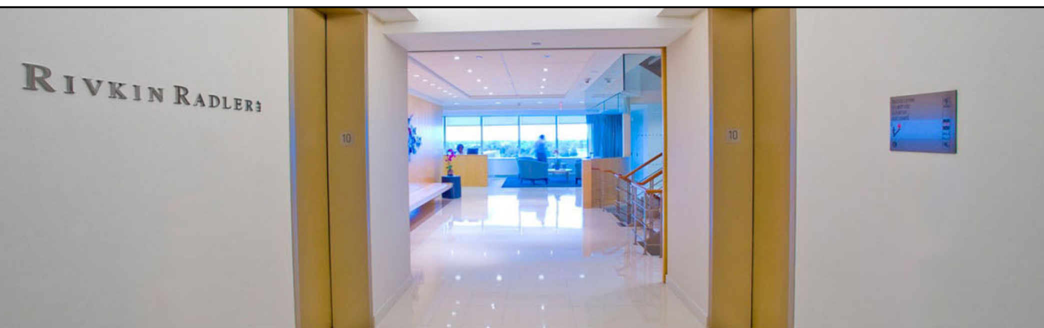

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Foreclosure Sale Price Determined Actual Loss Suffered by Insured Mortgagee Resulting from Superior Encumbrance, Connecticut Appellate Court Holds

An appellate court in Connecticut has ruled that the foreclosure sale price determined the actual loss suffered by an insured mortgagee under a mortgage title insurance policy when that loss resulted from a superior encumbrance.

The Case

On June 28, 2012, Sunford Properties & Development, LLC, borrowed $600,000 from RCN Capital, LLC. The loan was secured by a mortgage on property in Norwich, Connecticut. Chicago Title Insurance company issued a mortgage title insurance policy in favor of RCN.

Sunford defaulted on the loan and RCN filed a foreclosure action. During the foreclosure litigation, RCN learned that its rights in the property as a mortgagee were subordinate to the interest of a mortgage held by the Mashantucket Pequot Tribal Nation.

On April 27, 2015, the property became the subject of a tax foreclosure action commenced by the city of Norwich. Both RCN's mortgage and the Tribal Nation's mortgage were found to be subordinate in right to the interests of Norwich.

The court in the foreclosure action rendered a judgment of strict foreclosure and found the property to have a fair market value of $304,000. RCN purchased the property for $150,000 pursuant to the tax foreclosure. As a result of the sale to RCN, the Tribal Nation received

$108,478.32, which represented the total purchase price of $150,000 less expenses and satisfaction of Norwich's tax lien.

RCN sued Chicago Title, seeking to recover damages under its mortgage title insurance policy.

Chicago Title conceded liability and the trial court awarded RCN $108,000 in damages. The trial court rejected RCN's damages valuation of $269,337.08, which represented the fair market value of the property at the time of its foreclosure action less the $34,662.92 in taxes paid to Norwich. Rather, the trial court concluded that $108,000 was the actual loss suffered by RCN.

RCN appealed. It argued that the trial court had improperly valued its damages at $108,000, representing the actual loss of equity it would have received if its mortgage had priority over the Tribal Nation's mortgage. RCN asserted that the proper valuation of damages should have been the fair market value of the property as determined in its foreclosure action less the satisfaction of the Norwich tax lien.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that RCN could acquire title to the property free and clear of encumbrances only by satisfying the Tribal Nation's superior mortgage. The appellate court observed that the record "unequivocally" indicated that RCN would have received approximately $108,000 had its mortgage been superior to that of the Tribal Nation's mortgage.

Because its mortgage was not superior, the appellate court continued, RCN had sustained an actual loss of approximately $108,000 upon its purchase of the property pursuant to the tax foreclosure action.

The appellate court was not persuaded by RCN's contention that, due to the small number of bidders, the purchase price from the foreclosure by sale was an "unreliable valuation for purposes of damages." The appellate court acknowledged that appellate courts in Connecticut had not addressed the issue of the measurement of an actual loss sustained by an insured lender under a title insurance policy for purposes of calculating damages. It reasoned, however, that courts in other states had "used the foreclosure sale price to determine the actual loss suffered by an insured mortgagee under an insurance policy when that loss resulted from a superior encumbrance."

The appellate court adopted that standard and ruled that RCN had sustained an actual loss of $108,000. An award in excess of that amount, the appellate court concluded, would provide RCN "with an impermissible windfall."

The case is *RCN Capital, LLC v. Chicago Title Ins. Co.*, No. AC 42082 (Conn. Ct. App. March 17, 2020).

Massachusetts Appellate Court Rejects Title Insurer's Subrogation Bid

An appellate court in Massachusetts has issued a decision addressing the doctrine of subrogation in the context of a title insurance policy.

The Case

In 2001, Shane M. Kelly, who was in the business of renovating homes, acquired title to real property in the Alston section of Boston, Massachusetts.

In 2003, Kelly borrowed $322,500 from Chevy Chase Bank, F.S.B., secured by a mortgage to Mortgage Electronic Registration Systems ("MERS"), as nominee for Chevy Chase.

In 2007, Kelly granted a second mortgage on the property to JPMorgan Chase Bank, securing a promissory note for the $382,500 Kelly borrowed from JPMorgan. In connection with the second mortgage transaction, JPMorgan acquired a title insurance policy from Stewart Title Guaranty Company. At the time, JPMorgan apparently was not notified of the first mortgage.

After learning of the first mortgage, JPMorgan demanded that Kelly discharge it, relying on a provision in its mortgage allowing it to identify a priority lien on the property and, upon notice to Kelly, to require him to discharge it within 10 days. Kelly did not discharge the first mortgage.

Meanwhile, apparently in response to a claim by JPMorgan on the title insurance policy, Stewart Title had $268,084.83 paid to Chevy Chase's successor in interest to discharge the first mortgage held by MERS.

Thereafter, Stewart Title sued Kelly, claiming that it was entitled to damages against Kelly because Kelly had committed a breach of the second mortgage when he had not discharged the first mortgage and that, as JPMorgan's title insurer, Stewart Title had the right as subrogee to enforce the second mortgage against Kelly.

The trial court ruled in favor of Kelly, and the title insurer appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that Stewart Title's claim for breach of contract rested on its allegation that Kelly had committed a breach of the second mortgage when he had not discharged the first mortgage. The appellate court added that because the title insurer was not a party to the second mortgage and, therefore, had no contract with Kelly, an essential element of the title insurer's claim was proof of its status as JPMorgan's subrogee under the second mortgage.

The appellate court then ruled that Stewart Title was not JPMorgan's subrogee, finding that the title policy did not have an express subrogation clause.

The appellate court also rejected Stewart Title's argument that it was entitled to implied subrogation to pursue its contract claim because, without it, JPMorgan (its insured) would receive a windfall because it "would have benefitted by removing the priority mortgage without having to pay for this to be done." The appellate court reasoned that although the reason for implied subrogation under contracts of insurance was "to prevent an unwarranted windfall to the insured," it was "not at all clear" how allowing Stewart Title to pursue a claim against Kelly avoided a windfall to JPMorgan.

Moreover, the appellate court continued, unlike in cases allowing a title insurer to be subrogated to the rights of its insured-mortgagee against a mortgagor, Kelly was not primarily liable for JPMorgan's loss. Rather, the appellate court declared, Stewart Title bore the responsibility because it knew that a first mortgage encumbered the property but it had not disclosed that to JPMorgan, "thereby depriving JPMorgan of the opportunity to mandate that the encumbrance be cleared as a condition of the second mortgage."

Accordingly, the appellate court rejected Stewart Title's contention that it should be impliedly subrogated to the rights of JPMorgan, concluding that the "equities" did not favor the title insurer.

The case is *Stewart Title Guaranty Company v. Kelly*, No. 19-P-41 (Mass. Ct. App. April 17, 2020).

Delaware Court Dismisses Suit Against Title Insurer Brought by Insured's Husband

The U.S. District Court for the District of Delaware has dismissed a lawsuit against a title insurer brought by the husband of the named insured, who was not listed as an insured under the policy.

The Case

Ronald Angelo, Sr., *pro se*, sued Commonwealth Land Title Insurance Company. He appeared to be alleging that:

- He paid for full title coverage insurance for property in Townsend, Delaware;
- The title insurance contained exclusions;
- He did not receive coverage on all recorded documents;
- The title insurer committed insurance fraud.

Commonwealth Land Title argued that even if Angelo had pled a cognizable claim against it, he had not pled that he was an insured under any policy with Commonwealth Land Title and, even if he were, there were clear exceptions in the policy.

Angelo countered that he met all of the pleading requirements and that he had been "invoiced for full coverage and excluded for some recorded documents without [his] knowledge and permission."

Commonwealth Land Title moved to dismiss.

The Court's Decision

The court granted Commonwealth Land Title's motion, holding that Angelo's complaint failed to state a claim against Commonwealth Land Title.

In its decision, the court explained that the title policy had been issued to Rosemary Angelo for the Townsend property. The court added that Angelo seemed to allege that he might raise a claim against Commonwealth Land Title because after his wife had purchased the property and had obtained title insurance, the property had been deeded to him (along with his wife) as co-trustees under a revocable trust.

The court pointed out, however, that the title insurance policy indicated that Angelo's wife was the insured and, therefore, Angelo was not covered by the policy. Commonwealth Land Title never owed a duty to Angelo, the court declared.

The court concluded that to the extent that Angelo raised claims pursuant to a Delaware statute for insurance fraud, they failed as the Delaware statute did "not provide a private right of action."

The case is *Angelo v. NVR, Inc.*, No. 18-523-RGA (D. Del. March 24, 2020).

Exclusion Barred Coverage of Claim for Liens and Work Performed After Title Insurance Policies Were Issued, Texas Court Rules

The U.S. District Court for the Northern District of Texas has granted summary judgment in favor of a title insurer, finding that an exclusion in its title insurance policies barred coverage of a claim for liens and work performed after it had issued the policies.

The Case

The Cal Neva Lodge & Casino, a property that Frank Sinatra co-owned in the 1960s, sits on Lake Tahoe and straddles the California/Nevada Line. On September 30, 2014, Hall CA-NV, LLC, authorized up to $29 million in debt financing to New Cal-Neva Lodge, LLC, the owner of the

property. In connection with that financing, Hall required that New Cal-Neva's general contractor, The Penta Building Group, LLC, enter into a subordination agreement and a "Contractor's Agreement and Consent to Assignment of Construction Documents" providing that Penta agreed to subordinate any mechanic's lien it might ever have in favor of Hall.

Hall secured the loan with construction deeds of trust filed in California and Nevada. Old Republic National Title Insurance Company issued title insurance policies to Hall in connection with the loan for California and Nevada dated October 2, 2014.

In February 2016, Penta recorded a mechanic's lien in Nevada, claiming a balance of over $7.9 million. Penta subsequently sought to foreclose on the lien. Penta also filed mechanic's liens in California. New Cal-Neva entered bankruptcy and Hall filed a claim under its title insurance policies with Old Republic.

In 2017, the bankruptcy court held that Hall's subordination agreement with Penta was unenforceable with respect to that portion of the property located in Nevada. In January 2018, Hall sold the property for $38 million; Penta received just over $7.9 million for its liens and Hall received $26,753,429. Hall claimed a loss of at least $4,940,044. Old Republic did not object to the settlement or dispute that Penta's liens took priority, but Old Republic refused to indemnify Hall for the amount Hall said it had lost.

Hall sued Old Republic, asserting claims for breach of contract, breach of the duty to defend, breach of the duty of good faith and fair dealing, and violations of Chapter 541 of the Texas Insurance Code.

The parties moved for summary judgment.

The Court's Decision

The court, applying Texas law, denied Hall's motion, granted Old Republic's motion, and dismissed the action.

In its decision, the court held that there was no coverage under the Nevada or California title insurance policy for Hall's claim because Exclusion 3(d) of the title insurance policies barred claims for liens and work performed after the policy date. The court pointed out that Hall had not raised a genuine dispute of material fact that the Penta liens were for unpaid work that had taken place before the policies had been issued.

The court also ruled that Hall's claim of a breach of the duty to defend and extra contractual claims failed to raise a genuine dispute of material fact as to an independent injury (apart from the denial of coverage) that Hall had suffered as a result of the alleged breach of contract.

The case is *Hall CA-NV, LLC v. Old Republic National Title Ins. Co.*, No. 3:18-CV-00380-X (N.D. Tex. Feb. 20, 2020).

Failure of County Easement to Be Documented in "Public Records" Doomed Property Owners' Claims Against Title Insurers

The U.S. District Court for the District of Idaho has ruled that title insurers had no duty to indemnify or defend property owners against claims relating to a county ordinance restricting winter access to a road running through their property.

The Case

On January 17, 2006, Bannock County, Idaho, passed an ordinance designating multiple roads and trails as part of the "Scout Mountain Loop snowmobile trail." The ordinance prohibited vehicular traffic, except for snowmobile traffic, on the designated roads and trails – including a road known as the Upper Garden Creek Road – during the winter season (December 15 to April 15).

A number of years later, Dennis and Sherrilyn Munden purchased land in the county (the "North Garden Creek property") and obtained a title insurance policy from Stewart Title Guaranty Company.

Thereafter, the Mundens purchased additional land in the county (the "South Garden Creek property") and obtained a title insurance policy from Chicago Title Insurance Company.

The Upper Garden Creek Road ran through the Mundens' North Garden Creek and South Garden Creek properties.

On January 8, 2019, the county amended its 2006 ordinance to provide that the designated snowmobile roads and trails, including the Upper Garden Creek Road, "shall be closed . . . at the discretion of the County Public Works Director."

After the county passed its 2019 ordinance, the Mundens sued. The county contended that its ordinances were proper because the Upper Garden Creek Road had been a public highway since well before the Mundens had purchased their property. In addition, the county counterclaimed against the Mundens. The Mundens notified their title insurers, seeking defense and indemnification. The Mundens asserted that the county's claims affected the value and marketability of their titles.

The title insurers denied the Mundens' notice of claims, and the Mundens sued.

The title insurers moved for summary judgment. They contended that coverage was excluded because the county's claim that Upper Garden Creek Road was a public road was not shown by "public records," as defined by their title insurance policies.

For their part, the Mundens argued that Upper Garden Creek Road had been listed as a public county road on Idaho Department of Transportation maps and on county road maps before they had purchased their properties.

The Court's Decision

The court granted the title insurers' motions.

In its decision, the court ruled that the insurers were not obligated to indemnify and defend the Mundens' title relating to their dispute with the county over whether the Upper Garden Creek Road had been established as a public road prior to the Mundens' purchase of the property because the notice of its establishment as a public road had not been "recorded as a public record" as defined by their title insurance policies. The court agreed with the insurers that because ordinances and county road maps were "not filed with the County Recorder to provide constructive notice to purchasers for value," they were not public records within the meaning of the title insurance policies.

The court concluded that, even construing all facts in the Mundens' favor, they could not prevail on their claims for declaratory relief, defense and prosecution of action, indemnification, and breach of contract because the disputed easement was "not found on the public record, as defined by the title insurance policies."

The case is *Munden v. Stewart Title Guaranty Co.*, No. 4:19-cv-00112-DCN (D. Idaho March 11, 2020).

Colorado Court Rejects Insured's Challenge to Arbitrator's Awardand Sanction Order

The U.S. District Court for the District of Colorado has ruled in favor of a title insurer and confirmed an arbitrator's award and sanction order against the insured.

The Case

Good Funds Lending, LLC, a commercial loan provider, loaned $220,700 to C3 Investments LLC. In connection with the loan, Westcor Land Title Insurance Company issued a title insurance policy to Good Funds Lending.

C3 defaulted on the loan and despite selling the property securing the loan, Good Funds Lending was left with a deficiency of $198,350.19. Prior to the foreclosure sale, Good Funds Lending filed a claim on the title policy and spent $1,820.25 on a survey related to the claim.

Good Funds Lending objected to how Westcor handled the claim and initiated a claim with the National Arbitration Forum. The arbitrator found in favor of Good Funds Lending on its claims for breach of the title policy and breach of the covenant of good faith and fair dealing claims. Consequently, the arbitrator awarded Good Funds Lending the amount of its deficiency ($198,350.19) plus the cost of the survey ($1,820.25) for a total award of $200,170.44, plus eight percent statutory interest compounded annually.

The arbitrator, however, found that Good Funds Lending's claims of bad faith, breach of closing instructions, breach of fiduciary duty, and exemplary damages lacked substantial justification and awarded Westcor $70,129.38.

Good Funds Lending moved to clarify its award and asked the arbitrator to adjust the interest portion of it to reflect a 25 percent default interest rate, compounded daily. The arbitrator

found that Good Funds Lending's motion was disingenuous and that it lacked substantial justification, and sanctioned Good Funds Lending by ordering it to pay Westcor's attorneys' fees ($1,000) and the arbitrator fees ($750) incurred in responding to Good Funds Lending's clarification motion.

Thereafter, Westcor delivered to Good Funds Lending's counsel a letter and check payable to Good Funds Lending in the amount of $181,083. That amount, according to Westcor, was the difference between what Good Funds Lending was entitled to receive (at eight percent interest, compounded annually for about three years) minus the award to Westcor and the sanction order, rounded to the nearest dollar.

Good Funds Lending filed an amended petition, seeking to confirm the arbitrator's award in its favor in the amount of $200,170.44.

In response, Westcor asked the court to enter an order of satisfaction.

The Court's Decision

The court ruled in favor of Westcor.

In its decision, the court found that Westcor's payment of $181,083, which included offsets, "fully satisfied the arbitration award." The court pointed out that Good Funds Lending sought confirmation of the arbitrator's award in the amount of $200,170.44, but that, in doing so, it ignored "all the amounts payable to Westcor." The court rejected "engaging in such a piecemeal evaluation of the arbitrated issues."

The court determined that, because the $1,000 sanction order was final, it should confirm the arbitrator's award and sanction order. Accordingly, it concluded, Westcor's payment of $181,083 was in full and final satisfaction of the arbitrated dispute.

The case is *Good Funds Lending, LLC v. Westcor Land Title Ins. Co.*, No. 19-cv-00861-RM-MEH (D. Colo. March 30, 2020).

New Mexico Court Rejects Suit Seeking to Hold Title Insurer Liable for Title Agent's Alleged Negligence

A federal court in New Mexico has dismissed a lawsuit against a title insurance company that sought to hold it liable for the alleged negligence of its title agent.

The Case

Edward Mazel, the Chapter 7 trustee of the bankruptcy estate of Bryan A. Lamey, and United Real Estate Las Cruces, LLC, (together, the "plaintiffs") sued Fidelity National Title Insurance Company, seeking to hold it liable for the alleged conduct of its title agent, Las Cruces Abstract and Title Company ("LCAT"). The plaintiffs asserted claims against Fidelity for constructive fraud, civil conspiracy, professional negligence, and unfair trade practices. The plaintiffs did not allege in these claims that Fidelity had taken or had omitted to take any action. Rather, each count ended with the allegation that "[a]s LCAT's principal," Fidelity was "liable for the acts and omissions of LCAT."

Fidelity moved for summary judgment.

The Court's Decision

The court granted Fidelity's motion, holding that Fidelity could not be sued in tort for LCAT's work as Fidelity's title agent.

In its decision, the court first analyzed whether the holder of a title insurance policy could sue the insurer in tort if there was a title problem caused by the local title agent's negligence. The

court noted that the case law was split and that New Mexico appellate courts had not yet ruled on the issue.

The court then predicted that the New Mexico appellate courts would not allow the insured under a title policy to sue the insurer in tort if the insured believed the local title agent had been negligent in its title work. The court reasoned that allowing insureds to bring tort claims against insurers in addition to contract claims "would disrupt the regulatory and pricing scheme enacted by the legislature."

Accordingly, the court ruled, the plaintiffs' claims against Fidelity failed to the extent they were based upon LCAT's alleged negligence when acting as Fidelity's title agent. Instead of being able to sue Fidelity for vicarious tort liability, the plaintiffs were "limited to a claim under the title policy," the court declared.

The court then rejected the plaintiffs' argument that LCAT had been Fidelity's agent when LCAT provided escrow services for a fee and allegedly had failed to insist on a release of a mortgage as a condition to closing.

The court reasoned that, under New Mexico law, LCAT did not have actual authority to act on Fidelity's behalf when LCAT provided escrow services to the parties. Indeed, the court continued, the agency agreement between Fidelity and LCAT expressly prohibited LCAT from acting as Fidelity's agent "with regard to escrow matters or the settlement of real estate transactions."

The court explained that New Mexico's appellate courts had not considered whether a local title agent/producer had actual authority to act for a title insurer in providing escrow services for a fee, but that courts in other jurisdictions had "uniformly rejected" that argument. The court

said that it agreed with this line of cases, and that "the alternative would require mis-reading or ignoring the clear terms of the agency agreement."

Finally, the court ruled that LCAT also had no apparent authority to act as Fidelity's agent for escrow services. Among other things, the court pointed out that the three documents that the plaintiffs cited in support of their argument had been created by LCAT, not Fidelity. "The appearance of authority must come from the principal rather than the agent," the court stated.

The court concluded that the title commitment, which had been issued before closing by LCAT rather than by Fidelity, did not cloak LCAT with apparent authority to act as Fidelity's agent when providing escrow services. The court found the evidence of apparent authority "completely lacking," stating that if it held otherwise, "every title insurer doing business in New Mexico would be vicariously liable for the negligence of their local title companies when they (as so often happens) don their other hat and provide escrow services for a fee."

The case is *Mazel v. Las Cruces Abstract & Title Co.*, No. 14-13729 ta7, Adv. No. 18-01057-t (Bankr. D.N.M. April 15, 2020).

Exclusion Barred Coverage of HOA's Claim, Nevada District Court Decides

The U.S. District Court for the District of Nevada has ruled that

The Case

Alesandra and Robert Leckie (together, the "Borrowers") purchased real property in Reno, Nevada, that was located within the Arrow Creek Homeowners Association (the "HOA") with a loan in the amount of $1,500,000 secured by a first deed of trust. The deed of trust identified American Brokers Conduit ("ABC") as the lender, Western Title Company, Inc., as the trustee, and

Mortgage Electronic Registration Systems, Inc. (“MERS”) as beneficiary under the deed of trust, acting as a nominee for the lender and for the lender’s successors and assigns.

Thereafter, all beneficial interest in the deed of trust was conveyed to Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc., Asset-Backed Pass-Through Certificates, Series 2002-C by way of assignment. Deutsche became the assigned beneficiary under the deed of trust by way of a corporate assignment recorded against the property.

Fidelity National Title Insurance Company’s predecessor, Lawyers Title Insurance Corporation, issued a title insurance policy in connection with the recordation of the deed of trust. The policy identified ABC and its successors and/or its assigns as the insured.

After the HOA recorded a notice of delinquent assessment lien against the property, the HOA sold the property (the “HOA Sale”) to LVDG LLC Series 180 (the “Buyer”). The Buyer subsequently conveyed its interest in the property to Thunder Properties Inc. (the “Titleholder”).

Thereafter, Deutsche’s servicer, Ocwen Loan Servicing, LLC, provided written notice to Lawyers Title that the Titleholder was claiming an interest in the property superior to the deed of trust. The tender letter requested both indemnity and defense from Lawyers Title.

Fidelity responded, denying the claim on the basis that the claim did not fall within the insuring provisions of the policy and that the HOA lien had been created after the date the policy had been issued.

Deutsche sued Fidelity for breach of contract.

Fidelity moved to dismiss. It argued, among other things, that Exclusion 3(d) in its policy, which excluded coverage for loss or damage by reason of defects, liens or adverse claims, among

other things, that attached or were created subsequent to the "Date of Policy," precluded coverage of Deutsche's claim for breach of contract.

The Court's Decision

The court granted Fidelity's motion, finding that Exclusion 3(d) barred coverage.

In its decision, the court pointed out that the "Date of Policy" was December 29, 2006 and that the defect – the HOA's lien for delinquent assessments – arose after that date because the HOA's lien did not first become due until 2010.

Accordingly, the court ruled, there was no coverage per Exclusion 3(d).

The court rejected Deutsche's contention that paragraphs 1(a) and 2(a) of Endorsement 100 and 115.2 afforded coverage despite Exclusion 3(d). Paragraph 1(a) provided coverage against loss or damage that the insured sustained by reason of the existence of "[c]ovenants, conditions or restrictions under which the lien of the mortgage . . . can be cut off, subordinated, or otherwise impaired." Paragraph 2(a) extended insurance for "[a]ny future violations on the land of any covenants, conditions or restrictions occurring prior to acquisition of title to the estate or interest . . . by the insured, provided such violations result in impairment or loss of the lien of the mortgage."

The court reasoned that paragraph 1(a) did not provide coverage because Deutsche's loss occurred as a function of Nevada law governing HOA liens – not by reason of any covenants, conditions, or restrictions. It also decided that paragraph 2(a) was inapplicable because it referred to "violations on land" and extended only to physical violations.

Finally, the court was not persuaded by Deutsche's argument that coverage was extended by Endorsement 115.2, which insured against loss or damage sustained by reason of "the priority of any lien for charges and assessments at Date of Policy in favor of any association of

homeowners." The court concluded that, by its explicit language, this provision did not cover the HOA's lien because the HOA's lien was a post-policy attachment.

The case is *Deutsche Bank National Trust Co. v. Fidelity National Title Ins. Co.*, No. 3:19-cv-00468-MMD-WGC (D. Nev. April 2, 2020).

Washington Supreme Court Rules That Title Insurer Breached Duty to Defend Insureds Against Native American Tribe's Claim Under 1854 Treaty

The Supreme Court of Washington has ruled that a title insurer had a duty to defend its insureds against a Native American tribe's claim that, under an 1854 treaty, it could enter their property and harvest shellfish, and that the insurer had breached that duty in bad faith when it had unreasonably failed to provide a defense.

The Case

In 1978, Leslie and Harlene Robbins purchased property in Mason County, Washington, that included tidelands with manila clam beds. In connection with the purchase of the property, the Robbinses obtained a title insurance policy from Mason County Title Insurance Company, now known as Retitle Insurance Company ("MCTI").

In 2015, a Native American tribe – the Squaxin Island Tribe (the "Tribe") – sent the Robbinses a formal letter notifying them of the Tribe's plan to enter their property and harvest shellfish in accordance with the 1854 Treaty of Medicine Creek (the "Treaty") and a 2002 Shellfish Implementation Plan.

MCTI denied the Robbinses' request for a defense because, in MCTI's view, the Tribe's asserted right was an "easement" and the Treaty was "not a record that imparts constructive

notice pursuant to Washington law." Thus, MCTI claimed that the Tribe's rights under the Treaty were "not within the scope of this policy."

The Robbinses sued MCTI in a state court in Washington, alleging that MCTI had breached its duty to defend.

The trial court granted MTCI's motion. An intermediate appellate court reversed, holding that the Tribe's letter was a "demand" under the policy that triggered the duty to defend, that the Tribe's asserted right was a profit à prendre (a "profit"), and that a profit was not an easement. Finding the breach of the duty to defend "unreasonable," the appellate court also held that, as a matter of law, MCTI had acted in bad faith.

The dispute reached the Supreme Court of Washington.

The Washington Supreme Court's Decision

The Supreme Court of Washington affirmed, holding that because the insurance policy conceivably covered the Tribe's rights under the Treaty and no exceptions to coverage applied, MCTI owed the Robbinses a duty to defend and, in failing to provide a defense, that MCTI had breached that duty. The Washington Supreme Court also ruled that the breach was unreasonable and, therefore, that MCTI had acted in bad faith.

In its decision, the court ruled that the Tribe's letter was a "demand" within the meaning of the MCTI policy. The court pointed out that the MCTI policy indicated that MCTI would defend not only against legal proceedings but also against demands. Therefore, the court ruled, the duty to defend had been triggered when the Tribe sent the letter to the Robbinses, and MCTI was required to defend the Robbinses unless an exception under the policy applied.

The court noted that the MCTI policy excepted from coverage "public or private easements not disclosed by the public records," but ruled that this exception did not apply. The court decided

that the Tribe's right "squarely" fit within the definition of a profit. However, the court declined to rule on whether a profit was a type of easement, based on uncertainty in the law on that issue. It then stated that, because "any uncertainty in the law must be construed in favor of the insured," the policy exception for "easements" did not apply to the Tribe's right, and MCTI had a duty to defend.

Finally, the court decided that MCTI had acted in bad faith because it had unreasonably failed to defend against an asserted right. The court pointed out that "MCTI did not defend under a reservation of rights but, instead, refused to defend based on its own interpretation of the policy and the law." As a result, the court held that MCTI had breached the duty of good faith as a matter of law and it presumed harm to the Robbinses.

The court remanded the case to the trial court for it to consider MCTI's affirmative defenses, given that the Robbinses had not explicitly moved for summary judgment on those defenses.

The case is *Robbins v. Mason County Title Ins. Co.*, No. 96726-1 (Wash. May 7, 2020).

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