title Ins. Co.*, 2016 WL 5792686 (N.D. Ga. Oct. 4, 2016).

92. *Id.* at \*3.

93. *Id.* at \*4.

94. *Fed. Deposit Ins. Corp. v. Fid. Nat’l Title Ins. Co.*, 2017 WL 24872 (E.D. Mich. Jan. 3, 2017).

95. *Id.* at \*1–2.

96. *Id.* at \*3.

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scheme was indicted seven years later.<sup>97</sup> The court also confirmed that the CPLs and title policies are separate contracts that protect against entirely different risks. As a result, the title policy may be discharged under some circumstances, but the CPLs can still be enforced.

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

In *Bank of New York Mellon v. Commonwealth Land Title Insurance*, the court considered the remedies available to a lender in the event of the title agent's theft of funds and failure to pay a prior lien.<sup>98</sup> The court concluded that if the loan closed ten years ago, it was too late to sue the title insurer. The lender had no loan policy and, if it had a CPL, any claim based on it would be barred by the statute of limitations.<sup>99</sup>

In a case in Texas, a title agent stole all the buyer's purchase funds before the contract closed.<sup>100</sup> The court held the declaratory judgment action filed by the title insurer could proceed despite a pending Department of Insurance complaint.<sup>101</sup> In a New Jersey case, a former wife asserted the title insurer was liable for its agent's acts in assisting her husband in defrauding her.<sup>102</sup> The appellate court refused to extend vicarious liability of the insurer to non-insureds.<sup>103</sup>

### III. INSURER VERSUS AGENT

In the bankruptcy case of *In Re Mohiuddin*, a debtor was the treasurer of a title agent.<sup>104</sup> He arranged for the agency to issue eight loan policies that did not disclose and except existing liens. The insurer spent almost \$8.5 million to pay losses on the eight policies.<sup>105</sup> The insurer filed an adversary proceeding in the debtor's bankruptcy action, seeking an exception upon discharge for the losses caused by the debtor. The bankruptcy court held that the debtor was a subagent of the insurer.<sup>106</sup> Therefore, the debt was non-dischargeable as a debt obtained by actual fraud under 11 U.S.C. § 523(a)(2)(A).<sup>107</sup>

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97. *Id.*

98. *Bank of New York Mellon v. Commonwealth Land Title Ins.*, 2016 WL 6820475 (Penn. Super. Ct. Nov. 18, 2016).

99. *Id.* at \*3.

100. *WFG Nat'l Title Ins. Co. v. Peniel Holdings, LLC*, 2016 WL 7117252 (N. D. Tex. Dec. 6, 2016).

101. *Id.* at \*3-5.

102. *Thurber v. Thurber*, 2017 WL 164480 (N.J. Super. Ct. App. Div. Jan. 17, 2017).

103. *Id.* at \*7.

104. *In Re Mohiuddin*, 2017 WL 2123870 (Bankr. S.D. Tex. May 16, 2017).

105. *Id.* at \*2-3.

106. *Id.* at \*5.

107. *Id.* at \*9-12.

In another case, an insurer sued a former foreign agent who asserted the right to continue to use the insurer's name in its business activities.<sup>108</sup> Despite several innovative arguments by the former agent's counsel, the court held that the agency agreement had been validly terminated and the right to use the insurers' name had ended.<sup>109</sup> The court also noted that the insurer and one of its subsidiaries were distinct corporate entities and the former agent could not make allegations against them as if they were one legal entity.<sup>110</sup>

A title insurance agent agreement is not a civil code. In *Stewart Title Guaranty Co. v. Davis*, the court held that when an insurer sues an agent for breach of their agreement, it can rely on language stating that an agent is liable for losses caused by the agent's negligence.<sup>111</sup> Specifically, the contract does not have to say "[a]gent is liable if it does not record the new lien."

In a Michigan case, an agent failed to secure a subordination or release from a prior lienholder, Warren Bank, which subsequently foreclosed.<sup>112</sup> When the lien priority dispute arose between the Federal Deposit Insurance Corporation (FDIC), Warren Bank's successor, and the insured, the foreclosure-sale proceeds were placed in escrow. The insurer hired counsel for the insured to claim the proceeds. The counsel filed a formal claim with the FDIC four days late.<sup>113</sup> The insureds' claim was denied, and a state court upheld the FDIC's decision.<sup>114</sup> The insurer then sued the agent. The agent argued that the loss was caused by the insurer's counsel, who was not timely in filing the FDIC claim.<sup>115</sup> The court granted judgment for the insurer, holding that the insurer had taken reasonable steps to mitigate its losses. The counsel's failure to timely file the claim ". . . cannot be imputed to [the insurer]."<sup>116</sup>

In *First American Title Insurance Co. v. National Title Agency, LLC*, it took an agent three years to realize an escrow account was \$476,000 short due to two judgment creditors garnishing its escrow account.<sup>117</sup> Subsequently, the agent's title insurance underwriter terminated the agency agreement, paid some claims, and litigated others. Two months after the shortage was discovered, the principal of the agent transferred

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108. *Stewart Title Guar. Co. v. Stewart Title Latin Am., Inc.*, 2017 WL 1078759 (S.D. Tex. Mar. 21, 2017).

109. *Id.* at \*4.

110. *Id.* at \*3.

111. 2016 WL 6495416, at \*2 (D.D.C. Nov. 2, 2016).

112. *Fidelity Nat'l Title Ins. Co. v. Title One, Inc.*, 2016 WL 3971210 (E.D. Mich. July 25, 2016).

113. *Id.* at \*1.

114. *Id.*

115. *Id.* at \*3.

116. *Id.* at \*4.

117. 2017 WL 2222920 (D. Utah May 19, 2017).

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its assets to a new entity with a similar name.<sup>118</sup> The principal's son was named as vice president and director of the new entity.<sup>119</sup> The insurer amended the complaint to sue father and son for fraudulent transfer of the agency assets. The court held that (1) the original agent was liable under agency contract for insurer's losses, and (2) the insurer cannot impose individual liability on the father and son without first seeking to pierce the corporate veils of the agent and the new entity.<sup>120</sup>

#### IV. DUTIES OF TITLE/ESCROW AGENT

##### A. *Handling Documents*

The Ohio Court of Appeals reversed a summary judgment entered in favor of U.S. Title Agency, Inc. and Chicago Title based on an agent's failure to secure execution of subordination agreements.<sup>121</sup> The title company was charged with adhering to the *written* and *verbal* closing instructions provided by the borrower or incurring liability for its failure to do so. The court relied on an affidavit confirming that the title company was orally informed that the borrower required the same title policy coverage as requested in the lender's closing instructions, which the title company failed to provide. The court reasoned that the verbal closing instructions were in fact provided to the title company, and whether the instructions were required to be in writing was a genuine issue of material fact.<sup>122</sup> In addition, the court found that the borrower had standing as a third-party beneficiary to assert breach of the lender's title policy for failure to comply with the lender's closing instructions.<sup>123</sup>

In a case dealing with a \$12 million dollar mansion in Malibu, the California Court of Appeal recognized that an escrow agent can alter the grantee's name on a grant deed if the closing instructions authorize the escrow agent to do so.<sup>124</sup> Both buyer and seller approved escrow instructions stating that the buyer could assign his interest and the escrow company could alter the grant deed without further written instructions from the parties. After escrow closed and the property was conveyed to a limited liability company as assignee, the parties attempted to unwind the transaction. The court held that the escrow company's obligations were

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118. *Id.* at \*2.

119. *Id.*

120. *Id.* at \*7.

121. Johnson v. U.S. Title Agency, Inc., 2017 WL 2241652 (Ohio Ct. App. May 18, 2017).

122. *Id.* at \*7.

123. *Id.* at \*13.

124. Versailles Invs., LLC v. First Cal. Escrow Corp., 2017 WL 2264490 (Cal. Ct. App. May 24, 2017).

to comply strictly with the escrow instructions and found that the agent did precisely that by changing the grantee.<sup>125</sup>

In California, the statute of limitations for defects in closing documents recorded in the county records office begins to run at the close of escrow. In *Long v. Freedom Escrow*,<sup>126</sup> the plaintiffs alleged that the Preliminary Change of Ownership Report and California Impound Disclosure/Waiver recorded in the county recorder's office contained the incorrect purchase price. The plaintiffs waited over eight years after escrow closed to file an action. The court held that their complaint contained causes of action for fraud, breach of contract, and unlawful business practices, which were barred by three, four, and four year statutes of limitations, respectively. The court ruled that the delayed discovery rule did not apply because the plaintiffs failed to provide evidence for why they did not obtain the Preliminary Change of Ownership Report and California Impound Disclosure/Waiver earlier.<sup>127</sup> Further, the plaintiffs did not exercise reasonable diligence because they knew they had an issue once they received their tax bill in their first year of ownership.

### B. *Handling Escrow Funds*

In *231 W. Scott, LLC v. Lakeside Bank*, the trial court found that an Illinois escrow company breached its fiduciary duty for failing to inspect renovation work prior to disbursing funds.<sup>128</sup> The escrow company appealed, arguing it did not breach its duty because it strictly followed the escrow instructions and, therefore, could not have legally breached its duty. The Illinois Appellate Court agreed, finding that the specific language of the escrow agreement contained only permissive language that the escrow has the right to verify information and may stop disbursement if any inaccuracies are discovered.<sup>129</sup> The court held that this language did not create an implied duty upon the escrow to inspect the construction prior to issuing payment outside of the long-held duty to strictly comply with escrow instructions.

The Arizona Court of Appeals affirmed a trial court's decision denying a motion to certify a class of potential plaintiffs with claims against an escrow company, finding that factual questions related to the application of statutes of limitation for each class member precluded certification.<sup>130</sup> Country club members who deposited their membership fees in an escrow

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125. *Id.* at \*6–7.

126. 2017 WL 462133 (Cal. Ct. App. Feb. 3, 2017).

127. *Id.* at \*3–4.

128. 80 N.E.3d 753 (Ill. App. Ct. 2017).

129. *Id.* at 760–62.

130. *Angelo v. Stewart Title & Trust of Phoenix, Inc.*, 2017 WL 410903 (Ariz. Ct. App. Jan. 31, 2017) (unpublished).

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account with Stewart Title brought suit against Stewart Title after the developer failed to complete the project and then filed for bankruptcy. The members asserted that they had standing to sue Stewart as third-party beneficiaries after Stewart released the escrow funds to the developer before its bankruptcy filing. The country club members then moved for class certification under Arizona Rule of Civil Procedure 23(a). In opposition to this request, Stewart Title produced evidence showing that some of the named plaintiffs had prior notice of the alleged claims, which may have indicated that their claims were barred by the statute of limitations.<sup>131</sup> Based upon this, among other things, the trial court denied the motion for certification, and the appellate court affirmed.<sup>132</sup>

The U.S. Court of Appeals for the Third Circuit affirmed an order granting a motion to dismiss on the basis that a forum-selection clause contained in the escrow agreement required suit to be filed in North Carolina, instead of Pennsylvania where the lawsuit was filed.<sup>133</sup> The court held that contract clauses reflecting a chosen forum are *prima facie* valid and should be enforced absent a demonstration that enforcement would be unreasonable and unjust, as the parties had waived the right to challenge the preselected forum as inconvenient by virtue of entering into the contract.<sup>134</sup>

The U.S. District Court for the Northern District of Illinois denied competing motions for summary judgment in an action commenced by the FDIC as receiver for Founders Bank against Chicago Title for negligence, breach of contract, and breach of fiduciary duty where a title agent who was engaged in mortgage fraud caused losses to Founders.<sup>135</sup> In that case, the escrow agent assisted different limited liability corporations in purchasing properties to “flip” without having to deposit the required twenty percent down payment.<sup>136</sup> Four of these loans defaulted. The FDIC moved for summary judgment as to its breach-of-contract claim solely, arguing that Chicago Title wrongly disbursed funds without approval. The court held that a question of fact existed regarding whether Chicago Title’s disbursements were made in conformity with the escrow instructions.<sup>137</sup>

Chicago Title moved for summary judgment, arguing that the breach-of-contract claims must fail because its actions were not a proximate cause of Founder’s damages. Chicago Title contended that there were several

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131. *Id.* at \*2.

132. *Id.* at \*3.

133. *Podesta v. Hanzel*, 684 F. App’x 213 (3d Cir. 2017).

134. *Id.* at 216.

135. *Fed. Deposit Ins. Corp. v. Chi. Title Ins. Co.*, 2016 WL 7339150 (N.D. Ill. Dec. 19, 2016).

136. *Id.* at \*2.

137. *Id.* at \*5.

other intervening causes, such as the condition of the buildings, the real estate market, and the failure of Founders to obtain personal guarantees. The court rejected this argument, finding that factual issues existed as to whether the presence of the “intervening causes” noted by Chicago Title actually defeated the FDIC’s causation argument.<sup>138</sup> Additionally, the court found that the Founder’s loss was reasonably foreseeable based upon the fraud scheme. In denying Chicago Title’s motion, the court explained that under Illinois law, an escrow also owes a fiduciary duty “to the party making the deposit and the party for whose benefit the deposit is made,”<sup>139</sup> as well as the duty to use reasonable care in supervising the escrow. This duty is an extra-contractual duty outside the scope of the economic loss doctrine.<sup>140</sup>

### C. *Recording Documents*

In a case of first impression, the Washington Supreme Court found that title companies do not owe a duty of care to third parties in the recording of legal instruments. In *Centurion Properties III, LLC v. Chicago Title Insurance Co.*,<sup>141</sup> the plaintiff obtained a \$70.8 million loan from General Electric secured by a deed of trust. The deed of trust and other loan agreements prohibited the placement of any liens or encumbrances on the property without General Electric’s approval and provided that any unauthorized lien would constitute an event of default. Following the close of escrow, four facially valid liens were placed on the property without General Electric’s approval, and foreclosure commenced. The plaintiff sued Chicago Title Insurance Company, alleging the title company negligently breached its duty of care and caused damages when it recorded unauthorized liens on plaintiff’s property.<sup>142</sup>

The court reasoned that because Washington does not impose a duty on title insurers to identify and disclose title defects to its clients, it cannot support extending this duty of care to non-client third parties when recording a legal instruments, particularly when it is facially valid.<sup>143</sup> The court also noted that professionals do not owe a duty to third parties when the transaction at issue is not intended to benefit a third party and concluded a title insurer is in a similar position.<sup>144</sup> Finally, the

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138. *Id.* at \*5–6.

139. *Id.* at \*6 (quoting *Wells Fargo Bank Minn., NA v. Envirobusiness, Inc.*, 22 N.E.3d 125, 135 (Ill. App. Ct. 2014)).

140. *Id.* (citing *Home Loan Ctr., Inc. v. Flanagan*, 2012 WL 1108132, at \*5 (N.D. Ill. Apr. 2, 2012)); see also *Lake Cty. Grading Co. of Libertyville v. Great Lakes Agency, Inc.*, 589 N.E.2d 1128, 1132 (Ill. App. Ct. 1992).

141. 375 P.3d 651 (Wash. 2016).

142. *Id.* at 654.

143. *Id.* at 656–57.

144. *Id.* at 658–59.

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court decided that public policy does not support extending such a duty to title insurers to search for—and disclose—potential title defects, and Washington’s statutory schemes do not contemplate liability to third parties for the negligent recording of titles.<sup>145</sup>

The Utah Court of Appeals affirmed the district court’s grant of summary judgment in favor of a title insurer on a claim of negligence arising from the title insurer’s failure to record a trust deed securing a debt.<sup>146</sup> The plaintiff admitted in discovery that the transaction never closed and that closing instructions were never provided to the insurer.<sup>147</sup> The court relied on the plaintiff’s admission, finding that no instructions of any kind were given to the insurer directing it to record the trust deed. Thus, the insurer had no duty to record.<sup>148</sup>

#### D. Duty as Title Insurance Agent

In *Abikasis v. Provident Title Co.*, Provident Title Company issued a preliminary title report wherein a *lis pendens* was specifically listed as an exception.<sup>149</sup> The sellers and Provident negotiated a removal of the *lis pendens*.<sup>150</sup> Prior to title insurance issuing and escrow closing, the U.S. Drug Enforcement Administration seized the funds earmarked to satisfy the debt supporting the *lis pendens*.<sup>151</sup> The California Court of Appeal held that Provident’s failure to issue title insurance could not support a breach-of-contract claim, stating a “preliminary report is not a contract and cannot be the basis for a breach of contract claim.”<sup>152</sup> The court also noted that a preliminary title report is merely an offer to issue title insurance and thus cannot support a negligence claim.<sup>153</sup>

#### E. Duties to Third Parties

The California Court of Appeal affirmed the granting of an escrow company’s motion for a nonsuit based upon the escrow agent’s employee’s negligently listing the wrong name of the insured when securing a new certificate of insurance.<sup>154</sup> The court noted the following: the plaintiff was not a

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145. *Id.* at 662.

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

147. *Id.* at 1076.

148. *Id.* at 1078.

149. 2016 WL 3611016 (Cal. Ct. App. June 28, 2016).

150. *Id.* at \*3–5.

151. *Id.* at \*4.

152. *Id.* at \*5 (citing *Stockton Mortg., Inc. v. Tope*, 183 Cal. Rptr. 3d 186, 200 (Cal. Ct. App. 2014)).

153. *Id.* at \*4 (citing *Lee v. Fid. Nat’l Title Ins. Co.*, 115 Cal. Rptr. 3d 748, 758 (Cal. Ct. App. 2010)).

154. *Alereza v. Chi. Title Ins. Co.*, 211 Cal. Rptr. 3d 469 (Cal. Ct. App. 2016).

party to the escrow instructions and not a third-party beneficiary of the transaction; the decision of the third party to give a personal guarantee was not foreseeable; the escrow error was not the cause of the financial losses; and the negligence was not morally blameworthy.<sup>155</sup> The court held that, because escrow companies have obligations limited to carrying out the escrow instructions, it would not extend that duty in this case.<sup>156</sup>

#### F. *Errors and Omissions Insurance*

An escrow company filed an action for breach of contract and sought declaratory relief when its insurer failed to pay a claim under an errors and omissions policy.<sup>157</sup> The undisputed facts showed that the escrow company's employee had been duped into wiring the proceeds from the sale to a third-party hacker. The U.S. District Court for the District of New Jersey denied the motion to dismiss the claim, finding that the motion was premature. The court reasoned that it was not in a position to determine whether the conversion exclusion in the policy applied, as that would necessarily require the trial court to make legal and factual determinations as to whether the loss was the result of a "conversion" or negligence of an employee of the insured company.<sup>158</sup>

The U.S. District Court for the Eastern District of Michigan granted an errors and omissions insurer's motion for summary judgment in a case commenced by the insured title agency seeking coverage under a title agents, abstractors, and escrow agents policy for a claim made when the escrow agent allegedly wrongfully released escrow funds.<sup>159</sup> The court reasoned that the "Known Circumstances Exclusion" in the policy applied because the insured had subjective knowledge that the subject claim would be filed at the time she completed the insurance policy application and failed to include information regarding that potential claim.<sup>160</sup>

### V. GOVERNMENTAL REGULATIONS

#### A. *Federal*

In a recent Kentucky case, a law firm set up nine title agents.<sup>161</sup> The co-venturer in each agent was a real-estate broker. The Consumer Financial

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155. *Id.* at 475–76.

156. *Id.* at 476.

157. *ABL Title Ins. Agency, LLC v. Maxum Indem. Co.*, 2016 WL 3610163 (D.N.J. June 30, 2016).

158. *Id.* at \*3–4.

159. *Alterra Excess & Surplus Ins. Co. v. Excel Title Agency, LLC*, 2016 WL 6432650 (E.D. Mich. Oct. 31, 2016), *reconsideration denied*, 2016 WL 4003436 (Sept. 12, 2017).

160. *Id.* at \*5–6.

161. *Consumer Fin. Prot. Bureau v. Borders & Borders, PLC*, 2017 WL 2989183 (W.D. Ky. July 13, 2017).

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Protection Bureau (CFPB) sued the law firm, alleging the title agents operated in violation of Section 8(a), the anti-kickback provision, of the Real Estate Settlement Procedures Act (RESPA). Both parties filed summary judgment motions. The court found that the CFPB had demonstrated that the agents violated the anti-kickback provisions of Section 8(a).<sup>162</sup> The conduct was exempted under Section 8(c)(4), in this instance, however, because the required disclosures of the affiliated relationships were made.<sup>163</sup>

In *Chassen v. Fidelity National Financial Inc.*, borrowers brought a class action in New Jersey against most of the national title insurers and one agent, alleging they were overcharged for recording fees.<sup>164</sup> Two-and-half years into the action, the U.S. Supreme Court decided *AT&T Mobility, LLC v. Concepcion*.<sup>165</sup> The defendants then moved to arbitrate the claim based on that case. The Third Circuit remanded the case for arbitration.<sup>166</sup> The court excused the defendants' failure to make such a motion prior to *Concepcion*, reasoning that it would have been futile.<sup>167</sup>

### B. State

A group of South Carolina refinance loan borrowers, acting as proposed class representatives, sued Quicken Loans and its subsidiary Title Source, alleging the defendants engaged in the unauthorized practice of the law, and seeking to cancel the liens generated in the refinance transactions.<sup>168</sup> The South Carolina Supreme Court held that licensed attorneys were involved at every stage of the loan origination and the lenders thus complied with state law.<sup>169</sup> Lawyers oversaw title examination, preparing loan documents, closings, recording documents, and disbursing funds. The borrowers could choose their own attorneys or use the ones engaged by Title Source. As the court observed, “[unauthorized practice of law] rules exist to protect the public, not lawyers.”<sup>170</sup>

### C. Other Cases

The financial decline of LandAmerica 1031 Exchange Services, Inc. (LES) during 2008 is detailed in *Germinaro v. Fidelity National Title Insurance*.<sup>171</sup> LES had invested \$290.5 million in auction rate securities. When that

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162. *Id.* at \*4.

163. *Id.* at \*5–6.

164. 836 F.3d 291 (3d Cir. 2016).

165. 131 S. Ct. 1740 (2011).

166. *Chassen*, 836 F.3d at 304.

167. *Id.* at 297–301.

168. *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 452 (S.C. 2017).

169. *Id.* at 466–68.

170. *Id.* at 470.

171. 2017 WL 680001 (W.D. Pa. Feb. 21, 2017).

market froze due to lack of buyers in February 2008, LES could not withdraw its funds to pay existing exchanges.<sup>172</sup> Mr. and Mrs. Germinaro closed the first part of their exchange just five days before LES filed bankruptcy.<sup>173</sup> They had, however, recovered a portion of their proceeds via LES's bankruptcy.

The Germinaros then sued Fidelity National Title Insurance and Commonwealth Land Title Insurance alleging various causes of action, including claims under the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>174</sup> In summary, they asserted Fidelity and Commonwealth had not alerted them to LES's financial condition and the risk it posed to them. They claimed LES was operated like a Ponzi scheme with money from new exchanges being used to pay existing exchanges. The bankruptcy court held that under Third Circuit precedent a RICO claim under 18 U.S.C. § 1962(d) must involve conduct that persists for at least a year.<sup>175</sup> However, LES's alleged conduct lasted only nine months, from February 2008, when the ARS contract closed, to November 2008, when LES filed bankruptcy.<sup>176</sup>

In *Chang v. JPMorgan Chase Bank, N.A.*,<sup>177</sup> Gordon instructed Chang to give him \$750,000 to hold in escrow to secure a business loan from a third party. Gordon deposited the funds into a JPMorgan Chase account styled "OPT Title & Escrow, Inc. Escrow Account." Gordon immediately transferred the \$750,000 to another account and used the funds for his benefit. When the theft was discovered, Chang sued the bank, alleging JPMorgan Chase should not have let Gordon have an account styled "escrow account" when he was neither a title company nor an escrow agent.<sup>178</sup> Chang alleged that Gordon loaned a bank employee \$100,000 after the theft. The district court granted the bank's motion to dismiss, holding that Chang had failed to allege that the bank knew about Gordon's fraud or substantially assisted it. On appeal, the Eleventh Circuit reversed, holding that Chang had adequately asserted claims for negligence and fraud.

Finally, in *OC Interior Services, LLC v. Nationstar Mortgage, LLC*, Hart executed a note and mortgage in favor of Mirad Financial Group.<sup>179</sup> Two years later, he secured a default judgment against Mirad canceling its lien.<sup>180</sup> He did not join the loan servicers of the liens in the lawsuit. A few days later he sold the property to OC Interior Services, LLC, as Trustee

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172. *Id.* at \*4-5.

173. *Id.* at \*6-7.

174. *Id.* at \*8.

175. *Id.* at \*11.

176. *Id.* at \*13.

177. 845 F.3d 1087 (11th Cir. 2017).

178. *Id.* at 1091.

179. 213 Cal. Rptr. 3d 395 (Cal. Ct. App. 2017).

180. *Id.* at 399.

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(OCI), and OCI purchased a title insurance policy. One year after the sale to OCI, Mirad filed a motion and had the default judgment set aside, effectively reinstating its lien on the property. OCI then filed an action, seeking a declaratory judgment establishing that it did not take title subject to the Mirad lien. Although OCI prevailed in the trial court, that judgment was reversed on appeal. Citing an 1857 California case and the Restatement of Judgments, California Court of Appeal held that OCI was not a bona fide purchaser with respect to the Mirad lien and thus acquired title subject to that lien.<sup>181</sup>

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181. *Id.* at 409 (citing *Gray v. Hawes*, 8 Cal. 562 (1857) and RESTATEMENT (FIRST) JUDGMENTS § 115 cmt. j).

