RECENT DEVELOPMENTS IN TITLE INSURANCE LAW

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I. INTRODUCTION

More than 120 cases addressed title insurance issues during the past year. This article highlights various notable recent decisions impacting the practice of title insurance litigation and coverage.

II. INSURED VERSUS INSURER

A. *Policy Terms*

1. Who Is the Insured?

Several cases this year addressed the definition of "insured." Courts have held that a loan servicer,[1] a loan participant (even a 95 percent one),[2] or a commitment-holder[3] was not an insured under a loan policy. In the owner's policy arena, a California court held that, where a trustee was the named insured, his policy did not extend to claims made in his individual capacity.[4] Similarly, a Utah court held that the transfer of property to a related entity terminates an owner's policy.[5]

Other cases have taken a broad view of the term "insured." While the Supreme Court of Wisconsin did not expressly answer the question of whether an insured owner can assign his title policy rights to a neighbor as part of a settlement agreement, the court did assume the assignment

1. U.S. Bank, N.A. v. Stewart Title Guar. Co., 2014 WL 1096961, at *1 (D. Colo. Mar. 20, 2014).

2. Shamrock Bank of Fla. v. First Am. Title Ins. Co., 2014 WL 1304694, at *7 (S.D. Ill. Mar. 28, 2014).

3. Fed. Deposit Ins. Corp. v. United Gen. Title Ins. Co., 2014 WL 3611835, at *1 (E.D.N.Y. July 3, 2014) (FDIC had only a commitment to insure, rather than a policy, so had no claim against title insurer relating to fraudulent mortgages and sales). This case is also instructive in its treatment of an insurer's responsibility for an agent's acts. *See* Part II.E., *infra*.

4. Mulhearn v. Lawyers Title Ins. Co., 2014 WL 213554, at *5 (Cal. Ct. App. Jan. 21, 2014) (unpublished).

5. Durbano & Garn Inv. Co., LC v. First Am. Title Ins. Co., 330 P.3d 119 (Utah Ct. App. 2014) (Durbano & Garn transferred its property to Durbano Properties via quitclaim deed; transferee sued after its claim was denied, but the court held that when property was deeded, the insured retained no interest in property and made no warranties of title, and as such there was no coverage upon the transfer).

was valid, and found coverage.[6] The Arizona Court of Appeals held an owner may pursue a claim on a missed easement even after conveying most of its property, providing:

> the loss [the insured] alleges was sustained when it discovered the defect in title, at a time it owned all 75 acres. Because [the insured] owned the property at the time it allegedly incurred the loss, its damage claim is not barred by the "continuation in force" provision of the policy.[7]

2. What Is Insured?

The *McGonagle v. Stewart Title Guaranty Co.* case decided by the Texas Court of Appeals provides that an irregularity affecting the value of land, but not the ownership of it, does not give rise to a defect in title.[8]

In the same vein, the Fifth Circuit examined whether an insured's damage had been caused by a title defect, triggering coverage, or by another cause. An insured lender held a mortgage on a paper mill, which was recorded without a legal description, but subsequently cured by the insurer.[9] After the insured acquired title to the mill, its market value had declined due to significant operating losses. The court held that the insured's damages were caused by the decline in market value of the collateral, not by the title defect.[10] The *Fidelity National Title Insurance Co. v. Woody Creek Ventures, LLC* case complements this analysis, holding that a revocable thirty-year license satisfied the policy's "right of access," and explaining that the argument that the license rather than a permanent easement made the land less valuable was not an issue relating to coverage. The court stated: "Marketability of title should not . . . be confused with the value of title."[11]

6. Kimble v. Land Concepts, Inc., 845 N.W.2d 395, 402–03 (Wis. 2014).

7. Centennial Dev. Group, LLC v. Lawyers Title Ins. Corp., 310 P.3d 23, 27–28 (Ariz. Ct. App. 2013).

8. 432 S.W.3d 535 (Tex. App. 2014), *reh'g overruled* (June 24, 2014) (the issue was whether dedication instrument concerning building in historical district constituted a title defect "within the title policy's covered risks"; court held presence of instrument was not a defect in title, but even if it was, it would be subject to exclusion 3(a), because insureds assumed the defect when they signed purchase contract).

9. *In the Matter of* West Feliciana Acquisition, L.L.C., 744 F.3d 352 (5th Cir. 2014).

10. *Id.* at 358.

11. 2014 WL 1774821, at *5 (D. Colo. May 5, 2014) (internal citations omitted). Other cases addressing the scope of coverage include *Edwards v. First American Title Insurance Co.*, 2014 WL 575953, at *3 (Ariz. Ct. App. Feb. 13, 2014) (unpublished) (insured purchased property after two abstracts of judgment were recorded against him, but commitment did not list them; he later sued his insurer for fraud among other claims, but court granted insurer's motion to dismiss, holding that a commitment is not a representation of title, and neither a commitment nor a policy served to insure him against his debts); *Pekkola v. Fidelity National Title Insurance Co.*, 2013 WL 3873233, at *4 (D. Or. July 25, 2013) (coverage did not extend to execution of a renewal note; rather, execution of new indebtedness functioned as a novation); *Countrywide Home Loans, Inc. v. United General Title Insurance Co.*, 971 N.Y.S.2d 353, 355 (N.Y. App. Div. 2013) (release of lien did not terminate coverage; rather the loan and the lien securing it were void due to forgery); and *Kraft v. Estate of Cooper*, 330 P.3d 639

3. Exclusions

This year several cases addressed the 3(a) exclusion, which excludes from coverage "loss or damage, costs, attorney's fees or expenses, which arise by reason of . . . defects, liens, encumbrances, adverse claims, or other matters." In one case a jury applied 3(a) where the insured owner knew of a decree by the Mexican government deeming the property it wished to purchase as federal parkland, but moved forward and obtained a $41 million loan to purchase and begin a resort development anyway.[12] Stewart Title issued owner and loan policies that did not except the decree. After the Mexican government stopped the development, suit was filed, the jury held 3(a) exclusion applied, and the Texas Court of Appeals affirmed.[13]

Other courts addressing exclusion 3(a) this year have declined to apply it. In these cases, the insured's actions were deemed unintentional,[14] certain endorsements overrode the exclusion,[15] the insured did not have actual knowledge,[16] knowledge was imputed equally to the insurer,[17] or the insured did not engage in intentional misconduct.[18]

The *Stewart Title Insurance Co. v. Credit Suisse* case addresses the 3(b) exclusion.[19] Credit Suisse loaned $250 million to Tamarack Resort, LLC to build a ski resort and secured its loan with two mortgages on the resort property. After Tamarack defaulted mid-construction, various mechanics' liens were filed. Under Idaho law, these liens were superior

(Or. Ct. App. 2014) (holding that policy insured only land conveyed per the legal description of parcel, not parcel's distance or area).

12. Citigroup Global Mkts. Realty Corp. v. Stewart Title Guar. Co., 417 S.W.3d 592, 595–96, 599–600 (Tex. App. 2013).

13. *Id.* at 597.

14. First Citizens Bank & Trust Co. v. Stewart Title Guar. Co., 320 P. 3d 406, 411 (Colo. Ct. App. 2014) (commitment requirement for lender's construction loan requiring deed from borrower's company to him individually was not met, but the loan policy was issued anyway; court held 3(a) did not apply because lender, "although negligent, did not intend to cause the defect. . . .").

15. Regions Bank v. Commonwealth Land Title Ins. Co., 977 F. Supp. 2d 1237 (S. D. Fla. 2013).

16. Johnsen & Allphin Props. v. First Am. Title Ins. Co., 2013 WL 6230344, at *5, 6 (D. Utah Dec. 2, 2013) (plaintiff saw title report listing two liens not shown on the loan policy, but purchased loan believing the liens were invalid or had been paid; court found plaintiff did not have actual knowledge, and claim therefore survived the insurer's motion to dismiss under the 3(a) exclusion).

17. First Am. Title Ins. Co. v. DJ Mortgage, LLC, 761 S.E. 2d 811 (Ga. Ct. App. 2014) (same attorney serving as agent for insurer also acted as attorney for insured; court held that attorney's knowledge was imputed to insured but because attorney was not insured's general agent, and his role was also that of a dual agent, his knowledge was imputed equally on the insurer).

18. Shamrock Bank of Fla. v. First Am. Title Ins. Co., 2014 WL 1304694, at *1 (S.D. Ill. Mar. 28, 2014).

19. 2013 WL 4710264, at *1 (D. Idaho Aug. 29, 2013).

to the mortgages.[20] The insurer attempted to avoid coverage under 3(b), but the court held that, because the insured had provided the insurer with an accounts payable scheduling, including the contractor debts, the insurer was on inquiry notice that the loan priority might have been lost. As such, it could not assert 3(b) as a defense.[21]

4. Exceptions

Lawyers Title Insurance Corp. v. Doubletree Partners, L.P., which was decided by the Eastern District of Texas in 2012 and heard by the Fifth Circuit this year, addresses both exceptions and exclusions.[22] A retirement community developer purchased Lake Lewisville, Texas, property, which was encumbered by various easements and restrictions, including a flowage easement. The flowage easement was excepted from coverage but, due to a printing error, this exception did not appear on the policy.[23] The insured also purchased survey coverage, but this coverage was also excluded via printing error. After a survey of the property erroneously underrepresented the area of the property subject to the flowage easement, calling the insured's construction plans to a halt, the insured filed a claim.[24] After the insured's claim was denied, litigation ensued. The district court reformed the policy to reflect the exceptions, but then ruled coverage was barred under Exclusion 3(a).[25] The Fifth Circuit rejected application of the exclusion, finding that the district court properly reformed the policy and that the reformed policy covered survey errors, including the error in identifying the location of the flowage easement.[26]

Two other cases to note include *A. Gugliotta Development, Inc. v. First American Title Insurance Co. of New York*[27] and *Flagstar Bank, FSB v. Lawyers Title Co.*[28] In *Gugliotta*, the policy contained an exception relating to a trail running across the insured parcel. The insured owner submitted a claim, asserting encroachment of the trail meant the property could not be subdivided or conveyed without removal or preservation of the trail. The insurer denied the claim, citing the trail exception, and litigation ensued.[29] The court upheld the exception and granted summary judg-

20. *Id.* at *1.
21. *Id.* at *6-7.
22. 739 F. 3d 848 (5th Cir. 2014), *aff'g in part and rev'g in part*, 866 F. Supp. 2d 604 (E.D. Tex. 2012).
23. *Id.* at 853.
24. *Id.* at 854.
25. *Id.* at 855.
26. *Id.* at 857–64; *see also* Johnston v. Conn. Att'ys Title Ins. Co., 2014 WL 1494016, at *1 (D. Vt. Apr. 16, 2014); Patel v. Lawyers Title Ins. Corp., 2013 WL 6002069, at *1 (Ark. Ct. App. Nov. 13, 2013).
27. 976 N.Y.S.2d 172 (N.Y. App. Div. 2013).
28. 2014 WL 1725746, at *1 (Cal. Ct. App. May 2, 2014) (unpublished).
29. *Gugliotta Dev.*, 976 N.Y.S.2d at 174.

ment.[30] In *Flagstar Bank*, the insured purchased loans the originator represented were first liens; however, the insurer excepted from coverage prior deeds of trust that had not been paid off at closing.[31] The insured filed a claim after it learned it had been defrauded by the originator, but the insurer denied the claim, and litigation ensued. The court found that the exceptions were clear, and there was no coverage.[32]

B. *Claims Procedure*

1. Notice/Limitations

Two cases address the limitations period for a suit against the insurer. The Third Circuit held that the lender insured's breach of contract action against its insurer arose on the date its lien was cancelled by foreclosure of the prior lien.[33] By contrast, the Tenth Circuit determined that the statute of limitations does not begin until an insurer has denied a claim.[34]

The Eastern District of New York preserved the insurer's reservation of rights investigation period by rejecting an insured's argument that once its insurer had accepted coverage it was equitably estopped from later denying coverage. In *RP Family, Inc. v. Commonwealth Land Title Insurance Co.*,[35] after indicating the claim at issue was covered, the insurer disclaimed coverage based on certain policy exclusions. The insurer had provided in its initial acceptance letter that it was investigating the claim, and it reserved the right to supplement the letter to exercise its rights under any other term or provision of the policy.[36]

2. Duty to Defend

The "in for one, in for all" defense has been further rejected as applying to title insurers in Massachusetts.[37] The insured lender argued that the insurer should defend it in a case relating to a predatory lending scheme concerning the validity of the underlying note. The court disagreed, distinguishing title insurance from general liability insurance, where an insurer has a

30. *Id.* at 175.

31. *Flagstar Bank*, 2014 WL 1725746, at *1.

32. *Id.* at *3.

33. U.S. Bank Nat'l Ass'n v. First Am. Title Ins. Co., 944 F. Supp. 2d 386 (E.D. Pa. 2013), *aff'd sub nom.* 570 F. App'x 209 (3d Cir. 2014); *see also* San Jacinto Z, LLC v. Stewart Title Guar. Co., 2014 WL 1317696, at *1 (Cal. Ct. App. Apr. 2, 2014), *as modified on denial of reh'g* (Apr. 24, 2014), *review denied* (June 18, 2014) (unpublished) (appearing to hold limitation period accrues on policy date if insured was aware of adverse liens).

34. Bank of Am., N.A. v. Dakota Homestead Title Ins. Co., 553 F. App'x 764 (10th Cir. 2013) (agent stole lender's funds and did not record mortgage; two years later insured made claim, then three years after that sued insurer).

35. 2014 WL 1330932, at *4, 7 (E. D. N.Y. Apr. 1, 2014).

36. *Id.*, at *8.

37. Deutsche Bank, N.A., v First Am. Title Ins. Co., 991 N.E. 2d 638, 640 (Mass. 2013); *see also* GMAC Mortg., LLC v. First Am. Title Ins. Co., 985 N.E.2d 823 (Mass. 2013).

broad duty to defend.[38] The court held that "a title insurer *does not* have a duty to defend simply because the allegations in the underlying complaint are 'reasonably susceptible' of an interpretation that they state or adumbrate a claim covered by the policy terms."[39] Rather, the duty is triggered "only where the policy specifically envisions the type of loss alleged."[40]

However, the "in for one, in for all" defense is the law of the land for title insurers in Maryland according to the Fourth Circuit, which held that "[w]here covered and uncovered claims arise in the same action, the insurer must defend regardless of what the gravamen of the action might be."[41]

Additionally, several cases this year have held there was no duty of an insurer to defend either because of actual knowledge of the insured of an unrecorded lien, triggering the 3(a) exclusion,[42] where the litigation related to rights of access established by covenants filed after the policy issued,[43] or where at a county building permit hearing the county was not challenging the insured's title.[44]

3. Claims Handling

Castin, LLC v. First American Title Insurance Co. addresses the discretion of the insurer in the title curative process.[45] After closing but before the deed was recorded, the grantor's name was changed from the "Lawson Company" to "Lawson Milk Co."[46] Ten years later, the buyer learned of error and made a claim. No one had attacked the title, and the insurer offered indemnification. The insured refused. The court held that there had been no loss and the insurer's actions were enough.[47]

4. Subrogation

In *Stewart Title Guaranty Co. v. Inspection and Valuation International, Inc.*, the insurer, as subrogee of its insured lender, sued a company overseeing construction for breach of contract, among other things.[48] The Northern

38. *Id.* at 641–42.
39. *Id.* at 643 (internal citation omitted) (emphasis in original).
40. *Id.*; *see also San Jacinto Z*, 2014 WL 1317696, at *6 (insured conceded tortious conduct not covered).
41. Cornerstone Title & Escrow v. Evanston Ins. Co., 555 F. App'x 230, 239 (4th Cir. 2014) (internal citation omitted) (not published).
42. Fogg v. Fid. Nat'l Title Ins. Co., 89 A.3d 510, 512–14 (D.C. Ct. App. 2014).
43. Back Creek Partners, LLC v. First Am. Title Ins. Co., 75 A. 3d 394, 400–01 (Md. Ct. Spec. App. 2013).
44. Guenther v. Old Republic Title Ins. Co., 2013 WL 5424004, at *1 (D. Idaho Sept. 26, 2013).
45. 2014 WL 576269, at *1 (Ohio Ct. App. Feb. 12, 2014).
46. *Id.*
47. *Id.* at *3.
48. 2013 WL 5587293, at *1–2 (N.D. Ill., Oct. 10, 2013).

District of Illinois held that the cause of action accrued when the subrogor lender learned that a mechanic's lien had been filed, making the suit time-barred under Illinois law.[49]

In an opinion marked for its refusal to address subrogation, the Utah Supreme Court held that an insured prevailing in title litigation is entitled to recover attorney fees from the losing party, even when the title insurer paid for the defense.[50] After the trial court quieted title, it held a hearing on damages and awarded attorney fees and costs. On appeal, the losing party argued that the insurer had paid the fees, so the insured could not claim them as damages, and neither could the insurer because it had not been subrogated and was not a party to the litigation.[51] The court held that the inquiry is limited simply to "whether the overall attorney fees awarded to a party are reasonable" and not whether the party actually paid the fees.[52]

C. *Damages*

1. Owner/Leasehold Policies

The damages analysis saga of *First American Title Insurance Co. v. 273 Water Street, LLC*,[53] centered upon a parcel of property formerly owned by Katherine Hepburn. The $9 million policy failed to list an unused public road across the property. The insured owner sought $5 million, to which the insurer countered with $17,000.[54] At trial, the jury found $2.2 million in damages; however, the jury also found that the insurer had not breached the policy, and the insured's loss in value as to the entire tract was $73,000.[55] In ruling upon the insurer's motion to set aside the verdict, the court upheld the $2.2 million verdict.[56] Interestingly, the opposite conclusion was reached in another owner's policy case. In *Borowski v. Stewart Title Guaranty Co.*,[57] the trial court denied a motion by the insured for a new trial after the jury held both that the insurer did not breach the title policy, but that there was a diminution in value to the property due to an easement issue in the amount of $73,500.11. The appellate court reversed, stating the verdicts were inconsistent.[58]

49. *Id.* at *3–4.
50. Dillon v. S. Mgmt. Corp. Retirement Tr., 326 P.3d 656 (Utah 2014).
51. *Id.* at 671.
52. *Id.*
53. WL 3871443 (Conn. Super. Ct. July 5, 2013).
54. *Id.* at *3.
55. *Id.* at *4.
56. *Id.* at *8–9.
57. 842 N.W.2d 536 (Wis. Ct. App. 2013) (unreported).
58. *Id.*; *see also* May v. Ticor Title Ins., 422 S.W.3d 93 (Tex. App. 2014), *reh'g overruled* (Mar. 5, 2014) (damages awarded by jury for missed mineral interest were significantly less than insurers' pretrial offer; under Texas law, insurers could recover their costs as an off-

2. Loan Policies

Several cases this year have focused on section 9(b) of the loan policy, which provides that:

> [p]ayment in part by any person of the principal of the indebtedness, or any other obligation secured by the insured mortgage, or any voluntary partial satisfaction or release of the insured mortgage, to the extent of the payment, satisfaction or release, shall reduce the amount of insurance pro tanto.

The South Carolina Supreme Court held that a lender could recover damages for loss of its lien position on one of several insured parcels even after its credit bid on one parcel exceeded the policy amount.[59] The court held that the insurer's reading of 9(b), i.e., that coverage declines by the amount of any funds paid to the insured lender, is "contrary to the most basic protections [of] title insurance" and would unjustifiably cap liability when the insured receives "payment that does not eliminate the risk for which he purchased the property."[60] By contrast, in Arizona, section 9(b) still thrives. In *Equity Income Partners, LP v. Chicago Title Insurance Co.*,[61] the court held that a full credit bid terminated the loan policy.

3. Bad Faith

The bad faith cases examined this year were favorable for the insured. In one instance, an insured's bad faith claim survived the insurer's motion to dismiss where the court noted that the coverage opinion took seven months and was delivered the night before a competing lienholder's foreclosure sale.[62] In another case, the trial court allowed the insured to add a claim for punitive damages where the insurer allegedly delayed its coverage denial, in turn preventing the insured's settlement with lien claimants in an ancillary foreclosure action and serving to reduce the value of the property at issue.[63]

set against the damages, and court set value on a per acre basis then multiplied by one-half for interest missing).

59. Preservation Capital Consultants, LLC v. First Am. Title Ins. Co., 751 S.E.2d 256, 257 (S.C. 2013); *see also* Bank of Idaho v. First Am. Title Ins. Co., 329 P.3d 1066, 1071 (Idaho 2014) (reversing trial court's finding that full credit bid by lender discharged lender's liability, and holding that construing 9(b) to automatically satisfy policy after credit bid conflicts with other policy provisions explicitly providing for coverage to continue in force).

60. *Preservation Capital Consultants*, 751 S.E.2d at 261.

61. 2013 WL 6498144, at *6–7 (D. Ariz. Dec. 11, 2013).

62. Johnsen & Allphin Props. v. First Am. Title Ins. Co., 2013 WL 6230344, at *8–9 (D. Utah Dec. 2, 2013).

63. Stewart Title Ins. Co. v. Credit Suisse, 2013 WL 4710264, at *11–14 (D. Idaho Aug. 29, 2013).

D. *Closing Protection Letters*

This year's closing protection letter (CPL) case law yielded mixed results for insurers. In *Heritage Pacific Financial, LLC v. First American Title Insurance Co.*,[64] the insurer issued a CPL in conjunction with the closing of a home equity line of credit (HELOC) in 2007. The plaintiff purchased the HELOC slightly over three years after the closing and sued under the CPL for breach of contract, detrimental reliance, and fraud.[65] The insurer moved to dismiss, based upon the three-year statute of limitations applicable under Maryland law. The district court denied the motion, rejecting the insurer's argument that breach occurred at the time of closing on the HELOC,[66] and holding the CPL was not within the definition of a "title insurance policy."[67] The court held that the CPL was an indemnity agreement, not a policy, and, therefore, not time barred under Maryland's breach of contract statute of limitations. Despite the CPL's language obligating the insurer to reimburse the plaintiff for actual loss incurred in connection with fraud or dishonesty of the issuing agent (the reason for the underlying loss),[68] the district court held that the limitations period did not begin until actual loss was suffered, i.e., the foreclosure on the property, leaving the HELOC unpaid.[69] Accordingly, the plaintiff assignee was able to sue under the CPL even though it purchased the loan over three years after the closing, despite Maryland's three-year statute of limitations for breach of contract. The claims for detrimental reliance and fraud were also held not to be time-barred, based upon the "actual loss" rule.[70]

In *Bank of America, NA v. First American Title Insurance Co.*,[71] the Michigan Court of Appeals issued a mixed result for title insurers. The insurer issued CPLs for four loans, two of which were closed by an employee who likely participated in loan fraud, and the other two closed by an employee who failed to detect the fraud. With respect to the loans closed by the defrauding employee, the court reversed the lower court's granting of summary disposition in favor of the insurer and permitted the case to go forward, concluding the plaintiff presented sufficient evidence that it suffered actual losses as a result of the employee's dishonesty in handling funds in connection with the closing.[72] The court held the full credit bid rule

64. 2013 WL 4401040 (D. Md. Aug. 14, 2013).
65. *Id.* at *2.
66. *Id.* at *5.
67. *Id.*
68. *Id.* at *5–6.
69. *Id.* at *6.
70. *Id.* at *6–7.
71. 2014 WL 1271227 (Mich. Ct. App. Mar. 27, 2014).
72. *Id.* at *11.

set forth in *New Freedom Mortgage Corp. v. Globe Mortgage Corp.*[73] barred plaintiff's claims for some of the properties, because the lender's credit bid exceeded the debt. With respect to the two other claims, the court found that the lender failed to produce sufficient evidence to create a question of fact whether the agent's employer knew of or participated in the underlying fraud.[74] Accordingly, because the lender failed to produce sufficient evidence to create a question of fact that the closing agent's employer engaged in "fraud or dishonesty" within the meaning of the CPL, summary judgment in the insurer's favor was appropriate.[75]

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

The Illinois Appellate Court held that a title insurer was not liable for an agent's acts as an escrow agent. In *Rosenberg v. B.H. Kahan and Associates*,[76] the agency agreement between the insurer and its agent expressly excluded escrow and closing activities from the scope of the agent's authority, absent the issuance of a CPL.[77] The court agreed with the lower court's holding that the mere application for registration for a title insurance agent with the state did not amend or supplement the agency agreement.[78]

A favorable result for an insurer occurred in *McColgan v. Brewer*,[79] where the title agent verbally assured the purchaser of a property after the closing that the property the plaintiff purchased was benefitted by a right-of-way. The appellate division affirmed the trial court's summary judgment in favor of the insurer, holding that even though the title agent continued to represent that the plaintiff was entitled to the benefit of the right-of-way, and assuming that the representation was knowingly false, the agent was not acting within the scope of his authority when he made the representations.[80] The appellate division also upheld the trial court's conclusion that because the agent and other independent experts reviewed the relevant documents and opined that the plaintiff had a legally enforceable right-of-way, the insurer met its threshold burden of establishing a lack of knowledge of the falsity of the agent's representations, and upheld summary judgment in the insurer's favor.

In an action seeking to push the boundaries of vicarious liability, a felon convicted of corruption, identity fraud, theft, forgery, and money laundering arising out of a fraudulent real estate action sued the title

73. 761 N.W.2d 832 (Mich. Ct. App. 2008).
74. *Bank of Am.*, 2014 WL 1271227 at *13.
75. *Id.* at *14.
76. 2013 WL 3015860 (Ill. App. Ct. June 13, 2013).
77. *Id.* at *12.
78. *Id.* at *11–12.
79. 112 A.D. 3d 1191 (N.Y. App. Div. 2013).
80. *Id.* at 1192.

insurance company and its underwriter in *Anderson v. Preferred Title & Guaranty Agency, Inc.*,[81] claiming, in essence, that they enabled his criminal activity. The Ohio Court of Appeals affirmed summary judgment in favor of the title company and its underwriter, after rejecting the plaintiff's claims that they were vicariously liable for the "errors" made by an employee of the underwriter. The court held that because it was the plaintiff's acceptance and retention of funds that led to his criminal prosecution and convictions, it was his own criminal acts that broke the causal chain between the alleged tortious acts of the insurer/underwriter and the claimed injury by the plaintiff, i.e., the prosecution and convictions.[82] Because the underwriter was found not to be liable, the insurer was not vicariously liable either.[83]

III. INSURER VERSUS AGENT

A Minnesota agent stole loan proceeds and recording fees.[84] After claims were made on the title insurer, it sued the agent. Defense was tendered to the agent's errors and omissions carrier.[85] The Eighth Circuit held the carrier did not have to defend the agent since the "customer funds" exclusion of the errors and omission policy applied.[86] While the agent failed to record the refinance mortgages, this was found to be not a separate act of negligence but rather part of the scheme to misappropriate escrow funds.[87]

Two cases this year featured a title insurer suing parties whose allegedly fraudulent conduct caused policy claims. The court in *Fidelity National Title Insurance Co. v. Craven*[88] held the insurer could sue the agent's closer and the borrowers for fraud and civil conspiracy, but not under civil RICO.[89]

In the second case, *Stewart Title Guaranty Co. v. Sanford Title Services, LLC*,[90] the title insurer sued a party who orchestrated bogus loans closed by the insurer's agent for conspiracy to commit fraud and unjust enrichment. The defendant was paid almost $400,000 from the agent's escrow account for no valid reason.[91] The insurer recovered from the defendant

81. 2014 WL 585966 (Ohio Ct. App. Feb. 13, 2014).
82. *Id.* at *4–5.
83. *Id.* at 85.
84. Bethel v. Darwin Select Ins. Co., 735 F. 3d 1035 (8th Cir. 2013).
85. *Id.* at 1038.
86. *Id.* at 1040.
87. *Id.*
88. 2013 WL 3778388, at *6 (E.D. Pa. July 18, 2013).
89. *Id.* at *7.
90. 2013 WL 5566493, at *1 (D. Md. Oct. 8, 2013).
91. *Id.* at *2.

under its subrogation rights.[92] However, its recovery was limited to the amount paid to her from the escrow account.[93]

In a Georgia case, the appellate court held a title insurer could recover from the agent under the agency agreement if the insured prevailed in its suit against the insurer.[94] The insured would not have to establish the agent's liability by suing the agent. The indemnity provision in the agency agreement requires the agent to indemnify the insurer for the insurer's liability to the insured.[95]

Two cases this year dealt with title insurers suing other line carriers under policies issued to the title insurers. Normally a title insurer disclaims liability for an agent's acts as escrow agent. An Ohio case illustrates when this principle can frustrate the insurer.[96] EnTitle Insurance Co., a title insurer, purchased a professional liability policy from Darwin Select Insurance Co.[97] After an EnTitle agent stole escrow funds, EnTitle reimbursed parties who suffered losses due to the agent's actions and had received closing protection letters. Parties without CPLs were not reimbursed.[98] Darwin denied coverage for the CPL losses, relying upon language in the professional liability policy limiting coverage to acts "by any Insured, or by an individual or entity for whom the Company (EnTitle) is legally responsible."[99] Since EnTitle was not responsible for the agent's actions as escrow agent, the losses fell outside coverage.[100] The Sixth Circuit agreed and affirmed a judgment for Darwin.[101]

In *Stewart Information Services Corp. v. Great American Insurance Co.*,[102] the plaintiff had an attorney-agent in Florida who participated in fraudulent loans and misappropriated escrow funds. Stewart made a claim on its financial institutions bond, asserting that the losses were caused by employee dishonesty.[103] The bonding company's defenses were: (1) the attorney was not Stewart's employee, and (2) the attorney's acts only indirectly caused Stewart's losses under title policies and closing protection letters.[104] The Southern District of Texas examined the bond and Stewart's contract with the attorney and determined the attorney was an

92. *Id.* at *6.
93. *Id.* at *4.
94. Doss & Assoc. v. First Am. Title Ins. Co., 754 S.E.2d 85 (Ga. Ct. App. 2013).
95. *Id.*
96. EnTitle Ins. Co. v. Darwin Select Ins. Co., 553 F. App'x 543 (6th Cir. 2014).
97. *Id.*
98. *Id.* at 544.
99. *Id.* at 545.
100. *Id.*
101. *Id.* at 546-47.
102. 2014 WL 583965 (S.D. Tex. Feb. 12, 2014).
103. *Id.* at *6.
104. *Id.* at *8.

employee under the terms of the bond.[105] However, the attorney's acts were only indirectly responsible for Stewart's loss. The court found that the financial losses concerning Stewart's CPLs and policies issued to third parties were not "directly" caused by the employee's misconduct.[106]

IV. DUTIES OF TITLE/ESCROW AGENT

A. *Handling Escrow Funds*

This year many cases, some of them yielding results favorable to title companies, dealt with the handling of escrow funds. In *Bedrock Financial Corp. v. First American Title Co.*,[107] however, an escrow agent handled the closing of a first lien refinance. Despite the fact that the escrow instructions directed that the lender was to be in first position, the escrow agent paid an existing first lien and disbursed the balance of the proceeds to the borrowers without obtaining a release or subordination of the federal tax lien.[108] The district court found the insurer liable for conversion of the funds that should have gone to the Internal Revenue Service.[109] In dicta, the court also found that because of the insurer's constructive knowledge of the lien under California law, its disbursement of funds subject to the federal tax lien also constituted waste.[110] The court also rejected the insurer's argument that the government failed to mitigate its damages.[111] Therefore, even though the IRS was not a party to the escrow, the escrow agent was found liable.

Capcor at Kirbymain, L.L.C. v. Moody National Kirby Houston S, L.L.C.[112] yielded a more favorable result for an escrow agent. In *Capcor*, a closing failed because an escrow agent for a commercial real estate transaction refused to accept a cashier's check, instead insisting on the day before closing that wired funds were necessary.[113] The Texas Court of Appeals upheld judgment in favor of the escrow agent and rejected the prospective purchaser's claim that the agent breached its fiduciary duty, holding that the jury could reasonably have inferred that cashier's checks were so rarely used in commercial real estate transactions and wire transfers so commonly used, that whether the escrow agent would accept them was not a material fact.[114] The court also upheld the jury's finding rejecting the pro-

105. *Id.* at *6.
106. *Id.* at *8.
107. 2014 WL 1600452 (E.D. Cal. Apr. 17, 2014).
108. *Id.* at *2–3.
109. *Id.* at *4.
110. *Id.* at *8.
111. *Id.* at *8–9.
112. 2014 WL 982858 (Tex. App. Mar. 13, 2014).
113. *Id.* at *6.
114. *Id.* at *5.

spective purchaser's argument that the escrow agent was liable in tort under the Texas "good funds rule."[115] The court held that the escrow agent was vested with discretion to determine which good funds it would accept and, therefore, because the escrow agent testified that it needed the purchase price to be immediately available for transfer to the seller, a cashier's check did not comply with this requirement.[116] Finally, the court upheld the lower court's holding that the prospective purchaser's failure to deliver good funds acceptable to the escrow agent permitted the seller to terminate the contract and obtain the earnest money.[117]

In *Lawyers Title Co. v. J.G. Cooper Development, Inc.*,[118] a real estate investor brought an action against a fee attorney for a title company, an independent contractor of the fee attorney, and the title company. The fee lawyer was not an agent for the title company except for the limited purpose of closing real estate transactions.[119] The independent contractor accepted receipt of $1.8 million; after the independent contractor and others diverted $1.7 million, they were indicted on federal wire fraud charges. The trial court granted summary judgment against the title company, finding liability for bailment, conversion, and the money received.[120] The Texas Court of Appeals reversed, finding a genuine issue of material fact as to whether the title company exercised control of the escrow account and the $1.8 million wired into it.[121] Accordingly, this was held to be a factual issue appropriate for a jury's decision. Similarly, because there were genuine issues of material fact as to whether the title insurance company ever controlled the escrow account, the court found that summary judgment was improper for all parties on the investor's bailment claim and claim for money had and received.[122]

In another escrow funds matter, *FDIC v. St. Louis Title, LLC*,[123] the Eastern District of Missouri denied a title company's motion to dismiss, holding that the FDIC, despite not being a party to an escrow, could sue a title company. The court rejected the title company's claim that the action was barred because it owed no duty to the failed bank, because the bank, and therefore the FDIC, was a third party to the closing transaction.[124] Accepting the pleadings as true, the court held that "[t]he lender in a closing transaction is not a stranger to the transaction. It

115. *Id.* at *6–7.
116. *Id.* at *7.
117. *Id.* at *9–10.
118. 424 S.W.3d 713 (Tex. App. 2014).
119. *Id.* at 715.
120. *Id.* at 717.
121. *Id.* at 720.
122. *Id.*
123. 2014 WL 200368 (E.D. Mo. Jan. 17, 2014).
124. *Id.* at *3.

[has] a strong interest that its funds are not released by the closing agent unless the closing agent has complied with the lender's instructions."[125] The court also rejected the title company's argument that Missouri's five-year statute of limitations for contract and negligence actions applied, holding instead that the six-year statute of limitations under the Financial Institutions Reform, Recovery, and Enforcement Act applied.[126]

A more favorable result for an escrow agent occurred in an unpublished decision in Arizona.[127] There, the loan had been assigned, but no transfer of record existed when the escrow agent paid sales proceeds to the assignor lender. The servicing agent for the assignee sued the escrow agent, contending that it was a third party beneficiary pursuant to the escrow instructions between the borrowers and seller.[128] The Arizona Court of Appeals affirmed the summary judgment in favor of the escrow agent, holding that the servicer was neither a party to the promissory note or escrow, or, that under the facts of that case, it was not a third party beneficiary of the escrow.[129]

B. *Handling Documents*

In *Centurion Properties III, LLC v. Chicago Title Insurance Co.*,[130] the deed of trust in a commercial loan closed by an escrow agent prohibited the placement of any liens or encumbrances on the property without the lender's approval. Following the sale, six liens were placed on the property, four of which were recorded by the escrow agent. The lender declared a default, accelerated the entire unpaid principal balance of the loan, and imposed a default rate of interest.[131] The borrower then sued the escrow agents for negligence. The Eastern District of Washington granted the escrow agent's motion for summary judgment, holding that a title company owes no tort duty under Washington law to refrain from recording instruments that may cause harm to a third party's interests.[132]

C. *Duty to Search Title*

In an unpublished decision, the Michigan Court of Appeals held that a title agent's knowledge of a pending sales contract on a portion of real prop-

125. *Id.* at *3.
126. *Id.* at *2–3.
127. Aurora Loan Servs., LLC v. Sec. Title Agency, Inc., 2014 WL 458133 (Ariz. Ct. App. Feb. 4, 2014).
128. *Id.* at *1.
129. *Id.* at *3.
130. 2013 WL 3350836 (E.D. Wash. July 3, 2013).
131. *Id.* at *2.
132. *Id.* at *7.

erty was not imputed to the intervening lender.[133] The court affirmed summary judgment in favor of the lender, holding that the title agent was the plaintiff's agent at most for the issuance of the title insurance policy, and not the closing itself.[134] The mere fact that the lender hired the title agent to perform a title search and issue a title policy did not lead to the conclusion that the title company represented the plaintiff intervening lender as its agent at the closing.[135]

In *FDIC v. Horn*,[136] title agents were found liable for negligence to the FDIC, which had succeeded to the lender's claims, when the agents showed the borrowers to be on title for properties when, in fact, title to various properties was not vested in the borrowers and two of the properties were involved in "flip" transactions. In granting a default judgment for the FDIC, the Eastern District of New York held that, under New York law, the agents owed a duty of care to the lender, pursuant to the title company's guidelines, to identify flip transactions as a sign of potential fraud or indicator that the properties' value may have been lower than the value submitted at loan origination.[137] The court also agreed with the FDIC that the agents breached their duty of care when they prepared title commitments that contained inaccurate and misleading information regarding the identities of the owners of record, the dates and manners by which the record owners obtained title to the property, and the chain of title for the properties.[138]

In a decision affecting errors and omissions insurance coverage for title insurers,[139] a title agent failed to identify environmental restrictions and easements pertaining to real property sold in 2006. After discovering their error, the agents tried to remedy their error by causing the 2006 deed of trust to be released and adding the missed items to a new loan policy issued for a 2007 closing.[140] Affirming the district court's granting the professional liability insurer's motion for judgment on the pleadings, the Eleventh Circuit upheld the conclusion that the "prior acts" exclusion barred coverage for any claim connected to the 2006 loan.[141] The 2007

133. J.S. Evangelista Dev., L.L.C. v. Found. Capital Resources, Inc., 2014 WL 1679067 (Mich. Ct. App. Apr. 24, 2014).

134. *Id.* at *5.

135. *Id. See also* Tamburine v. Ctr. Sav. Ass'n, 583 S.W.2d 942 (Tex. Civ. App. 1979) (title insurance company not acting as agent of purchaser so as to defeat purchaser's status as bona fide purchaser; rather, title company was acting in its own interests in determining insurability of title before issuing title policy).

136. 2014 WL 1236053 (E.D.N.Y. Feb. 14, 2014).

137. *Id.* at *7.

138. *Id.*

139. Am. Guar. & Liab. Ins. Co. v. Abram Law Grp., LLC, 555 F. App'x 919 (11th Cir. 2014) (per curiam).

140. *Id.* at 920.

141. *Id.* at 921.

loan closing was the "necessary predicate" to the fraudulent scheme to extinguish the 2006 errors. The Eleventh Circuit concluded that the district court did not err in determining that the acts and omissions surrounding the 2006 loan formed the basis of the claims regarding the fraud alleged during the 2007 loan.[142] Accordingly, the Eleventh Circuit held that the "prior acts" exclusion applied to exclude coverage against the title agents.[143]

D. *Closing Instructions*

This year yielded mixed results for title companies concerning closing instructions. The California Court of Appeal held an escrow company was liable for the full amount of a construction loan because a performance bond was not secured in accordance with the loan instructions.[144] The closing agent disbursed the proceeds of the loan with no evidence of a performance bond being in place, despite having a conversation with the lender the day of closing in which the agent was specifically instructed not to close unless all conditions were met. The loan funds were disbursed to a construction disbursement agent that paid based upon false invoices.[145] With an extensive and colorful analysis invoking Woody Guthrie and Mark Twain,[146] the court held that the escrow holder, as a fiduciary to the parties to the escrow, was bound to strictly comply with the instructions of the parties.[147] The court further invoked ninety years of California case law upholding the principle that an escrow holder is responsible for any loss caused by its negligence.[148] The court rejected the title company's argument that it cannot be held liable in negligence because its liability is strictly limited to contract[149] and, likening the escrow agent's responsibility to that of a guard at a jewelry store, the court rejected the title company's argument that the superseding bad acts of other parties to the transaction absolved the title company of responsibility.[150]

In another unpublished California opinion,[151] a title agent failed to pay a $30,000 bonus to the buyer's realtor who, in turn, agreed to purchase a flat screen television for the purchasers. Perhaps not coincidentally, the

142. *Id.*
143. *Id.* at 921–22.
144. Strohbach v. United Gen. Title Ins. Co., 2013 WL 3286218 (Cal. Ct. App. July 29, 2013).
145. *Id.* at *5.
146. *Id.* at *14–15.
147. *Id.* at *6.
148. *Id.* at *7.
149. *Id.* at *10.
150. *Id.* at *11.
151. Openiano v. First Am. Title Co., 2013 WL 5372878 (Cal. Ct. App. Sept. 26, 2013).

purchase agreement contained a provision increasing the price of the property by $30,000. The realtor sued the escrow company, which demurred, contending that the one-year statute of limitations clause in the escrow contract barred the realtor's claims.[152] The California Court of Appeal agreed, citing the language in the escrow agreement. The court rejected the realtor's argument that the statute of limitations was tolled by the Service Members Civil Relief Act (50 U.S.C. App. § 501, *et seq.*) because the transaction involved the sale of real property, not the sale of goods or services, and, accordingly, the Act did not apply.

In *Shore Financial Services, Inc. v. Lakeside Title & Escrow Agency, Inc.*,[153] the Michigan Court of Appeals imposed no liability on a title agent who failed to ensure that closing instructions were followed. In particular, the loan had been approved contingent upon various conditions, including the sale of the borrower's condominium, but the loan closed without these conditions being satisfied. The court upheld the trial court's grant for summary disposition in favor of the title agent, reasoning that because the lender had not attempted to sell the loan and the loan was current, the lender suffered no damages. The court also rejected the lender's claim that it was entitled to liquidated damages of $1,000 per day until the breach was rectified.[154] The court noted that the liquidated damages provision called for the payment of the same sum regardless of the degree of breach and found that in view of its unreasonable relationship to the residential mortgage of $180,000, the liquidated damages were found to be an unenforceable penalty.[155] The court even awarded the agent costs and case evaluation sanctions.[156]

In another decision favorable to closing agents,[157] a closing agent was absolved of liability arising from identity theft. The New York Appellate Division held that a closing agent fulfilled its obligation in the closing instructions to determine that the borrower executed all required documents and that all necessary signatures and notary acknowledgments were included.[158] An imposter showed the notary public a driver license and the lender subsequently learned that the purported borrower had been the victim of identity theft. The court reversed the trial court's denial of summary judgment in favor of the closing agent, holding that the parties' written agreement did not require the agent to ensure the identity

152. *Id.* at 1.
153. WL 2223781 (Mich. Ct. App. May 21, 2013).
154. *Id.* at *4–5.
155. *Id.* at *5.
156. *Id.* at *7–8.
157. Countrywide Home Loans, Inc. v. United Gen. Title Ins. Co, 972 N.Y.S.2d 296 (N.Y. App. Div. 2013).
158. *Id.* at 297–98.

of the person signing the note and mortgage.[159] Moreover, because the closing agent complied with its contractual obligations to obtain all "necessary signatures" of the borrower and "notary acknowledgements," the closing agent fulfilled this obligation by checking the (falsified) identification.[160]

E. *Duty to Disclose*

In what appears to be the first Texas case addressing the issue, a bankruptcy court addressed an escrow agent's duty to disclose a previously existing contract to purchase a property.[161] There, an escrow agent was handling a transaction between the seller and buyer No. 1. After a dispute arose between seller and buyer No. 1, the seller signed a contract to sell the same property and an adjacent tract to buyer No. 2.[162] The escrow agent moved forward with closing the second sale, and buyer No. 1 sued the seller and the escrow agent. After an extensive analysis of the fiduciary and disclosure duties of an escrow agent,[163] the bankruptcy court held that the escrow agent breached its fiduciary duty of loyalty by serving as an escrow agent for buyer No. 2.[164] The bankruptcy court's conclusion was premised upon a finding that the escrow agent favored the seller's interests over buyer No. 2's interests and should not have agreed to serve as the escrow agent for the second transaction or should have withdrawn from the second transaction.[165] In contrast, however, the court did not find that the escrow agent breached its duty of disclosure.[166] The court reasoned that when an agent obtains material information concerning two principals, it is unclear whether the agent may disclose the information to the second principal, in view of the duty of confidentiality and loyalty owed to both principals. Noting that it found no Texas authority holding an escrow agent liable for breaching its disclosure duty in similar circumstances, the court declined to impose liability for duty to disclose upon the escrow agent.[167] The court also noted that the contract for the second sale contained a confidentiality provision, which purported to prohibit the escrow agent from disclosing the contract to plaintiff.[168]

159. *Id.* at 298.
160. *Id.*
161. *In re* SMC, Ltd., 2013 WL 4078704 (Bankr. N.D. Tex. Aug. 13, 2013).
162. *Id.* at *3.
163. *Id.* at *10–13.
164. *Id.* at *12.
165. *Id.*
166. *Id.* at *12–13.
167. *Id.* at *13.
168. *Id.*

In *FDIC v. Lennar Corp.*,[169] the Northern District of Florida denied a motion to dismiss a fraud action brought by the FDIC in which it alleged that the closing agent was aware of inflated valuations provided to the lender. The agent argued that the "economic loss rule" barred the FDIC's claims, arguing that parties to a contract cannot recover in tort for alleged damages arising out of a contract.[170] The court rejected this argument, however, noting that the Florida Supreme Court had carved out exceptions to the economic loss rule for cases involving negligent misrepresentation and fraud in the inducement.[171] The court also rejected the closing agent's argument that the FDIC's claims should be dismissed because there was no allegation that the escrow agent had a contract with or owed a duty to the FDIC's predecessor, noting that the FDIC stood in the shoes of the initial lender and was assigned almost one hundred of the defaulted loan claims that had been foreclosed upon.[172]

F. *Right to Cure Title*

In *In re County Treasurer*,[173] the Illinois Appellate Court ruled in favor of a title company that filed a petition to declare a tax deed void and vacate an order directing the issuance of the tax deed.[174] The buyer of the tax deed contended that the title company lacked standing to attack the tax deed.[175] The court affirmed the trial court's denial of the buyer's motion to dismiss, holding that although the title company did not have an ownership interest in the property, the company had issued a title insurance policy and could have redeemed the taxes on the subject property on behalf of the prior owner, to whom it had issued a title policy.[176] The court even emphasized that as the prior owner's title insurer, the title company would be expected to act on the prior owner's behalf to preserve its ownership of the property and fulfill its contractual obligation to provide or insure clear title to the property.[177] Because the title company had the right to redeem the property on behalf of its insured, it had standing to file a petition to collaterally attack the tax deed that had been issued.[178]

169. 2014 WL 201663 (N.D. Fla. Jan. 17, 2014).
170. *Id.* at *6.
171. *Id.* at *6–7.
172. *Id.* at *8.
173. 999 N.E. 2d 748 (Ill. App. Ct. 2013).
174. *Id.* at 751.
175. *Id.*
176. *Id.* at 758.
177. *Id.*
178. *Id.*

G. *Duties to Third Parties*

In an unpublished decision,[179] the California Court of Appeal imposed liability on an escrow agent to a nonparty for a voluntary act. In that case, an escrow agent during a refinance contacted a third party lienholder to request a reconveyance of a trust deed in exchange for which he would get a new, subordinate lien after close of escrow.[180] The escrow agent, however, negligently prepared the second trust deed, mistakenly listing the wrong trustor.[181] The agent filed a motion for summary judgment on the third party lienholder's negligence cause of action, arguing that it did not agree to consummate properly the re-recording transaction and owed no duty of care to the lienholder.[182] The trial court granted the escrow agent's summary judgment, but the appellate court reversed.[183] After an extensive discussion of negligence claims in general, the court held that, as a matter of public policy, a person may be liable for negligent performance of a voluntary undertaking in cases involving financial loss.[184] The court rejected the escrow agent's argument that it cannot owe any duty to third parties to an escrow, such as the third party lienholder, because escrow holders cannot be liable for acts done outside of escrow.[185] The court, instead, recognized that the case involved an alleged voluntary undertaking by the escrow agent and, therefore, summary judgment in favor of the escrow agent was inappropriate.[186]

In *Yavapai Title Agency, Inc. v. Pace Preparatory Academy*,[187] a more favorable result for an escrow agent was reached. In *Yavapai Title*, Pace had signed a promissory note to a lender. Pace subsequently entered into a lease/option to purchase with the buyer to pay rent equal to the monthly note payment; the lease term was to end the day the last payment was due under the note.[188] Pace also quitclaimed the property to the buyer. The buyer sold to a third party, and the title agent did not locate and pay off the existing lien.[189] The policy insured that the second buyer's deed of trust was in a first lien position.[190] The title company paid the lender and was given a general assignment and then sued Pace and the first buyer

179. Bates v. Chicago Title Co., 2013 WL 3753062 (Cal. Ct. App. July 16, 2013).
180. *Id.* at *1.
181. *Id.* at *3.
182. *Id.* at *2.
183. *Id.* at *1.
184. *Id.* at *6.
185. *Id.* at *13.
186. *Id.*
187. 2013 WL 3368935 (Ariz. Ct. App. July 2, 2013).
188. *Id.* at *1.
189. *Id.*
190. *Id.*

to recover the sums it paid the lender. Pace filed a counterclaim against the title company for negligence,[191] and the trial court denied Pace's motion for summary judgment and granted the title insurer's cross-motion for summary judgment on the grounds that the title insurer had no duty to Pace during the second sales transaction. After an extensive review of Arizona law surrounding the existence of a duty when parties are not in privity of contract,[192] the Arizona Court of Appeals applied the general rule that privity is required for a plaintiff to assert a negligence claim against a title insurer.[193] The court also rejected Pace's argument that the title insurer breached a fiduciary duty, noting that it was no longer a party to any transaction involving Pace.[194]

Finally, the Southern District of California issued a decision favorable to escrow agents in *Jafari v. FDIC*.[195] There, the seller of a home entered into a short sale transaction. The FDIC, successor to the original lender, executed a release agreement under which, subject to certain conditions, the FDIC would reconvey the deed of trust.[196] After escrow closed and the escrow agent wired the funds to the FDIC pursuant to the release agreement, the FDIC rejected the funds, claiming certain conditions in the release agreement had not been satisfied. The payment to the FDIC was a small fraction of the amount actually outstanding on the deed of trust. The contested conditions concerned an outstanding construction loan and whether the personal guaranty signed by the construction lender would continue to apply.[197] Because the FDIC refused to reconvey the deed of trust and threatened foreclosure, the seller was left with no alternative but to pay the FDIC the amount due on the loan and sue the FDIC to enforce the release agreement.[198] The FDIC sued the escrow agent for, inter alia, breach of contract, breach of fiduciary duty, and negligence.[199] The escrow agent moved to dismiss, claiming that the FDIC was neither a party to the escrow nor an intended third party beneficiary of it and was therefore owed no duty of care.[200] The court agreed with the escrow agent. After an extensive review of California law concerning when a lender is or is not a party to an

191. *Id.* at *2.
192. *Id.* at *3–4.
193. *Id.* at *3.
194. *Id.* at *4.
195. 2 F. Supp. 3d 1125 (S.D. Cal. 2014).
196. *Id.* at 1126–27.
197. *Id.* at 1127.
198. *Id.* at 1128.
199. *Id.* at 1129.
200. *Id.*

escrow, the court found that the agent owed no duty to the FDIC because there was "no allegation that the FDIC gave any instructions to [the agent] such that [the agent] had . . . reason to know or expect that [the FDIC] was looking to [the agent] for protection as to facts learned by it."[201] Accordingly, because the agent owed no duty of care on the facts alleged, the claims for breach of fiduciary duty and negligence failed.[202] The court also rejected the FDIC's breach of contract claim, in which the FDIC argued that it was an intended third party beneficiary of the short sale.[203] The court distinguished other California cases imposing third party beneficiary status on third parties.[204] Because the FDIC never presented the release agreement to the escrow company in such a way that it could be construed as instructions from the FDIC or as the basis for a contractual relationship, the court refused to impose breach of contract liability on the escrow agent.[205] The court also rejected the FDIC's contention that it was an intended beneficiary of the joint escrow instructions.[206]

V. GOVERNMENT REGULATIONS OF THE TITLE INDUSTRY

In 1983 Congress amended the Real Estate Settlement Procedures Act (RESPA) to provide a safe harbor for "affiliated business arrangements."[207] A company referring a title insurance order to a sister company could do so consistent with RESPA if the relationship of the two entities was disclosed, the parties were able to reject the referral, and the entity making the referral only received a return, e.g., stock dividend, on its ownership interest.[208]

The Department of Housing and Urban Development issued a policy statement on Controlled Business Arrangements in 1996. The policy statement added a fourth requirement, i.e., that the entity receiving the order is a "bona fide provider of settlement services."[209] HUD then set forth ten factors it would use in determining "a bona fide provider" status.[210]

201. *Id.* at 1134–35 (citing Markowitz v. Fidelity Nat'l Title Co., 142 Cal. App.4th 508 (Cal. Ct. App. 2006)).
202. *Id.*
203. *Id.* at 1138.
204. *Id.* at 1136–38.
205. *Id.* at 1138.
206. *Id.*
207. 12 U.S.C. § 2607(e) (4).
208. *Id.*
209. Statement of Policy 1996-2 Regarding Show Controlled Business Arrangements, 61 Fed. Reg. 29258 (1996).
210. *Id.*

In *Carter v. Welles-Bowen Realty, Inc.*,[211] three Ohio consumers sued their real estate brokers and the related title agents. The Northern District of Ohio granted summary judgment to the defendants. The Sixth Circuit affirmed, finding that the companies complied with the "safe harbor" statute.[212] The "bona fide provider" requirements of the policy statement were not in the statute and were not enforceable.[213]

In *Dewrell Sacks, LLC v. Chicago Title Insurance Co.*,[214] an insurer sued a Georgia agent for unpaid premiums. The agent asserted the contract was invalid because the tiered contracts under which the agent was to pay a smaller percentage to the insurer if the agent remitted over $100,000 violated RESPA. The court held the provision was severable and would not void the entire contract.[215] The court noted that the agent did perform services for its portion of the premium.[216]

Similarly, in *Weslowski v. Title Source, Inc.*,[217] the court found that while only attorneys can conduct closings in Georgia, the defendant title companies did not violate RESPA by charging for work actually performed.

In *Commonwealth Land Title Insurance Co. v. Robertson*,[218] a title insurer had filed rates with the Indiana Department of Insurance (IDI) and allowed its Indiana agents to collect premiums from the consumer on a subjective basis for each transaction.[219] The agent was supposed to calculate the amount owed the insurer, however, based on the filed rates.[220] IDI issued an order finding this practice discriminatory in premium charges and an unsafe business practice. Moreover, it caused the insurer to underreport the premium taxes owed to the state.[221] The IDI's order was affirmed on appeal,[222] and the insurer was ordered to recalculate its premium tax owed by reviewing every title insurance transaction for the period the program was in effect.[223]

The Eleventh Circuit asked the Alabama Supreme Court to decide when an attorney-title insurance agent in the state is providing "legal service" for purposes of limitations.[224] In that case, an insurer sued an agent

211. 719 F. Supp. 2d 846 (N.D. Ohio 2010).
212. 736 F.3d 722, 729 (6th Cir. 2013).
213. *Id.*
214. 749 S. E. 2d 802 (Ga. Ct. App. 2013).
215. *Id.* at 805–06.
216. *Id.*
217. 2014 WL 2154187, at *4 (N.D. Ga. 2014).
218. 5 N.E.3d 394 (Ind. Ct. App. 2014).
219. *Id.* at 398.
220. *Id.*
221. *Id.* at 399.
222. *Id.*
223. *Id.* at 412.
224. Miss. Valley Title Ins. Co. v. Thompson, 754 F. 3d 1330 (11th Cir. 2014).

for negligently missing a lien during a title search.[225] The court noted that if the agent was providing a legal service, the claim was barred before the suit was filed, but if the agent was acting in a title agent capacity, the claim was not barred.[226]

VI. BANKRUPTCY

In *Ash v. North American Title Co.*,[227] the plaintiff was completing a tax-free exchange. Although the purchase was to close on a Friday, it did not close, due to an unspecified breach of duty by the escrow company. On the following Monday, the qualified property exchange intermediary filed a bankruptcy action.[228] The plaintiff received his funds sixteen months later, thus losing tax-free exchange status. He also incurred significant legal fees in securing the release of his proceeds by the bankruptcy court.[229] The jury awarded damages against the escrow agent for breach of contract, negligence, and breach of fiduciary duty.[230] The trial court vacated a punitive damage award of $1 million.[231] The California Court of Appeal affirmed the breach of contract finding, but reversed the damage award for that issue.[232] It also reversed the judgment on tort liability, i.e., negligence and breach of fiduciary liability.[233] After reviewing the old contracts casebook warhorse *Hadley v. Baxendale*,[234] the court found that the exchange company's bankruptcy was not foreseeable.[235] Therefore, the court held, the contract damages and tort liability issue must be re-tried with an instruction on intervening and superseding causes. Judge Kriegler filed a lengthy dissenting opinion.[236]

A Mississippi case, *Fidelity National Title Insurance Co. v. Colson*,[237] featured a title insurer seeking to have the agent's debt for losses caused by escrow account misappropriations declared non-dischargeable. The bankruptcy court based its decision on *Bullock v. Bank Champaign, N.A.*[238] In

225. *Id.*
226. *Id.* at 1332.
227. 223 Cal. App. 4th 1258 (Cal. Ct. App. 2014).
228. *Id.* at 1266.
229. *Id.* at 1267.
230. *Id.* at 1268.
231. *Id.*
232. *Id.* at 1273.
233. *Id.* at 1278.
234. (1854) 156 Eng. Rep. 145.
235. *Ash*, 223 Cal. App. 4th at 1273.
236. *Id.* at 1279–92.
237. 2013 WL 5352638 (Bankr. S.D. Miss. 2013).
238. 133 S. Ct. 1754 (2013).

that case, the U.S. Supreme Court stated that "defalcation" as used in Bankruptcy Code § 523(a)(4) "includes a culpable state of mind requirement."[239] The agent had argued the deficiency in the escrow accounts was due to sloppy bookkeeping, not reckless conduct. The court held that § 523(a)(14) applied.[240] The debt to the insurer for the escrow deficiency plus the insurer litigation costs were excepted from the discharge.[241]

239. *Id.*
240. *Fidelity Nat'l Title Ins.*, 2013 WL 5352638, at *32.
241. *Id.* at *38.