

**In the Supreme Court  
Appeal from the Michigan Court of Appeals  
Murphy, C.J., and Markey and Riordan, JJ.**

---

Bank of America, N.A.,

Plaintiff-Appellant

v.

First American Title Insurance Company; Patriot Title Agency, LLC; Kirk D. Schieb; Westminster Abstract Company doing business as Westminster Title Agency, Inc.; The Prime Financial Group, Inc.; Valentino M. Trabucchi; Pamela S. Notturmo, formerly known as Pamela S. Siira; Douglas K. Smith; Joshua J. Griggs; Nathan B. Hogan; State Value Appraisals LLC, and Christine D. Mays,

Defendants-Appellees,

and

Fred Matson, Michael Lynett, Jo Kay James, and Paul Smith,

Third-party Defendants.

Supreme Court No.: 149599

Court of Appeals No.: 307756

Oakland CC No.: 2010-11206-CK

---

**PLAINTIFF-APPELLANT BANK OF AMERICA, N.A.'S SECOND SUPPLEMENTAL  
AUTHORITY LETTER**

Richard J. Landau (P42223)  
Christopher A. Merritt (P70924)  
RJ LANDAU PARTNERS PLLC  
Attorneys for Plaintiff-Appellant Bank  
of America, N.A.  
5340 Plymouth Road, Suite 200  
Ann Arbor, Michigan 48105  
(734) 865-1585  
[rjlandau@rjgps.com](mailto:rjlandau@rjgps.com)  
[cmerritt@rjgps.com](mailto:cmerritt@rjgps.com)

The Bank submits this Supplemental Authority Letter to apprise the Court of new authority regarding the application of the full credit bid rule to third parties. First American has argued that the Bank did not suffer an “actual loss” because it made full credit bids on two of the subject properties (First American Br, pp 10-11) and ALTA has argued that allowing the Bank to recover under the CPLs for these properties would amount to a “double recovery” (ALTA Br, pp7-8). But according to Professor Joyce Palomar’s updated treatise, *Title Insurance Law*, the amount of a lender’s credit bid should not measure the lender’s loss, and even when a lender makes a full credit bid, it still has an action to recover its actual loss from the title insurer.<sup>2</sup> (Ex. A, pp 11-12.)<sup>3</sup> According to Professor Palomar, the full credit bid defense raised by title insurers is in conflict with the language of their contracts, and title insurers should not receive the benefit of the full credit bid rule. (*Id.*, pp 7, 12.) Professor Palomar also notes in her updated treatise that the decision in *New Freedom Mtg Corp v Globe Mortgage Corp*, 281 Mich App 63; 761 NW2d 832 (2008)—the first Michigan court to apply the full credit bid rule to third parties and the principal case relied on by Defendants—appears wrong based on the language of Michigan’s anti-deficiency statute. (See Ex. B, p 5.)<sup>4</sup> Professor Palomar also criticizes the case law cited by ALTA on pages 8 and 9 of its brief for the proposition that Michigan should apply the full credit bid rule to non-borrower third parties. (Ex. A., pp 9-11.) Professor Palomar also suggests that title insurers should not be allowed to rely on the full credit bid rule unless the contracts drafted by these insurers (like CPLs) expressly say that a full credit bid terminates coverage. (See Ex. A, p 8.)

Respectfully submitted,

---

<sup>2</sup> Professor Palomar relies in part on Professor Barlow Burke’s treatise, *The Law of Title Insurance*. (Ex. A, p 11.) ALTA cites Palomar’s treatise and Burke’s treatise in its brief. (ALTA Br, p 2.)

<sup>3</sup> Professor Palomar’s analysis of the full credit bid rule as it relates to claims against title insurers is found on pages 7 to 12 of § 6:19.

<sup>4</sup> Professor Palomar’s analysis of the full credit bid rule as it relates specifically to CPL claims is found on page 5 of § 20:20.

August 24, 2015

**RJ LANDAU PARTNERS PLLC**

By: /s/ Richard J. Landau  
Richard J. Landau (P42223)  
Christopher A. Merritt (P70924)  
Attorneys for Bank of America, N.A.  
5340 Plymouth Road, Suite 200  
Ann Arbor, MI 48105  
(734) 865-1585  
[rjlandau@rjlp.com](mailto:rjlandau@rjlp.com)  
[cmerritt@rjlp.com](mailto:cmerritt@rjlp.com)

RECEIVED by MSC 8/24/2015 11:17:46 AM

# EXHIBIT A

## 1 Title Ins. Law § 6:19 (2014-2015 ed.)

Title Insurance Law  
Database updated August 2015  
Joyce D. Palomar  
Chapter 6. Exclusions from Coverage

## References

## § 6:19. Defects causing “no loss or damage”—Existence of a title defect versus out-of-pocket loss

Most courts and commentators agree that a title insurance policy is an indemnity contract.<sup>1</sup> A duty to indemnify obligates an insurer either to reimburse the insured for losses incurred directly by the insured or to pay sums that the insured has become legally obligated to pay others.<sup>2</sup> Only a few courts have held that, because of title insurance's title examining and risk eliminating functions,<sup>3</sup> the title insurance policy is more in the nature of a covenant against encumbrances<sup>4</sup> or a title guaranty.<sup>5</sup>

*Owners Policies*

In the context of owner's title insurance, insureds have claimed against their insurers upon discovering that title is not as stated in the policy, even though no third party has yet asserted an interest causing the insured an out-of-pocket loss. Conversely, title insurers contend that if title insurance is an indemnity contract, then the insured may not recover until the insured has become obligated to spend money because of a superior claimant's assertion of the title defect. Title insurers maintain that if they are required to pay before the insured has sustained an out-of-pocket loss, the insured receives a windfall which it might never have to apply to clear the title.

In *Sattler v. Philadelphia Title Insurance Co.*,<sup>6</sup> the Superior Court of Pennsylvania held that the title insurer was not liable for failing to show a lien which encumbered the insured title. Though the title was not unencumbered as was stated on the face of the policy, and though the lien arguably clouded the title, the court ruled that “[a] title insurance policy is a contract of indemnity and not of guaranty. Unless and until a loss occurs, there is no liability.” Since there was no present risk of the lien's being enforced against the insured, the court held that the insured had not shown an actual loss. The insured's claim against the title insurer failed.<sup>7</sup>

Nevertheless, the *Sattler* court's position has been adopted by only a minority of courts in the context of owner's title insurance. The majority of courts, instead, recognize that doubt as to the status of the title can immediately cost an insured owner the freedom to develop, sell, or mortgage property.<sup>8</sup> Within this majority group, Texas courts have reasoned that, to the extent of the policy's description of the insured estate or interest, a title insurance policy must be considered a guaranty. In *Lunt Land Corp. v. Stewart Title Guaranty Co.*,<sup>9</sup> the insured discovered that the insured title was encumbered by a pipeline easement which had not been disclosed in or excepted from the policy. The Texas Supreme Court held that the value of the land was diminished by the mere existence of a pipeline easement, without any requirement of out-of-pocket expense. While the policy was in one respect a contract of indemnity, it was also intended to be a guaranty in that the parties “must be held to have agreed that the insured under the policy would be made whole, in what both parties supposed he had by way of title to real property, in the event it should later be discovered that he held a lesser estate.”<sup>10</sup>

The other courts in the majority group maintain that title insurance is a contract of indemnity but still find that an insured owner sustains a loss from the existence of a lien or encumbrance because the fee interest is immediately diminished.<sup>11</sup> Where the title defect is an easement over the insured property, the California Court of Appeals has held that the damage arises from the cloud on the title on the date the defect is discovered. The court found that the insured was entitled to recover upon proving the existence of the easement and diminution of the property's market value.<sup>12</sup> Other courts similarly have

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

found that insured owners are entitled to the amount that the existence of an easement diminishes the property's market value as of the date the easement is discovered.<sup>13</sup> This has been true whether or not the easement owner has exercised rights as to the easement, and whether or not the insureds have sold the property at a loss.<sup>14</sup> The Alabama Supreme Court concluded that to hold otherwise would be to allow title insurers to conceal or neglect to search for defects in title “on the calculation that the title might never be challenged and thereby cause a loss under the title policy.”<sup>15</sup>

Where the title defect was of record prior to the transaction in which the insured took title, other courts have reasoned that the insured purchaser suffers a loss even without the assertion of a third-party claim because the insured presumably paid a higher price for the property than it would have had the insurer disclosed the title defect in the preliminary title report.<sup>16</sup>

Title insurers' refusal to recognize a “loss” until an insured owner has lost or paid money out of pocket is no easier to defend after the 1987 revision of American Land Title Association owner's policies. The 1970 version of ALTA standard owner's policies limited the title insurer's liability to the least of (i) the insured's “actual loss” or (ii) the amount of insurance stated in Schedule A.<sup>17</sup> To abate the incessant litigation over the meaning of the term “actual loss,” the ALTA in 1987 revised this policy condition and limited the title insurer's liability to the least of (i) the amount of insurance stated in Schedule A, or (ii) “the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.”<sup>18</sup> This latter phrase was the definition that courts had frequently adopted when determining an insured owner's “actual loss” under the 1970 policy. Thus, one reading of this revision is that replacing the phrase “actual loss” with this definition was title insurers' acknowledgement of the ruling of the majority of courts that an insured owner sustains a loss as soon as an unexcepted lien, encumbrance, or title defect makes the insured property interest less valuable.

Yet, the 1987 revision of this policy condition also added a sentence as a preface to limitations (i) and (ii) which states that the title insurance policy “is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against....”<sup>19</sup> Title insurers contend this sentence means that an insured owner who discovers an unexcepted lien, encumbrance, or title defect has no indemnifiable loss unless, because of the title problem, the insured also has had to pay money to a third party or receive less money for a transfer of the land. They contend that this sentence makes such an out-of-pocket loss a prerequisite for a claim, and then limitations (i) and (ii) cap the amount of the insurer's liability for that loss. However, an alternate interpretation is that the prefatory sentence states the requirement of an “actual monetary loss” and then clauses (i) and (ii) define the insurer's maximum liability and the term “actual monetary loss.” This second interpretation is not unreasonable, since, as the preceding paragraph explains, courts for years have defined the amount of an insured's “actual loss” in basically the language that ALTA used in clause (ii). Furthermore, an insured does suffer a financial or “monetary” loss when its property becomes less valuable because of a lien, title defect, or encumbrance that limits marketability or use.

Of course, when language in an insurance policy may reasonably be interpreted in more than one way, courts are to adopt the interpretation favoring the insured, rather than the insurer, who had the opportunity to choose the contract terms. Therefore, if title insurers have decided that “actual loss” should mean that an insured owner must have had to pay a third party or sell the land to a third party at a loss, they need to revise the owner's policy to expressly say so.

Recognizing a loss from the existence of an unexcepted title defect that decreases the market value of the property interest, without waiting for an out-of-pocket payment to a third party or a subsequent transfer at a loss, also yields more commercially efficient and economically reasonable results. If it were concluded that an insured only sustains a loss, and therefore a title insurer is only obligated to investigate a claim, when the insured has sold the property to a third party at a loss or been forced to pay a third party's claim, then the time and opportunity costs incurred during the insurer's investigation and efforts to clear title would always delay pending transactions and harm third parties as well as the insured. Losses would always be maximized. One of many examples of this economic inefficiency is a recent claim made by insureds who learned that the only road to their acreage, which bordered on a river, actually was on private land. The landowner recorded a “Notice of Private Road” which stated that he was not immediately prohibiting property owners along the river from using the road but was constructing a gate over the road to discourage public access. The notice also stated that the landowner reserved the

right to restrict use of the road in the future. Certainly, land with access that is only permissive and subject to being restricted or withdrawn at any time is less valuable than land to which a legal right of access is attached. If the insured's loss was recognized upon discovery of the lack of legal access, the title insurer would at that time be obligated to begin investigating whether it could purchase a right-of-way easement or bring an action to declare a prescriptive or implied easement. Yet, the title insurer denied the claim on the grounds that the insured had not yet suffered a loss and would not until the landowner actually stopped the insured's use of the road or the insured sold the land at a loss because of the lack of a right of access. The title insurer's interpretation of this policy condition, thus, would permit it to ignore the existing title problem until the loss is exacerbated because either the insured can no longer get to or from its property or a third party has refused to pay full value for the land in a contract of purchase due to the lack of a right of access. Either scenario increases the insured's damages; in the second scenario, a third party suffers time and opportunity costs as well.

When dealing with the issue of loss or damage, courts, insureds, and title insurers must remember the context is both a contract of insurance and a real property transaction. The mere existence of an encumbrance or defect in an insured title may not constitute the economic injury required for damages in contract or in tort but may cause a loss of one of the rights in the bundle ascribed to the insured estate in land. For example, an insured whose title policy insures title in fee simple instantly has fewer rights to use the property or to profit from his or her ownership when it is found that he or she actually acquired only a life estate, fee simple subject to defeasance, or fee subject to a mortgage or easement. His or her ability to use, sell, or mortgage the land is impaired immediately, even though years may pass before a third party asserts its interest or the insured sells the property and suffers pecuniary damage. Thus, indemnification in the context of an owner's title insurance may properly include making good the loss that results from the acquisition of a less valuable estate in land rather than the more valuable estate insured. Courts have applied this reasoning when:

- (1) The apparent validity of the claim leaves no doubt that it could be successfully enforced against the insured;<sup>20</sup>
- (2) The unasserted title defect is a government lien;<sup>21</sup>
- (3) The discovered encumbrance inhibits the insured's ability to improve the property and achieve the expected return from its investment;<sup>22</sup>
- (4) The insured closed the real estate transaction in reliance on the policy's stating that the insured would acquire the particular estate insured;<sup>23</sup> and
- (5) The encumbrance or title defect was discoverable at the time that the policy was issued.<sup>24</sup>

#### *Loan Policies*

In the context of a loan policy, on the other hand, the majority rule has become that no loss accrues from the mere existence of a defect in the insured mortgage lien. Title insurers have reasoned that, although a mortgage is invalid or a superior lien reduces the status of an insured first mortgage to a second or third lien, the insured lender is not damaged so long as the potential exists for the mortgagor to repay the loan.

If the mortgagor defaults and the insured mortgage lien is discovered to be invalid and unenforceable, the insured mortgagee then has a payable loss.<sup>25</sup> In contrast, if the mortgagor defaults, but the insured mortgage lien can be foreclosed against the real property security, the insured lender has no pecuniary loss if the property brings a price at foreclosure sufficient to pay the debt to the insured lender. According to the title insurer, so long as the insured lien is enforceable, to pay the lender prior to default and foreclosure sale would be contrary to the principle of indemnification, since it could result in a windfall to the lender if either the borrower or a sale of the property subsequently repays the lender in full.

A case in point is *Green v. Evesham Corp.*<sup>26</sup> The Superior Court of New Jersey held that a title insurance policy does not guaranty that the insured holds the property interest described in the policy. Instead, it offers to indemnify if the insured suffers a loss because the title is other than as described. Since an insured mortgagee suffers no pecuniary loss unless the paramount

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

lien rendered the mortgagee undersecured or unable to collect the full amount owed, the court held that the insured's claim was premature.<sup>27</sup> The Wisconsin Supreme Court agreed, distinguishing the requisites for a loss under a lender's policy from those under an owner's policy.<sup>28</sup> The court ruled that an insured owner suffers a loss upon discovery of a lien because the owner's fee interest is immediately diminished; however, when the insured is a mortgagee, no loss accrues unless and until the mortgagor defaults on the loan.<sup>29</sup> According to the court, even then a loss triggering the policy's coverage is only found if the mortgagee is then unable to collect the full amount owed by foreclosing.<sup>30</sup>

Although the majority of courts agree that the mere existence of a prior lien or encumbrance is insufficient to establish an actual loss under a lender's policy when the insured mortgage can be foreclosed, they disagree on exactly what the insured must show.

—*Lender's loss from being undersecured*

Some courts within this majority group only require the insured mortgagee to show that the unexcepted lien or encumbrance has reduced the value of its security sufficiently to make the mortgagee undersecured.<sup>31</sup> These courts do not make insured mortgagees wait for a default and foreclosure sale before recovering, recognizing that receiving less than the amount of the indebtedness in a foreclosure sale is only one way of demonstrating the damage to a mortgagee from the existence of a prior lien.<sup>32</sup> One court has reasoned that the title the insured lender would acquire by purchasing at foreclosure would be unmarketable due to the prior lien or encumbrance, and the law requires no one to purchase an unmarketable title.<sup>33</sup> Other courts have held that the loss actually was sustained when the insured invested in the inferior mortgage. Courts have been most likely to reach this result when the insured made the investment in reliance upon title policy representations as to the mortgage's priority.<sup>34</sup> The amount of the insured's loss is the extent to which the insured mortgagee's security is impaired by the prior lien.<sup>35</sup>

—*Lender's loss from invalid or unenforceable mortgage lien*

Where the defect in title was not a prior lien but a defective execution of the insured mortgage, the Seventh Circuit Court of Appeals has held that a compensable loss occurred when the defective mortgage was given. The court's theory was that the insured lender invested money on the basis that it would have a valid mortgage, not a voidable or void one, to secure the loan.<sup>36</sup> Therefore, the court held that the insured was entitled to monetary damages incurred by reason of falling property values during the time required for the insurer to establish title in the insured. The Tenth Circuit Court of Appeals, conversely, has said that a title insurance policy is *not* a warranty deed covenant and is *not* breached at the time it is given when title actually is different than the policy states.<sup>37</sup> The Tenth Circuit ruled that, so long as the title insurer complies with policy conditions permitting it to establish the title as insured, the policy is not breached and the insured will not be compensated for the fact that a decrease in property values in the interim has caused the property to be worth less than the policy amount and the amount of the debt. The Tenth Circuit's view is the majority rule today.<sup>38</sup>

Nevertheless, as discussed in §§ 11:10 to 11:15 *infra*, if the insurer is to negate a loss by establishing title as insured, the title established must give the insured all legal rights the insured mortgage provided. For example, when the title insurer litigates to establish a mortgage lien or obtain an equitable lien in favor of the insured, the insured mortgagee is entitled to recover interest that the insured mortgage should have secured. Loss of interest is sufficient to trigger the insurer's obligation to indemnify an insured mortgagee.<sup>39</sup>

—*Title insurers' requirement of “foreclosure first”*

Today, title insurers have convinced most courts that the principle of indemnification does not permit recognition of loss to an insured lender unless and until the mortgagor has defaulted, the land has been sold at foreclosure sale, and the insured has been left with a deficiency. They reason that the mere existence of a prior lien is not enough since, even if presently it makes the insured undersecured, the property might still be sold in the future for a sum sufficient to satisfy the indebtedness to the insured.<sup>40</sup>

Title insurers also distinguish between losses caused by the title defect and losses to a mortgage holder caused by decreases in property values.<sup>41</sup> Thus, if at foreclosure sale the insured purchases the land subject to its mortgage lien, and the market value of the land at that time is less than the debt owed to the insured, title insurers may still contend that the insured has suffered no loss.<sup>42</sup> Insurers reason that a lender's title insurance assures that the land described in the mortgage will be available to satisfy the debt. Thus, so long as the insured acquires the land at the foreclosure sale or via deed in lieu thereof, the insured has received what the policy guaranteed,<sup>43</sup> regardless of whether the property's market value has fallen since the loan was given. Insurers would like to delay assessment of the insured lender's loss even longer, arguing that the insured still may sell the land acquired via foreclosure in the future for more than the amount of the debt and then would have received a windfall if the insurer paid the deficiency between the amount of the debt and the assessed market value of the land at the time of foreclosure.<sup>44</sup> Even where the insured has foreclosed and taken the land subject to a prior lien or encumbrance that was not excepted from the policy, title insurers have asserted that the insured still will not suffer a loss unless and until the senior lienor forecloses.<sup>45</sup> The majority of courts have refused to allow title insurers to go this far, however.

An Oklahoma court found that the disbursement of foreclosure sale proceeds to mechanic's lienors prior to the insured lender was enough to show a loss, since the policy insured that the lender had a first lien.<sup>46</sup>

When the insured has sold the land at or after foreclosure to a third party for *less* than the amount of the debt, some title insurers have continued to deny an obligation to pay the insured the deficiency, again contending that the policy insured only the ability to enforce the mortgage lien and acquire the property and not the market value of the property nor full payment of the debt. The insured must be prepared to prove that the land sold for less than the debt owed, not because of a decrease in land values, but because an unexcepted prior lien or encumbrance either required payment or clouded the title sufficiently to reduce the amount a purchaser would pay.<sup>47</sup>

In *Cale v. Transamerica Title Insurance*, the title insurer had failed to except from Cale's title policy three liens that were prior to Cale's insured deed of trust.<sup>48</sup> After the borrowers defaulted, Cale made a claim for the cost of removing the liens. Transamerica declined to pay the amount required to remove them on the basis that it could not be determined whether the senior liens would cause him any loss until Cale foreclosed against the property, since it was possible that sufficient proceeds would be realized from a foreclosure sale to discharge all three senior liens and pay the full debt to Cale. Two months later, Cale foreclosed under the deed of trust and purchased the property at the sale for \$1, subject to the senior liens. Transamerica continued to refuse payment of Cale's claim, maintaining that as the current owner of the property Cale had not yet sustained any loss as a result of the three undisclosed senior liens. The California Court of Appeals for the Third District held that Cale had sustained no actual loss, since (a) Cale now owned the property which had secured his loan, (b) Cale had spent no money to remove the senior liens, (c) none of the senior lienors had yet demanded payment, and (d) the title policy continued to insure if he eventually suffered loss or damage by reason of the three senior, unexcepted liens.<sup>49</sup>

Although fair market value may provide inadequate security for Cale's lien, his insured indebtedness continues to be secured against loss by the terms of the title insurance policy. If one of the senior lienors were to foreclose, or if Cale were to sell the property on the open market, he might then suffer an indemnifiable loss under the policy, but only to the extent the proceeds of sale otherwise available to discharge Cale's lien are required instead to discharge any of the undisclosed senior liens.<sup>50</sup>

One of the problems with the *Cale* decision is that, in requiring the insured to resell the property to a third party before being willing to consider whether the insured sustained a loss, the court ignored the fact that one sale—a trustee's sale—was already had at which a third party could have bought. If no other buyer is willing to bid at the foreclosure or trustee's sale—at least in part because of the senior liens the buyer would have to take subject to, so no cash is generated to be applied to satisfy the insured's secured note—is the insured not damaged? If no third-party buyer can be found for land with such an unmarketable title, why should the insured lender be required to buy it in foreclosure? And how long should the insured have to hold the land with its note unsatisfied without recognition of a loss? If, when the insured does sell the land to a third party, can the insurer object that the insured chilled the price obtained by not marketing as widely or aggressively as the insurer

would have liked? What if the price achieved is higher only because the lender waited out a downturn in real property prices before marketing the land and also invested its own cash, time, and effort in maintaining and/or renovating the property in the meantime? Should the lender or the title insurer benefit from such efforts of the lender?

Because of such questions, in 1994 the California Court of Appeals for the Fourth District, in *Karl v. Commonwealth Land Title Ins. Co.*, refused to adopt the rule in *Cale*.<sup>51</sup> In *Karl*, the title policy insured a second deed of trust. The policy failed to list as an exception a tax lien. The holder of the first trust deed paid the tax lien to preserve its security interest and informed the insured of its plan to foreclose, which foreclosure would cause the loss of the insured's lien. The insured persuaded the first lienor to reinstate the loan by agreeing to pay the tax lien advance plus past-due installments on the loan secured by the first deed of trust. The title insurer, however, refused the insured's request for payment of the tax lien, claiming that there was not yet any loss under the policy.<sup>52</sup> The insured ultimately foreclosed and obtained title to the land by bidding the amount owed to it. The insured repaired and maintained the property for a time and then sold it to a third-party buyer. As in *Cale*, the title insurer initially had told the insured that there would be no loss recognizable under the policy until the borrower defaulted and the property was sold at foreclosure sale. Following the foreclosure, however, the insurer denied the claim on grounds that the insured sustained no loss because the insured sold the land to the third-party buyer for about the same amount that the insured was owed.

The *Karl* court, first, affirmed the rule that a lender is interested in the property solely as security for its loan, and if the lender fully recoups all amounts due, the fact that the title to the property was not as the policy represented and an unexcepted lien reduced the equity cushion does not cause any compensable loss.<sup>53</sup> For there to be a loss, the value of the subject property must be less than the total of the lender's lien plus all prior liens. Also, the value of the property without any liens must be more than the amount of the senior liens that the insured knowingly took subject to, for if it were not, the lender would not have recovered on his lien even if the unexcepted senior liens had not existed. The insured's loss then would have been the result of his own bad investment judgment.<sup>54</sup>

The court then limited the length of time the insured must wait to determine whether it will recoup all amounts due—the court held that when an insured lender forecloses on the security the loss, if any, occurs on the date of foreclosure and the presence or absence of loss depends on whether the value received by the insured in discharge of the note (here the property) is less than the amount owed. The relevant value is the fair market value as of the date of foreclosure, not the price realized at a later sale. Resale price may be evidence of fair market value as of foreclosure in some cases, but resale price does not control valuation of the loss. Refuting *Cale* on one final point, the *Karl* court correctly concluded that offering to continue to insure against loss is not the same as indemnification for an insured lender's loss.

—*Foreclosure court finding of invalid mortgage lien & title insurer's pursuit of equitable lien*

When the result of a lender's foreclosure suit is the court's judgment that the insured mortgage is invalid or unenforceable, the title insurer often will want to sue for an equitable lien against the property in place of the insured mortgage lien. Is the insured's loss certain and payable upon the court's determination of the mortgage's unenforceability in a foreclosure action? The fact that the insurer could take collateral actions to recover a portion of the loss does not render the amount of loss unknown. Plus, one court of competent jurisdiction already has entered its final determination adverse to the lien of the insured mortgage, which seems to meet the policy condition.<sup>55</sup> Yet, the title insurer likely will ask the insured lender to wait for a judgment of an equitable lien and its foreclosure before the insurer will determine and pay the amount of the lender's loss.<sup>56</sup> Under a post-1992 ALTA policy, the title insurer likely will assert the right to do so because of the right to prosecute to “reduce loss or damage to the insured” that was added to the insurer's right to prosecute “to establish the title ... or the lien of the insured mortgage, as insured.”<sup>57</sup> Yet, an equitable lien is not the same as the “lien of the insured mortgage, as insured.” No case has been found directly answering whether the insured lender's loss should be paid when the foreclosure court declares the mortgage invalid, or not until after the insured has sued for an equitable lien and then also foreclosed on it. Title insurers, in at least some cases, have deemed it more appropriate to pay their insured's loss at the time the insured mortgage was found to be unenforceable, and to pursue and foreclose an equitable lien with their subrogated rights.<sup>58</sup> Section

§ 6:19. Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

10:7 *infra* considers the effect of the insurer's right to “reduce the insured's loss” in 1992 and subsequent ALTA policies on when a loss is ascertainable. Sections 8:10 to 8:16 *infra* discuss title insurers' rights of subrogation.

—*Effect of a Full Credit Bid or Failure to Pursue Deficiency Judgment on Lender's Title Insurance*

Another issue is whether the undersecured mortgagee must also bid less than the amount of the indebtedness at foreclosure and seek a deficiency judgment as well as a prerequisite to claiming a loss under a loan policy.

—*The Full Credit Bid Rule.*

According to *The Restatement Third of Property, Mortgages* and hornbooks like Dunaway's *The Law of Distressed Real Estate* and Nelson & Whitman's *Real Estate Finance Law*, the Full Credit Bid Rule applies in property and casualty insurance law to prevent a mortgagee from receiving a double recovery. Where a casualty loss has occurred before foreclosure, if a mortgagee has a right to foreclose the mortgage and a right to casualty insurance, the mortgagee may either: (1) recover from the insurance proceeds the full amount of the mortgage obligation; or (2) foreclose on the mortgaged real estate and, to the extent that doing so does not satisfy the mortgage obligation, recover the balance from the insurance proceeds.<sup>59</sup> If the mortgagee chooses to foreclose and makes a full-credit bid at least equal to the mortgage obligation, that obligation is fully satisfied and the mortgagee will have no additional recourse against the insurance carrier.<sup>60</sup> The mortgagee is considered to have taken into account the damaged condition of the property when deciding whether and how much to bid at foreclosure. If the mortgage indebtedness is fully satisfied after loss by foreclosure, then the insurance company is no longer liable to the mortgagee.<sup>61</sup>

—*Should the Full Credit Bid Rule apply to Title Insurance?*

As further discussed below, the American Land Title Association Loan policy's Condition 2 tells lenders the policy will continue after a lender acquires the land by foreclosing its insured mortgage lien. Condition 2 seems in conflict with title insurers' current argument that a full credit bid in foreclosure terminates the title insurance.

Illustrating the issue is a phone call the author received in 2014 from a New York lender who was insured to have a first mortgage. The borrower defaulted and, in preparing its foreclosure petition, the insured lender learned that six undisclosed liens had priority over its own. The six prior liens secured debt greater than the property's value, so the lender clearly was undersecured. When the lender filed a title insurance claim, the title insurer replied that the lender had no loss unless the lender first foreclosed. The lender thought this was futile, but since none of the prior lienholders had foreclosed yet, the lender followed the insurer's instruction and foreclosed. The insured lender knew the debtor had no other assets, so the lender bid the amount of the debt and decided not to spend more money pursuing a deficiency judgment. When the insured lender re-asserted its title insurance claim for the loss in value due to the six prior liens, the title insurer replied that the insured's full credit bid had satisfied the debt. The insurer declared that, with no remaining indebtedness, no title insurance coverage remained. The lender asked, “What about my continuing coverage after foreclosure under policy Condition 2?” The title insurer replied that coverage did not continue when the insured acquired the property in foreclosure via a full credit bid.

Cases published in 2014 and 2013 show that this lender was just one of many surprised by title insurers' assertion that the policy's continuing coverage after foreclosure ends if the insured acquired the property with a full credit bid. Furthermore, even lenders who bid only the decreased value of the land due to title defects have been told that failing to pursue a deficiency judgment means their lower bid satisfied the debt, and extinguished their title insurance.

—*Relevant Policy Conditions*

Condition 2 of the ALTA Loan policy expressly provides for “Continuation of Insurance” in favor of an insured lender after the insured acquires the title. The 2006 policy is that broad.<sup>62</sup> Its drafters explain that the 2006 Condition 2 includes all the substance of the 1992 policy,<sup>63</sup> which states coverage continues in favor of an insured lender who acquires “the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage.”<sup>64</sup>

The 1992 Condition 2 adds that the amount of insurance after the acquisition shall not exceed the Amount of Insurance stated in Schedule A, or the amount of the principal of the indebtedness with interest thereon plus expenses of foreclosing and

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

protecting the lien prior to acquisition, but reduced by the amount of “payments made.”<sup>65</sup> The 2006 policy provides that same amount of insurance after acquisition of the land in Condition 8(b).<sup>66</sup>

Condition 10(b) of the 2006 policy and 9(c) of the 1992 policy are titled “Reduction or Termination of Liability.” This condition provides that “voluntary satisfaction or release of the insured mortgage shall terminate all liability,” but expressly *excepts* the continuing coverage after foreclosure provided by Condition 2.<sup>67</sup> Even if Condition 10/9(c) did not except the effect of Condition 2, is a lender's having to foreclose due to the borrower's default, as well as due to the title insurer's insistence prior to the insurer's recognition of a claim, a “voluntary” satisfaction of the mortgage under Condition 10(b)/9(c)'s terms? Also, since Condition 10(b)/9(c) expressly excepts from its termination of liability the effect of acquiring the land under Condition 2, why would “discharging the lien of the insured mortgage” under Condition 2 with a full credit bid that gives the lender title terminate the continuation of the policy?<sup>68</sup>

If title insurers intend for insureds only to receive Condition 2's continuing coverage after foreclosure if they make *less* than a full credit bid *and* obtain a deficiency judgment, shouldn't title insurers expressly say this in Condition 2? Until they do, doesn't the law provide that any ambiguity be construed in favor of the insured and against the insurer who drafted it?<sup>69</sup>

—Case law

The most thorough analysis of this issue and the title insurance policy's terms was in June 2014 by the Idaho Supreme Court in *Bank of Idaho v. First American Title Insurance Company*.<sup>70</sup> The Court quoted the 1992 policy's Condition 7(b) which says “in the event the insured has acquired the estate in the manner described in” Condition 2(a) then the insurer's liability “shall continue.”<sup>71</sup> Because Condition 2(a) says the policy's coverage shall continue in favor of an insured who acquires the estate in land by foreclosure, trustee's sale, deed in lieu, or other legal manner which discharges the lien of the insured mortgage, the Court found the insurer's liability continued after the insured foreclosed. The court then quoted Condition 7(a) as limiting the “amount of insurance” as defined in both Conditions 9 and 2(c) to not more than either the policy amount or “the amount of the principal of the indebtedness [with] ... interest thereon, expenses of foreclosure, amounts ... to protect the lien of the insured mortgage ..., but reduced by the amount of all payments made.”<sup>72</sup>

First American Title Insurance Company argued that the lender's “full credit bid” constituted “payments made” and reduced the policy amount to zero. The Idaho Supreme Court reasoned:

the words ‘payments made’ would normally be construed by laymen to mean payments made by the obligor on the principal indebtedness secured by the deed of trust, not a credit bid made by a lender at a trustee's sale.<sup>73</sup>

The Court added that construing “all payments made” to include a full credit bid by the lender would conflict with the policy's continuing coverage after a lender acquires the property via foreclosure or other legal manner which discharges the lien of the insured mortgage. Quoting the Court,

Thus, under Section 9(c), payment in full by any person does not terminate the liability of the insurance company if the person making payment in full was the insured who purchased ... at a trustee's sale.<sup>74</sup>

The South Carolina Supreme Court addressed this issue in 2013 in *Preservation Capital Consultants, LLC v. First American Title Insurance Co.*<sup>75</sup> The loan policy covered multiple parcels. After default, the insured lender foreclosed and made a credit bid on one parcel that exceeded the policy amount. Mortgage debt still existed on another covered parcel. The insured lender was unable to foreclose on this parcel because of a title defect.

First American argued the lender's credit bid for the first parcel was a “payment of the indebtedness” that reduced the amount of insurance under Condition 9(b) of the 1992 ALTA policy to zero.<sup>76</sup> Like the Idaho Supreme Court, the South Carolina Supreme Court held that Condition 9 reduces the amount of coverage by payments made only when the borrower or a third party makes loan payments, not when an insured lender makes a credit bid to acquire the property in foreclosure. The court's sound bite was, “insured lenders bear the risk of repayment from the borrower, title insurance companies bear the risk of inadequate security due to title defect.”<sup>77</sup>

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

The South Carolina Supreme Court found that under Conditions 2 and 9, the insured lender's coverage continues after foreclosure so long as there remains unpaid principal indebtedness. Otherwise the insurer would “escape liability ... anytime debt grows to exceed the original principal amount ... and is later paid down by foreclosing on a portion of the collateral ... [with] a foreclosure credit bid [that] exceeds the policy limit, regardless of whether the debt is paid in full.”<sup>78</sup>

The court further explained that the amount of insurance *after* acquisition of title under 2(c) is the Policy Amount reduced by payments under 9(b) and increased by accruing interest, OR the amount of the indebtedness remaining with interest thereon. The remaining debt with interest was \$452,000, which was less than the \$3million policy limit. Since this made the remaining amount of insurance \$452,000, the insured was able to collect its \$345,000 loss caused by the title defect in the second parcel of land.<sup>79</sup>

The parties had stipulated that Conditions 2 and 9 are unambiguous, so the South Carolina Supreme Court agreed and said Condition 2 “unambiguously covered” the insured's loss.<sup>80</sup> In contrast, that same year, the Georgia Court of Appeals in a slightly different factual context ruled the formula for measuring continuing coverage in Conditions 9 & 2 is ambiguous and should be construed in the insured's favor.<sup>81</sup>

Contrary to the Idaho and South Carolina Supreme Courts, the U.S. District Court for the District of Arizona held in 2013 that the full credit bid rule protects title insurers. This court also held that a credit bid less than the full amount of the debt fully satisfies the debt if the lender does not obtain a deficiency judgment, and these facts also extinguish the lender's title insurance coverage.<sup>82</sup> These rulings were surprising, because in a 2012 opinion on a separate issue in the same case, this court *distinguished* title insurance from property and casualty insurance and held that the full credit bid rule does *not* apply in favor of title insurers.<sup>83</sup>

In *Equity Income Partners, LP v. Chicago Title Insurance Co.*, after the borrower's default, the insured lender made a claim for lack of access. The lender did not initially foreclose because one title insurer promised to make interest payments while it attempted to cure the lack of access.<sup>84</sup> After several years that attempt failed, and the insured foreclosed with a credit bid.<sup>85</sup> Litigation had been going on for years between Chicago Title and Equity Income Partners about when the land's value should be measured to determine a lender's loss, and Equity Income Partners had won on that issue in 2012.<sup>86</sup> Chicago Title then filed for summary judgment on grounds that the lender's credit bid at the trustee's sale constituted “payment” of the principal of the debt and terminated the title insurance policy's coverage for the insured's pre-existing claim. In 2013, the Court focused on the Arizona statute which ended a lender's right to sue for a deficiency if the lender did not do so within 90 days of the foreclosure. The court did *not* examine the terms of the title insurance policy. The court never discussed Condition 2. The court briefly applied Condition 9, but did not analyze its language like the Idaho and South Carolina courts. While both the Idaho and South Carolina Supreme Courts held that the payments under Condition 9 that reduce the indebtedness are payments by the borrower or third parties, the Arizona Court said that a lender's bid at a foreclosure sale is a payment on the debt:

Plaintiffs are “any person” and ... they could pay to themselves all or part of the insured obligation.

Thus, the amount of insurance was reduced to nil by Plaintiffs' payments to themselves. Consequently,

Plaintiffs cannot now assert any damages based on the value of the property ...<sup>87</sup>

The Court acknowledged the property had much less value because of the lack of access than the amount of secured debt the insured bid. The Court nevertheless held that it was the lenders' problem that they did not know that a credit bid without suing for the deficiency could terminate their title insurance. Applying no equity for *Equity Income Partners*, the Court said,

To the extent Plaintiffs were negligent, ignorant, or inadvertent in acquiring the Properties by full-credit bids, that mistake was theirs to make ... [T]he rule of ‘caveat emptor’ applies to purchasers at execution sales.<sup>88</sup> [citation omitted]

Was it negligent, however, for Equity Income Partners to not expect a full credit bid would affect their title insurance when the same court had already responded to the title insurer's contention that, because the lender acquired the properties via a full credit bid, the lender did not suffer a “loss?” In 2012, the Court had held:

Defendant lastly contends that because Equity acquired the Properties via a full credit bid, it has not suffered a loss under the Policies. Pursuant to [Arizona Revised Statutes \(“A.R.S.”\) § 33-814](#), a full-credit bid prevents a lender from seeking deficiency damages against a debtor, as “the difference between the amount owed on the debt and the amount bid ... [is] zero.” *ING Bank, FSB v. Mata*, CV-09-748-PHX-GMS, 2009 WL 4672797, at \*4 (D.Ariz. Dec.3, 2009). See also A.R.S. § 33-814(A), (D). Section 33-814 also applies to preclude lenders from seeking deficiency damages from third parties. *Mata*, 2009 WL 4672797, at \*4 (“Plaintiff chose its price, and it would be unjust to allow it to seek to recover the loan deficiency from a third party after already extinguishing the entire debt at the deed of trust sale.”). Even though “the antideficiency statute would prevent [a] plaintiff from seeking a deficiency judgment,” however, “it does not preclude an action for recovery of insured losses” brought by a lender against its title insurer. [citation omitted] Section 33-814 does not, therefore, preclude Equity Income from recovery.<sup>89</sup>

For this 2012 ruling, the U.S. District Court cited its 2011 opinion in *M & I Marshall & Ilsley Bank v. Wright*.<sup>90</sup>

In its 2011 case, the note and deed of trust had been forged.<sup>91</sup> The insured lender was able to foreclose on the deed of trust because no one claimed a competing interest, but the uncertainty of title decreased the property's value. The insured lender did make its credit bid only about 1/6 of the debt due to the decreased value. The insured lender also began an action against the borrower for the deficiency, but later dismissed it, presumably because the note was forged and invalid.<sup>92</sup> First American Title Insurance Company [FATCO] contended that, though the insured did not make a full credit bid, the credit bid for the property's lowered value together with declining to sue for the deficiency meant the debt was fully satisfied, with the same effect as a full credit bid.<sup>93</sup>

The court disagreed and said it was clear that the loss in the property's value was due to the forgery and the uncertainty of title that caused.<sup>94</sup>

It is not relevant that these damages are approximately equal to those that could be sought in a deficiency action. We conclude that plaintiff's claims against defendant FATCO are for insured losses related to the invalidity of the lien, not for deficiency damages.

In *Marshall & Ilsley Bank v. Wright*, the court cited a 9<sup>th</sup> Circuit Court of Appeals case for the rule that a full credit bid precludes recovery by a mortgagee on a fire and casualty insurance policy.<sup>95</sup> The court also agreed with the title insurer in calling the insured's credit-bid-plus-failure-to-pursue-the-deficiency a “full credit bid.”<sup>96</sup> The Court, however, expressly distinguished title insurance on a mortgage lien from a fire and casualty insurer's interest in the property itself. The Court held that the Full Credit Bid Rule did not apply to title insurers:

But casualty insurance and the title insurance policy at issue here are not the same. One is related to problems with the property itself, while another specifically addresses the mortgagee's lien. For purposes of this motion, we may assume that in Arizona, as in California, upon the entry of a full-credit bid, “the mortgagee no longer has any interest in insurance on the property.” *Altus Bank v. State Farm Fire and Cas. Co.*, 979 F.2d 854, \*2 (9th Cir.1992). It does not then follow that a mortgagee may not be compensated for the damages it incurred as a result of the invalidity of the lien. While it may make sense that a full credit bid should extinguish any right to demand further compensation related to the value of the property, losses arising from the unenforceability of the lien are separate, and may be resolved independently.<sup>97</sup>

In this 2011 case, the title defect was a forged mortgage and note while in the 2012 and 2013 *Equity Income Partners* cases the title defect was lack of access. The other factual difference is that, in the Arizona court's 2011 case, the insured did bid only the lowered value of the land to acquire it, and could not have sued on the forged note for a deficiency judgment.

§ 6:19. Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

The title insurers' arguments are a little different—in the 2011 and 2012 cases, the title insurers argued that acquiring the property with a full credit bid meant the insured lender suffered “no loss.” In the 2013 case, the title insurer acknowledged the lender's loss, but contended the full credit bid reduced the amount of indebtedness and amount of insurance to zero. This is the same argument that the Idaho and South Carolina Supreme Courts rejected, however.

None of the preceding 3 distinctions seem enough for the court to not even mention its 2011 and 2012 distinctions between casualty insurance and title insurance and explain the reason that distinction did not apply in the 2013 *Equity Income* case.

— *Does a Full Credit Bid prevent recovery on a Closing Protection Letter?*

The reader is referred to § 20:20 of this treatise for discussion of whether a full credit bid prevents a lender from suing to recover a loss under its Closing Protection Letter.

— *State Statutes*

State statutes may determine whether the full credit bid rule is intended to protect third parties like insurers, or whether it protects only borrowers. For example, a Michigan Court of Appeals held in 2008 that the full credit bid rule applied to both title insurance policies and title insurers' closing protection letters. In 2014, however, in *Bank of America v. First American Title Insurance Company*, the Michigan Court of Appeals said it was bound to apply that precedent, but quoted the state's statute as protecting only borrowers and those with liability for the debt.<sup>98</sup> At this writing in 2015, the question is on appeal to the Michigan Supreme Court as to whether title insurers have liability for the debt as the statute requires.

— *Commentators' Conclusions and Recommendations*

Title insurers attempting to impose the Full Credit Bid Rule have been seeking to apply only *half* the rule. The hornbook rule from property and casualty insurance gives the lender the *choice*—don't foreclose and instead make a claim against the insurance for the loss OR, foreclose and acquire the property and sue for the deficiency if one is recoverable. Conversely, title insurers require an insured lender to “foreclose first” before the insurer will recognize any “loss” under a loan policy. Title insurers have convinced most courts to apply this rule. *See supra* this Section and *infra* § 10:13. If title insurers deny their insureds the choice the Full Credit Bid Rule allows, then should title insurers get the benefit of the rest of the rule that terminates insurance coverage if the lender foreclosed with a full credit bid?

Secondly, the idea behind the Full Credit Bid Rule is that an insured should not recover twice. An insured lender should not get land worth the full amount of the debt AND be paid by the insurer. In all the cases reported here, however, the insured got land worth much less than the debt because of title defects. Where the land clearly has lost value due to encumbrance and title defects, and the lender foreclosed because the title insurer made foreclosing a prerequisite to recognizing the lender's loss, the lender's loss should be measured by the amount the title defects decrease the land's value.<sup>99</sup> The amount of the lender's credit bid should *not* either measure the lender's loss or terminate the policy and pre-existing claim.

Third, might the ALTA Loan Policy Condition 2's provision for continuing coverage after an insured lender acquires the property via foreclosure have been written expressly to prevent the Full Credit Bid Rule from applying to terminate coverage as it did in fire and casualty insurance? Why else expressly provide continuing coverage for insured lenders without limiting it to lenders who acquire the property for less than the full amount of the debt? The author has found no history of Condition 2 that could answer this question but inquired of a retired vice president and counsel for one of the major title insurers who said Condition 2 is in the policy because the mortgage lending industry demanded it to make clear that, when a lender's security interest changes to an ownership interest due to enforcement of the security interest, this change will not affect the lender's coverage under a title insurance policy. He added that the implied covenant of good faith and fair dealing weighs against defeating the continuing coverage both parties intended with a legal presumption that does not clearly apply.

Finally, Professor Barlow Burke's treatise, *The Law of Title Insurance*, states that, “The fact that a mortgagee bids in the outstanding debt in foreclosure does not preclude the policy from converting, by its terms, into a policy insuring the perfected lien or title as it comes out of foreclosure with the insured mortgagee as the successful bidder.”<sup>100</sup> He further explains that, because the lien and its priority are what has been insured, not the debt evidenced by the mortgage note, a suit on the note to recover the debt or a deficiency after foreclosure should not be a precondition to recognizing an insured lender's claim for

a loss.<sup>101</sup> “[E]ven when an insured lender makes a full credit bid at its foreclosure ... it has an action to recover its actual loss from its [title] insurer.”<sup>102</sup>

Professor Burke notes, that despite his analysis, title insurers persist in requiring foreclosure first and may claim that a full credit bid extinguished the insured's claim on the policy.<sup>103</sup> Burke, therefore, recommends that, before bidding, an insured lender should give notice to its title insurer that the insured is following the insurer's instructions to foreclose, but does not intend by doing so without pursuing a deficiency judgment to extinguish its title insurance claim.<sup>104</sup>

—*Loss of Negotiability of Insured Mortgage in the Secondary Mortgage Market*

Today, the importance of the negotiability of mortgages in the secondary mortgage market may strengthen an insured mortgage holder's argument that an indemnifiable loss occurs from the mere existence of a title defect or a prior lien. Lenders no longer simply hold the mortgage loans they make as long-term investments. Instead, lenders sell the notes and first mortgages securing them to investors in the national mortgage market. When the insured mortgage lien is reduced to the status of second or third lien, its value in the secondary mortgage market is immediately diminished.<sup>105</sup> Thus, the insured lender may experience an actual loss even where no party has commenced a foreclosure action or asserted a superior claim and the prior lien(s) have not made the lender undersecured.<sup>106</sup>

—*Loss from Regulator requiring Lender to Increase Reserves*

Additionally, it makes sense for the title insurer to be required to compensate a *regulated* lender immediately upon discovery of an unexcepted prior lien if it results in the lender being undersecured. Regulators require lender portfolios to show loan-to-value ratios low enough so that the lender is fully secured plus there is a suitable equity cushion, so that, in the event of default and foreclosure, the lender, its depositors, and deposit insurers will suffer no loss of principal.<sup>107</sup> When regulators detect diminishing margins of safety, they require lenders to set aside more reserves to cover potential losses.<sup>108</sup> Funds held in reserve are not available to be loaned to borrowers, so the lender's potential earnings are reduced.<sup>109</sup> Therefore, it is reasonable for a regulated lender to claim a loss once it is determined that the lender is undersecured because of a prior lien that was not excepted from its title insurance policy's coverage, even though no default or foreclosure has yet occurred.<sup>110</sup>

Westlaw. © 2015 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

Footnotes

- 1 *Federal*: *In re West Feliciana Acquisition, L.L.C.*, 744 F.3d 352, 359 (5th Cir. 2014); *Gibraltar Sav. v. Commonwealth Land Title Ins. Co.*, 905 F.2d 1203, 1205, *Bankr. L. Rep.* (CCH) P 73431 (8th Cir. 1990); *Diversified Mortg. Investors v. U.S. Life Ins. Co. of New York*, 544 F.2d 571, 574 n.2 (2d Cir. 1976); *Home Title Ins. Co. v. U.S.*, 50 F.2d 107, 9 A.F.T.R. (P-H) P 1578 (C.C.A. 2d Cir. 1931), *aff'd*, 1932-1 C.B. 362, 285 U.S. 191, 52 S. Ct. 319, 76 L. Ed. 695, 3 U.S. Tax Cas. (CCH) P 906, 10 A.F.T.R. (P-H) P 1592 (1932).  
*Arizona*: *Wenima Development, LLC v. Lawyers Title Ins. Corp.*, 2013 WL 85246, ¶¶ 13, 14 (Ariz. Ct. App. Div. 1 2013), *Not reported in P.3d*; *Swanson v. Safeco Title Ins. Co.*, 186 Ariz. 637, 925 P.2d 1354 (Ct. App. Div. 1 1995), *redesignated as opinion and publication ordered*, (Nov. 1, 1995).  
*California*: *Rosen v. Nations Title Ins. Co.*, 56 Cal. App. 4th 1489, 66 Cal. Rptr. 2d 714, 720 (2d Dist. 1997), *as modified*, (Aug. 12, 1997); *Bank of America v. Quackenbush*, 56 Cal. App. 4th 1167, 66 Cal. Rptr. 2d 81, 84 (4th Dist. 1997); *Golden Security Thrift & Loan Assn. v. First American Title Ins. Co.*, 53 Cal. App. 4th 250, 258, 61 Cal. Rptr. 2d 442 (4th Dist. 1997); *Siegel v. Fidelity Nat. Title Ins. Co.*, 46 Cal. App. 4th 1181, 54 Cal. Rptr. 2d 84, 89 (2d Dist. 1996); *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 275 Cal. Rptr. 107, 109 (3d Dist. 1990); *Contini v. Western Title Ins. Co.*, 40 Cal. App. 3d 536, 115 Cal. Rptr. 257 (5th Dist. 1974).  
*Colorado*: *Behen v. Transamerica Title Ins. Co.*, 531 P.2d 641 (Colo. App. 1974).  
*Connecticut*: *Cohen v. Security Title and Guar. Co.*, 212 Conn. 436, 562 A.2d 510, 512 (1989).  
*Delaware*: *Pioneer Nat. Title Ins. Co. v. Child, Inc.*, 401 A.2d 68, 69, 70 (Del. 1979).  
*Florida*: *Bohr v. First American Title Ins. Co.*, 2008 WL 2977353, \*5 (M.D. Fla. 2008); *Ring v. Home Title Guaranty Co.*, 168 So. 2d 580, 581 (Fla. Dist. Ct. App. 3d Dist. 1964); *Florida Home Ins. Co. v. Braverman*, 163 So. 2d 512, 513 (Fla. Dist. Ct. App.

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

3d Dist. 1964) (title insurance is a contract of indemnity); *Goode v. Federal Title & Ins. Corp.*, 162 So. 2d 269, 270 (Fla. Dist. Ct. App. 2d Dist. 1964).

*Georgia*: *Beaulieu v. Atlanta Title & Trust Co.*, 60 Ga. App. 400, 4 S.E.2d 78 (1939).

*Maryland*: *Heritage Pacific Financial, LLC v. First American Title Ins. Co.*, 2013 WL 4401040, \*4 (D. Md. 2013) *Not Reported in F.Supp.2d*; *Stewart Title Guar. Co. v. West*, 110 Md. App. 114, 676 A.2d 953, 960 (1996) (stating that the “predominate view is that title insurance is a contract of indemnity, not of guaranty”); *Lawyers Title Ins. Corp. v. Knopf*, 109 Md. App. 134, 674 A.2d 65, 70 (1996).

*Massachusetts*: *Falmouth Nat. Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058, 1062 (1st Cir. 1990) (under Massachusetts law, title insurance is a contract of indemnity, not guarantee).

*Minnesota*: *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 2012 WL 3067895, \*5 (D. Minn. 2012).

*Missouri*: *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1 (Mo. 1975) (in issuing title insurance policy against loss or damage as result of any defect in or lien encumbrance on title, insurer agreed to indemnify insured for any loss due to causes insured against; it did not guarantee or insure a clear title).

*Nebraska*: *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696, 703 (1997); *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154, 156 (1984).

*New Jersey*: *Green v. Evesham Corp.*, 179 N.J. Super. 105, 430 A.2d 944, 947 (App. Div. 1981).

*New York*: *Halfmoon Professional Offices v. American Title Ins. Co.*, 235 A.D.2d 801, 652 N.Y.S.2d 390, 392 (3d Dep't 1997); *Heidi Associates v. Lawyers Title Ins. Co.*, 112 A.D.2d 844, 492 N.Y.S.2d 949, 950 (1st Dep't 1985), order rev'd on other grounds, 67 N.Y.2d 1041, 504 N.Y.S.2d 87, 495 N.E.2d 350 (1986); *Grunberger v. Iseon*, 75 A.D.2d 329, 429 N.Y.S.2d 209, 210 (1st Dep't 1980); *Citibank, N.A. v. Chicago Title Ins. Co.*, 163 Misc. 2d 282, 620 N.Y.S.2d 717 (Sup 1994), rev'd on other grounds, 214 A.D.2d 212, 632 N.Y.S.2d 779 (1st Dep't 1995).

*Oklahoma*: *American-First Title & Trust Co. v. First Federal Sav. & Loan Ass'n of Coffeyville, Kan.*, 1965 OK 116, 415 P.2d 930 (Okla. 1965).

*Oregon*: *De Carli v. O'Brien*, 150 Or. 35, 41 P.2d 411, 97 A.L.R. 693 (1935).

*Pennsylvania*: *Sattler v. Philadelphia Title Ins. Co.*, 192 Pa. Super. 337, 162 A.2d 22 (1960) (“The correct rule ... is that a contract of title insurance is an agreement to indemnify against loss through defects of title.”); *Foehrenbach v. German-American Title & Trust Co.*, 217 Pa. 331, 66 A. 561 (1907) (a title insurance policy is a contract of indemnity and not of guaranty; until a loss occurs, there is no liability).

*Texas*: *Williams v. Land Title Co. of Dallas*, 1997 WL 196345, \*3 (Tex. App. Dallas 1997); *First American Title Ins. Co. of Texas v. Willard*, 949 S.W.2d 342, 350 (Tex. App. Tyler 1997), writ denied, (Dec. 4, 1997) (mortgagee's policy); *Tri-Legends Corp. v. Ticor Title Ins. Co. of California*, 889 S.W.2d 432, 443 (Tex. App. Houston 14th Dist. 1994), writ denied, (Sept. 21, 1995).

*Virginia*: *Title Ins. Co. of Richmond v. Industrial Bank of Richmond*, 156 Va. 322, 157 S.E. 710 (1931).

*Washington*: *Securities Service, Inc. v. Transamerica Title Ins. Co.*, 20 Wash. App. 664, 583 P.2d 1217, 1221 (Div. 2 1978) (rejected on other grounds by, *Hartman v. Shambaugh*, 96 N.M. 359, 630 P.2d 758 (1981)) (title insurer in essence agreed to indemnify or reimburse insured for any loss due to causes insured against in amount not exceeding policy limits; it did not guarantee or insure a clear title or that there would be no losses).

9 Appleman, *Insurance Law and Practice* pp 3, 4 § 5201; 15 Couch on *Insurance* (2d ed.) p 806 § 57; 43 *Am. Jur. 2d, Insurance* § 13. See §§ 1:10 to 1:13 and § 10:3.

2 Windt, *Insurance Claims and Disputes* 225 (1982).

3 See § 1:13.

4 *New Jersey*: *Summonte v. First American Title Ins. Co.*, 180 N.J. Super. 605, 436 A.2d 110, 113 (Ch. Div. 1981), judgment aff'd, 184 N.J. Super. 96, 445 A.2d 409 (App. Div. 1981) (title insurance policy is a contract of indemnity analogous to a covenant in a deed against encumbrances and, therefore, subject to the rules applicable to such a covenant).

*New York*: *Empire Development Co. v. Title Guarantee & Trust Co.*, 225 N.Y. 53, 121 N.E. 468 (1918) (usual policy of title insurance is more than a contract of indemnity and should be given a broader definition in the nature of a warranty or a covenant against encumbrances).

5 *8th Circuit*: *Lawyers Title Ins. Corp. v. Research Loan & Inv. Corp.*, 361 F.2d 764 (8th Cir. 1966) (title insurance is more than a contract of indemnity, the essence of the transaction is to obtain a professional title search, opinion, and guarantee, and the policy is in the nature of a warranty).

*Missouri*: *Drilling Service Co. v. Baebler*, 484 S.W.2d 1 (Mo. 1972) (title insurance is in the nature of a warranty).

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

*Ohio*: Fifth Third Mortg. Co. v. Chicago Title Ins. Co., 758 F. Supp. 2d 476, 487 (S.D. Ohio 2010) holding that, where Chicago Title advertised that “[t]itle insurance will pay for defending against any lawsuit attacking your title as insured, and will either clear up title problems or pay the insured’s losses” that is guaranty of title.

*Texas*: Stone v. Lawyers Title Ins. Corp., 537 S.W.2d 55, 60 (Tex. Civ. App. Corpus Christi 1976), writ granted, (Nov. 17, 1976) and aff’d in part, rev’d in part on other grounds, 554 S.W.2d 183 (Tex. 1977); Lunt Land Corp. v. Stewart Title Guaranty Co., 342 S.W.2d 376 (Tex. Civ. App. Fort Worth 1961), writ granted, (Apr. 5, 1961) and judgment rev’d on other grounds, 162 Tex. 435, 347 S.W.2d 584 (1961).

*Washington*: Kiniski v. Archway Motel, Inc., 21 Wash. App. 555, 586 P.2d 502 (Div. 1 1978) (“title insurance is a guaranty of the accuracy of a company search and record title on a specific property”).

See §§ 1:10, 10:3 discussing title insurers’ basic indemnification obligations.

6 Sattler v. Philadelphia Title Ins. Co., 192 Pa. Super. 337, 162 A.2d 22 (1960).

7 Sattler v. Philadelphia Title Ins. Co., 192 Pa. Super. 337, 162 A.2d 22 (1960). See also Wenima Development, LLC v. Lawyers Title Ins. Corp., 2013 WL 85246 (Ariz. Ct. App. Div. 1 2013), *Not reported in P.3d*; Hawkins v. Oakland Title Ins. & Guaranty Co., 165 Cal. App. 2d 116, 331 P.2d 742 (1st Dist. 1958) (fact that insurer failed to note that the insured title was subject to a deed to the state of access rights was not sufficient to state a claim since insured had not alleged pecuniary loss).

Not surprisingly, where the title insurer failed to disclose an irrigation easement which was found to actually increase the value of the insured title, the Idaho Supreme Court held that the insured suffered no loss or damage. Hunt v. Bremer, 47 Idaho 490, 276 P. 964 (1929) (canal and irrigation easements).

8 See Bohr v. First American Title Ins. Co., 2008 WL 2977353 (M.D. Fla. 2008); La Minnesota Riviera, LLC v. Lawyers Title Ins. Corp., 2007 WL 3024242, \*4 (M.D. Fla. 2007); U.S. v. City of Flint, Genesee County, State of Mich., 346 F. Supp. 1282 (E.D. Mich. 1972) (though undisclosed tax claims could not be foreclosed against the federal government, named as the insured under several title insurance policies, such tax claims could prevent resale unless they were discharged); Holly Hotel Co. v. Title Guarantee & Trust Co., 147 Misc. 861, 264 N.Y.S. 3 (Sup 1932), aff’d, 239 A.D. 773, 264 N.Y.S. 7 (1st Dep’t 1933) (where a lender refused a loan unless the insured owner removed a cloud on the title, the insurer could not say the title defect was invalid and that the insured was not damaged by its existence).

9 Lunt Land Corp. v. Stewart Title Guaranty Co., 342 S.W.2d 376 (Tex. Civ. App. Fort Worth 1961), writ granted, (Apr. 5, 1961) and judgment rev’d on other grounds, 162 Tex. 435, 347 S.W.2d 584 (1961).

10 Lunt Land Corp. v. Stewart Title Guaranty Co., 342 S.W.2d 376 (Tex. Civ. App. Fort Worth 1961), writ granted, (Apr. 5, 1961) and judgment rev’d on other grounds, 162 Tex. 435, 347 S.W.2d 584 (1961). See also Stone v. Lawyers Title Ins. Corp., 537 S.W.2d 55, 60 (Tex. Civ. App. Corpus Christi 1976), writ granted, (Nov. 17, 1976) and aff’d in part, rev’d in part on other grounds, 554 S.W.2d 183 (Tex. 1977).

11 Bohr v. First American Title Ins. Co., 2008 WL 2977353 (M.D. Fla. 2008); La Minnesota Riviera, LLC v. Lawyers Title Ins. Corp., 2007 WL 3024242, \*4 (M.D. Fla. 2007); Summonte v. First American Title Ins. Co., 180 N.J. Super. 605, 436 A.2d 110, 116 (Ch. Div. 1981), judgment aff’d, 184 N.J. Super. 96, 445 A.2d 409 (App. Div. 1981) (insureds sustained loss immediately upon acquisition of property subject to a judgment lien; that the holder of the lien had not yet attempted to enforce it did not delay the insurer’s liability); Green v. Evesham Corp., 179 N.J. Super. 105, 430 A.2d 944 (App. Div. 1981).

12 Overholzer v. Northern Counties Title Ins. Co., 116 Cal. App. 2d 113, 253 P.2d 116, 123 (1st Dist. 1953).

13 See Linder v. Ticor Title Ins. Co. of California, Inc., 647 N.E.2d 37 (Ind. Ct. App. 1995) (insured suffered loss from existence of pipeline easement even where location was same as disclosed right-of-way and within a 100-foot setback restriction); Hartman v. Shambaugh, 96 N.M. 359, 630 P.2d 758, 762 (1981); Happy Canyon Inv. Co. v. Title Ins. Co. of Minnesota, 38 Colo. App. 385, 560 P.2d 839, 843 (App. 1976); Sullivan v. Transamerica Title Ins. Co., 35 Colo. App. 312, 532 P.2d 356 (App. 1975); Lawyers Title Ins. Corp. v. Frieder, 147 Colo. 44, 362 P.2d 555 (1961).

14 See U.S. v. City of Flint, Genesee County, State of Mich., 346 F. Supp. 1282 (E.D. Mich. 1972).

15 Stewart Title Guar. Co. v. Goldome Credit Corp., 494 So. 2d 10, 13 (Ala. 1986).

16 See Summonte v. First American Title Ins. Co., 180 N.J. Super. 605, 436 A.2d 110, 116 (Ch. Div. 1981), judgment aff’d, 184 N.J. Super. 96, 445 A.2d 409 (App. Div. 1981) (purchaser’s loss was immediately upon acquisition of title since it purchased subject to an undiscovered judgment at a value greater than it would have paid had the title insurer disclosed the defect); Sullivan v. Transamerica Title Ins. Co., 35 Colo. App. 312, 532 P.2d 356 (App. 1975); Lawyers Title Ins. Corp. v. Frieder, 147 Colo. 44, 362 P.2d 555 (1961); Overholzer v. Northern Counties Title Ins. Co., 116 Cal. App. 2d 113, 253 P.2d 116, 123 (1st Dist. 1953). See also, in the mortgagee context, Prudential Federal Sav. & Loan Ass’n v. St. Paul Ins. Companies, 20 Utah 2d 95, 433 P.2d 602 (1967) (insured’s loss “was

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

- its entitlement to a first lien”). *Compare* both courts' opinions in *Citibank, N.A. v. Chicago Title Ins. Co.*, 163 Misc. 2d 282, 620 N.Y.S.2d 717 (Sup 1994), rev'd, 214 A.D.2d 212, 632 N.Y.S.2d 779 (1st Dep't 1995). A further appeal of the Citibank case was filed in November 1995, but the parties settled the case while that appeal was pending.
- 17 *See* at Appendix B, ALTA Owner's Policy 1970—Form B, Conditions and Stipulations ¶6(a).
- 18 *See* at Appendix B1, ALTA Owner's Policy (October 17, 1992), Conditions and Stipulations ¶7.
- 19 ALTA Owner's Policy (October 17, 1992), Conditions and Stipulations ¶7.
- 20 *See Sandler v. New Jersey Realty Title Ins. Co.*, 36 N.J. 471, 479, 178 A.2d 1, 9 (1962) (recovery permitted when paramount title was such ... as to leave no doubt it would be enforced, despite fact that insured had not yet been deprived of property by third party claimant and had not yet suffered an economic loss); *Burks v. Louisville Title Ins. Co.*, 95 Ohio App. 509, 54 Ohio Op. 128, 121 N.E.2d 94 (9th Dist. Summit County 1953); *Burke*, Law of Title Insurance § 21, 1986.
- 21 *See Caravan Products Co. v. Ritchie*, 55 N.J. 71, 259 A.2d 223 (1969) (court approved recovery of damages in the amount of a municipal assessment without considering whether insured had been required to pay it); *Burke*, Law of Title Insurance § 21, 1986. *But see Hawkins v. Oakland Title Ins. & Guaranty Co.*, 165 Cal. App. 2d 116, 331 P.2d 742 (1st Dist. 1958) (insurer not liable for failure to note insured title was subject to a deed to the state of access rights since insured had not alleged pecuniary loss).
- 22 *Bohr v. First American Title Ins. Co.*, 2008 WL 2977353 (M.D. Fla. 2008); *Shada v. Title & Trust Co. of Florida*, 457 So. 2d 553 (Fla. Dist. Ct. App. 4th Dist. 1984) (though third party had not yet asserted its claim, insured had suffered an “actual loss” by closing the transaction in reliance upon the policy's description of the insured interest *and* being unable to sell the property or otherwise receive a return on its investment without first quieting title); *Summonte v. First American Title Ins. Co.*, 180 N.J. Super. 605, 436 A.2d 110, 116 (Ch. Div. 1981), judgment aff'd, 184 N.J. Super. 96, 445 A.2d 409 (App. Div. 1981) (“These properties, whether valued at the time of purchase or at some other time, are worth less than they would otherwise be by the amount due on the judgment. Consequently, the insured suffered a loss immediately upon the acquisition of title and that loss was in every sense ‘actual’.”); *Lawyers Title Ins. Corp. v. Frieder*, 147 Colo. 44, 362 P.2d 555 (1961); *Burks v. Louisville Title Ins. Co.*, 95 Ohio App. 509, 54 Ohio Op. 128, 121 N.E.2d 94 (9th Dist. Summit County 1953).
- 23 *See Shada v. Title & Trust Co. of Florida*, 457 So. 2d 553 (Fla. Dist. Ct. App. 4th Dist. 1984) (though third party had not yet asserted its claim, insured had suffered an “actual loss” by closing the transaction in reliance upon the policy's description of the insured interest *and* being unable to sell the property or otherwise receive a return on its investment without first quieting title); *Summonte v. First American Title Ins. Co.*, 180 N.J. Super. 605, 436 A.2d 110, 116 (Ch. Div. 1981), judgment aff'd, 184 N.J. Super. 96, 445 A.2d 409 (App. Div. 1981). In the context of a loan policy, *see Prudential Federal Sav. & Loan Ass'n v. St. Paul Ins. Companies*, 20 Utah 2d 95, 433 P.2d 602 (1967) (insured's loss “was its entitlement to a first lien”).
- 24 *See Summonte v. First American Title Ins. Co.*, 180 N.J. Super. 605, 436 A.2d 110, 116 (Ch. Div. 1981), judgment aff'd, 184 N.J. Super. 96, 445 A.2d 409 (App. Div. 1981); *Lawyers Title Ins. Corp. v. Frieder*, 147 Colo. 44, 362 P.2d 555 (1961); *Burks v. Louisville Title Ins. Co.*, 95 Ohio App. 509, 54 Ohio Op. 128, 121 N.E.2d 94 (9th Dist. Summit County 1953). The reasoning here is that the insured has already lost money because it paid for more than it obtained.
- 25 *See Equity Income Partners LP v. Chicago Title Ins. Co.*, 2013 WL 6498144 (D. Ariz. 2013) *affirming this ruling of Equity Income Partners LP v. Chicago Title Ins. Co.*, 2012 WL 3871505 (D. Ariz. 2012); *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F. Supp. 2d 1058 (D. Minn. 2012); *Interbay Funding, LLC v. Lawyers Title Ins. Corp.*, 2003 WL 22939275 (E.D. Pa. 2003); *In re Evans*, 460 B.R. 848, 899–900 (Bankr. S.D. Miss. 2011) (“[the insured] never could have foreclosed on the deed of trust because there was no collateral”); *First Citizens Bank & Trust Company v. Stewart Title Guaranty Company*, 2014 COA 1, 320 P.3d 406, 412 (Colo. App. 2014) (insured deed of trust was defective at the moment it was recorded); *Demopoulos v. Title Ins. Co.*, 1956-NMSC-059, 61 N.M. 254, 298 P.2d 938, 60 A.L.R.2d 969 (1956); *Quigley v. St. Paul Title Ins. & Trust Co.*, 60 Minn. 275, 62 N.W. 287 (1895).
- 26 *Green v. Evesham Corp.*, 179 N.J. Super. 105, 430 A.2d 944 (App. Div. 1981).
- 27 *Green v. Evesham Corp.*, 179 N.J. Super. 105, 430 A.2d 944 (App. Div. 1981). *Accord Falmouth Nat. Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058, 1063 (1st Cir. 1990) (under Massachusetts law, title insurance is a contract of indemnity, not guarantee); *National Title Ins. Co. v. Safeco Title Ins. Co.*, 661 So. 2d 1234 (Fla. Dist. Ct. App. 3d Dist. 1995); *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal. App. 4th 972, 980, 24 Cal. Rptr. 2d 912, 916 (4th Dist. 1993); *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 275 Cal. Rptr. 107, 109 (3d Dist. 1990); *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis. 2d 68, 423 N.W.2d 521, 525 (1988); *Foothill Capital Corp. v. Commonwealth Land Title Ins. Co.*, No. 86 Civ. 5934 (E.D. Pa. Nov. 16, 1987), aff'd, 862 F.2d 307 (E.D. Pa. 1988); *CMEI, Inc. v. American Title Ins. Co.*, 447 So. 2d 427 (Fla. Dist. Ct. App. 5th Dist. 1984); *Green v. Evesham Corp.*, 179 N.J. Super. 105, 430 A.2d 944, 947 (App. Div. 1981); *Grunberger v. Iseson*, 75 A.D.2d 329, 429 N.Y.S.2d 209 (1st Dep't 1980); *First Commerce Realty Investors v. Peninsular Title Ins. Co.*, 355 So. 2d 510 (Fla. Dist. Ct. App. 1st Dist. 1978);

§ 6:19. Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

- Grimsey v. Lawyers Title Ins. Corp., 38 A.D.2d 572, 328 N.Y.S.2d 474, 476 (2d Dep't 1971), order modified on other grounds, 31 N.Y.2d 953, 341 N.Y.S.2d 100, 293 N.E.2d 249 (1972); Ring v. Home Title Guaranty Co., 168 So. 2d 580, 581 (Fla. Dist. Ct. App. 3d Dist. 1964); C.J.S., Insurance page 1162 § 169.
- 28 Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis. 2d 68, 423 N.W.2d 521, 525 (1988):
- Defining and measuring actual loss under a title policy is not the same for the owner who has title to the property, and a mortgagee who holds only a security interest in the borrower's title. The fee interest of an owner is immediately diminished by the presence of a lien since resale value will always reflect the cost of removing the lien.
- 29 Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis. 2d 68, 423 N.W.2d 521, 525 (1988).
- 30 Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis. 2d 68, 423 N.W.2d 521, 525 (1988). *Accord* Falmouth Nat. Bank v. Ticor Title Ins. Co., 920 F.2d 1058, 1063 (1st Cir. 1990) (under Massachusetts law, title insurance is a contract of indemnity, not guarantee); First American Bank v. First American Transp. Title Ins. Co., 2013 WL 3995261 (E.D. La. 2013), judgment aff'd, 2014 WL 3510113 (5th Cir. 2014); Associated Bank, N.A. v. Stewart Title Guar. Co., 881 F. Supp. 2d 1058 (D. Minn. 2012); Hodas v. First American Title Ins. Co., 1997 ME 137, 696 A.2d 1095, 1097 (Me. 1997) (“The presence of a title defect immediately results in a loss to the holder of a fee interest since resale value will always reflect the cost of removing the defect. In contrast, the holder of a loan policy incurs a loss only if the security for the loan proves inadequate to pay off the underlying insured debt due to the presence of undisclosed defects.”); Karl v. Commonwealth Land Title Ins. Co., 20 Cal. App. 4th 972, 980, 24 Cal. Rptr. 2d 912, 919 (4th Dist. 1993); Cale v. Transamerica Title Insurance, 225 Cal. App. 3d 422, 275 Cal. Rptr. 107, 109 (3d Dist. 1990); Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co., 144 Wis. 2d 68, 423 N.W.2d 521, 525 (1988); Green v. Evesham Corp., 179 N.J. Super. 105, 430 A.2d 944 (App. Div. 1981); Grimsey v. Lawyers Title Ins. Corp., 38 A.D.2d 572, 328 N.Y.S.2d 474, 476 (2d Dep't 1971), order modified on other grounds, 31 N.Y.2d 953, 341 N.Y.S.2d 100, 293 N.E.2d 249 (1972); Ring v. Home Title Guaranty Co., 168 So. 2d 580 (Fla. Dist. Ct. App. 3d Dist. 1964) (discovery of mechanic's lien insufficient to trigger policy's coverage unless lien's priority causes insured lender to be undersecured); Goode v. Federal Title & Ins. Corp., 162 So. 2d 269 (Fla. Dist. Ct. App. 2d Dist. 1964). *See also* American-First Title & Trust Co. v. First Federal Sav. & Loan Ass'n of Coffeyville, Kan., 1965 OK 116, 415 P.2d 930 (Okla. 1965); Miller v. Commercial Standard Ins. Co., 248 So. 2d 675 (Fla. Dist. Ct. App. 2d Dist. 1971). *Compare* Prudential Federal Sav. & Loan Ass'n v. St. Paul Ins. Companies, 20 Utah 2d 95, 433 P.2d 602 (1967) (title insurer liable for loss of insured mortgagee's first lien, since mortgagee would be undersecured); C.J.S., Insurance page 1162 § 169.
- 31 First Community Bank v. Commonwealth Land Title Ins. Co., 2014 WL 4720153 (M.D. La. 2014) (reaching this result without commenting on this rule); Stewart Title Guar. Co. v. Goldome Credit Corp., 494 So. 2d 10 (Ala. 1986) (insured “purchased a mortgage, not the privilege of becoming involved in a series of lawsuits to correct ... [the insurer's] oversights while ... [the insured's] mortgage continued in default”); Prudential Federal Sav. & Loan Ass'n v. St. Paul Ins. Companies, 20 Utah 2d 95, 433 P.2d 602 (1967); *In re Gordon*, 317 Pa. 161, 176 A. 494 (1935) (in dicta, since the property actually was sold and the proceeds received by the insured were reduced because of the prior lien); The Bryn Mawr Trust Company v. Chicago Title Insurance Company and Jenkins Abstract Company, 28 Phila. Co. Rptr. 81, 1994 WL 1251157 (Pa. C.P. 1994), aff'd, 442 Pa. Super. 670, 660 A.2d 649 (1995).
- 32 *In re Gordon*, 317 Pa. 161, 176 A. 494 (1935) (in dicta—insured sustained loss when insured invested in mortgage and not when loss was demonstrated by sale of property in foreclosure); The Bryn Mawr Trust Company v. Chicago Title Insurance Company and Jenkins Abstract Company, 28 Phila. Co. Rptr. 81, 1994 WL 1251157 (Pa. C.P. 1994), aff'd, 442 Pa. Super. 670, 660 A.2d 649 (1995) (“the actual loss occurred at the moment Bryn Mawr received an encumbered title and a later sheriff's sale serves only to determine the extent of the loss”). *See also* Frantze, Equity Income Partners LP v. Chicago Title Ins. Co. and Recovery Under a Lender's Title Insurance Policy in a Falling Real Estate Market, 48 A.B.A. Real Prop., Tr. & Est. L.J. (Fall 2013) (examining the distribution of risk in a real estate loan transaction and arguing for finding a loss and measuring the fair market value of the land as of the date the loan was made).
- 33 First Community Bank v. Commonwealth Land Title Ins. Co., 2014 WL 4720153, \*9 (M.D. La. 2014) (requiring the title insurer to pay the amount of indebtedness with interest without requiring the insured lender to foreclose first, since the insured's title acquired via foreclosure would be unmerchantable because of the prior lien).
- 34 *See* Bluff Ventures Ltd. Partnership v. Chicago Title Ins. Co., 950 F.2d 139 (4th Cir. 1991); Stewart Title Guar. Co. v. Goldome Credit Corp., 494 So. 2d 10 (Ala. 1986); Prudential Federal Sav. & Loan Ass'n v. St. Paul Ins. Companies, 20 Utah 2d 95, 433 P.2d 602 (1967); *In re Gordon*, 317 Pa. 161, 176 A. 494 (1935); Title Ins. Co. of Richmond v. Industrial Bank of Richmond, 156 Va. 322, 157 S.E. 710 (1931); Goode v. Federal Title & Ins. Corp., 162 So. 2d 269 (Fla. Dist. Ct. App. 2d Dist. 1964); Citibank, N.A. v. Chicago Title Ins. Co., 163 Misc. 2d 282, 620 N.Y.S.2d 717 (Sup 1994), rev'd on other grounds, 214 A.D.2d 212, 632 N.Y.S.2d

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

779 (1st Dep't 1995). Applying the same rule when other covered title defects caused the insured's loss, *see also* *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2013 WL 6498144 (D. Ariz. 2013) *affirming in part but overruling the result in* *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2012 WL 3871505 (D. Ariz. 2012); *Citicorp Sav. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir. 1988) applying this theory in the context of a finding that the insured mortgage was voidable, rather than in the context of a prior lien. *Compare* the same result on a theory of liability for damages resulting from the title insurance agent's breach of contract or negligence in performing a contract to procure insurance of a first lien in *Dreibelbiss Title Co., Inc. v. MorEquity, Inc.*, 861 N.E.2d 1218 (Ind. Ct. App. 2007).

35 *See* *Bluff Ventures Ltd. Partnership v. Chicago Title Ins. Co.*, 950 F.2d 139, 143 (4th Cir. 1991) (“when Bluff Ventures failed to receive the subject matter of its purchase unimpaired by the judgment lien, it suffered a loss covered by the policy.... The loss it suffered, if the lien was valid, was at least the amount necessary to pay off the prior lien.”); *Prudential Federal Sav. & Loan Ass'n v. St. Paul Ins. Companies*, 20 Utah 2d 95, 433 P.2d 602 (1967); *In re Gordon*, 317 Pa. 161, 176 A. 494 (1935); *National Title Ins. Co. v. Safeco Title Ins. Co.*, 661 So. 2d 1234 (Fla. Dist. Ct. App. 3d Dist. 1995) (measure of damages is “the difference between the market value of the mortgage, if the lien thereof were as insured, and the market value of the mortgage with title imperfections.”); *The Bryn Mawr Trust Company v. Chicago Title Insurance Company and Jenkins Abstract Company*, 28 Phila. Co. Rptr. 81, 1994 WL 1251157 (Pa. C.P. 1994), *aff'd*, 442 Pa. Super. 670, 660 A.2d 649 (1995). *See also* *Goode v. Federal Title & Ins. Corp.*, 162 So. 2d 269 (Fla. Dist. Ct. App. 2d Dist. 1964):

When it was disclosed that ... there was a total encumbrance of \$10,000, the insurer then and there became legally liable ... to the insured ... the measure of damages [being] the difference in the market value of the \$8000 mortgage which in fact was subject to both the disclosed lien of \$4000 and the undisclosed lien of \$6000, and what its market value would have been had it been subject only to the former.

*Compare* *Dreibelbiss Title Co., Inc. v. MorEquity, Inc.*, 861 N.E.2d 1218 (Ind. Ct. App. 2007) (holding title insurance agent liable for all damages resulting from agent's breach of contract or negligence in performing a contract to procure insurance of a first lien and measuring such damages by the full amount of the prior lien).

36 *See* *Citicorp Sav. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir. 1988). *See generally* *Mississippi Valley Title Ins. Co. v. Hardy*, 541 So. 2d 1057 (Ala. 1989). *See also* *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2013 WL 6498144 (D. Ariz. 2013) *affirming this ruling but reversing in part* *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2012 WL 3871505, \*4 (D. Ariz. 2012); *Frantze, Equity Income Partners LP v. Chicago Title Ins. Co. and Recovery Under a Lender's Title Insurance Policy in a Falling Real Estate Market*, 48 A.B.A. Real Prop., Tr. & Est. L.J. (Fall 2013).

37 *First Federal Sav. and Loan Ass'n of Fargo, N.D. v. Transamerica Title Ins. Co.*, 19 F.3d 528, 530 (10th Cir. 1994). *See also* *In re West Feliciana Acquisition, L.L.C.*, 744 F.3d 352 (5th Cir. 2014).

38 *In re West Feliciana Acquisition, L.L.C.*, 744 F.3d 352 (5th Cir. 2014); *First Federal Sav. and Loan Ass'n of Fargo, N.D. v. Transamerica Title Ins. Co.*, 19 F.3d 528, 530 (10th Cir. 1994); *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F. Supp. 2d 1058, \*5 (D. Minn. 2012).

39 *Citicorp Sav. of Illinois v. Stewart Title Guar. Co.*, 840 F.2d 526 (7th Cir. 1988); *McHenry Sav. Bank v. Pioneer Nat. Title Ins. Co.*, 186 Ill. App. 3d 238, 132 Ill. Dec. 617, 540 N.E.2d 357 (2d Dist. 1989) (insured mortgage claimed lost interest).

40 *See* *In re West Feliciana Acquisition, L.L.C.*, 744 F.3d 352, 360 (5th Cir. 2014); *Falmouth Nat. Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058, 1063 (1st Cir. 1990); *Stewart Title Ins. Co. v. Credit Suisse*, 2013 WL 4710264, \*9 (D. Idaho 2013), *Not Reported in F.Supp.2d* (court can decide coverage issues but not make any final determination of liability and set damages at a sum certain until foreclosure is completed); *First American Bank v. First American Transp. Title Ins. Co.*, 2013 WL 3995261 (E.D. La. 2013), judgment *aff'd*, 2014 WL 3510113 (5th Cir. 2014); *Hodas v. First American Title Ins. Co.*, 1997 ME 137, 696 A.2d 1095, 1097 (Me. 1997); *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal. App. 4th 972, 24 Cal. Rptr. 2d 912 (4th Dist. 1993); *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 275 Cal. Rptr. 107 (3d Dist. 1990); *Blackhawk Production Credit Ass'n v. Chicago Title Ins. Co.*, 144 Wis. 2d 68, 423 N.W.2d 521 (1988); *In re Gordon*, 317 Pa. 161, 176 A. 494 (1935); *Citibank, N.A. v. Chicago Title Ins. Co.*, 163 Misc. 2d 282, 620 N.Y.S.2d 717 (Sup 1994), *rev'd on other grounds*, 214 A.D.2d 212, 632 N.Y.S.2d 779 (1st Dep't 1995). *But see* *First Community Bank v. Commonwealth Land Title Ins. Co.*, 2014 WL 4720153, \*9 (M.D. La. 2014) (requiring the insurer to pay the amount of indebtedness without requiring the insured to foreclose first, since the insured's title acquired via foreclosure would be unmerchantable due to the prior lien).

§ 6:19. Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

- 41 See *First Federal Sav. and Loan Ass'n of Fargo, N.D. v. Transamerica Title Ins. Co.*, 19 F.3d 528, 530 (10th Cir. 1994); *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 2012 WL 3067895, \*5 (D. Minn. 2012); *RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.*, 58 F. Supp. 2d 503, 534 (D.N.J. 1999).
- 42 See *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 275 Cal. Rptr. 107 (3d Dist. 1990) and other cases cited with *Cale* earlier in this subsection.
- 43 See *American Sav. and Loan Ass'n v. First American Title Ins. Co. of New York*, 78 A.D.2d 624, 432 N.Y.S.2d 706 (1st Dep't 1980).
- 44 See *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 275 Cal. Rptr. 107 (3d Dist. 1990).
- 45 See *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 275 Cal. Rptr. 107 (3d Dist. 1990); Reply of Defendant to Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's General Demurrer at 8, 9, *First Republic Thrift & Loan v. Stewart Title Guar. Co.*, (Cal. Super. Ct., L.A. County, filed May 2, 1995) (No. BC114084).
- 46 See *American-First Title & Trust Co. v. First Federal Sav. & Loan Ass'n of Coffeyville, Kan.*, 1965 OK 116, 415 P.2d 930 (Okla. 1965).
- 47 See, e.g., *In re West Feliciana Acquisition, L.L.C.*, 744 F.3d 352, 360 (5th Cir. 2014); *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 2713973, \*3–4 (D. Ariz. 2011); *RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.*, 58 F. Supp. 2d 503, 534 (D.N.J. 1999).
- 48 *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 275 Cal. Rptr. 107 (3d Dist. 1990).
- 49 *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 427, 275 Cal. Rptr. 107, 110 (3d Dist. 1990).
- 50 *Cale v. Transamerica Title Insurance*, 225 Cal. App. 3d 422, 428, 275 Cal. Rptr. 107, 110 (3d Dist. 1990).
- 51 *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal. App. 4th 972, 24 Cal. Rptr. 2d 912 (4th Dist. 1993).
- 52 *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal. App. 4th 972, 24 Cal. Rptr. 2d 912 (4th Dist. 1993).
- 53 *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal. App. 4th 972, 24 Cal. Rptr. 2d 912 (4th Dist. 1993).
- 54 *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal. App. 4th 972, 24 Cal. Rptr. 2d 912 (4th Dist. 1993).
- 55 See *infra* at Appendices C3 & C4, ALTA 2006 Loan Policy, Condition ¶9(b); and at Appendices C1, C2 & C4, ALTA 1992 Loan Policy, Condition ¶8(b).
- 56 This seems to have been the approach taken in *McHenry Sav. Bank v. Pioneer Nat. Title Ins. Co.*, 186 Ill. App. 3d 238, 132 Ill. Dec. 617, 540 N.E.2d 357 (2d Dist. 1989) (title insurer paid attorney's fees in insured's suit for foreclosure of the allegedly invalidly-executed mortgage and, alternatively, for an equitable lien in favor of the insured) and *Mississippi Valley Title Ins. Co. v. Hardy*, 541 So. 2d 1057 (Ala. 1989) (ruling that a mortgagee's claim for an equitable lien is a compulsory counterclaim in a borrower's action to set aside the mortgage and foreclosure, and if not raised in the same lawsuit which finds the mortgage void, it cannot be brought in a later lawsuit).
- 57 See *infra* at Appendices C3 & C4, ALTA 2006 Loan Policy, Condition ¶5(b); and at Appendices C1, C2 & C4, ALTA 1992 Loan Policy, Condition ¶4(b).  
See also *infra* §§ 11:10 to 11:15 analyzing the title insurer's right to take affirmative action to establish the title as insured.
- 58 In *California Land Title Co. v. Emslie*, 221 Cal. Rptr. 332 (App. 4th Dist. 1985), review granted and opinion superseded, 224 Cal. Rptr. 100, 714 P.2d 1283 (Cal. 1986), the insured had commenced nonjudicial foreclosure proceedings and then learned that the trust deed was a forgery. The title insurer paid the insured, then asserted its subrogated rights for payment and imposition of an equitable lien. In *Allen v. Union Federal Mortg. Corp.*, 204 F. Supp. 2d 543 (E.D. N.Y. 2002), the mortgage could not be recorded and was unenforceable because the signature and notary pages were missing. Lawyers Title paid Countrywide and accepted an assignment of Countrywide's rights, then substituted itself as a party in the lenders' counterclaim against the borrowers for an equitable mortgage against the property.
- 59 Restatement Third, Property: Mortgages § 4.8; Dunaway, *The Law of Distressed Real Estate* § 11:105, Nelson and Whitman, *Real Estate Finance Law* § 4.16 (4th ed.); 3COUCH ON INSURANCE 3<sup>rd</sup> ed. § 42:32.
- 60 Restatement Third, Property, Mortgages, § 4.8; Dunaway, *The Law of Distressed Real Estate* § 11:105; Nelson and Whitman, *Real Estate Finance Law* § 4.16 (4th ed.); 3COUCH ON INSURANCE 3<sup>rd</sup> ed. § 42:32.
- 61 Restatement Third, Property: Mortgages § 4.8; Dunaway, *The Law of Distressed Real Estate* § 11:105; Nelson & Whitman, *Real Estate Finance Law* § 42:32 (3rd ed.); 3 COUCH ON INSURANCE 3<sup>rd</sup> ed. § 42:32; *Right of mortgagee, who acquires title to mortgaged premises in satisfaction of mortgage, to recover, under fire insurance policy covering him as "mortgagee," for loss or injury to property thereafter damaged or destroyed by fire*, 19 A.L.R. 4th 778.  
When the insured does not know of the title defect before bidding, courts may or may not apply the full credit bid rule. If the insured can show that knowledge of the title defect was prevented by fraud or misrepresentation, most courts have not held that the insured's

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

full credit bid extinguished its fire and casualty insurance. *Restatement Third, Property: Mortgages* § 4.8, Dunaway, *The Law of Distressed Real Estate*, § 11:105, Nelson & Whitman, *Real Estate Finance Law* § 4.16 (4th ed.); 3 *COUCH ON INSURANCE* 3<sup>rd</sup> ed. § 42:32; *Right of mortgagee, who acquires title to mortgaged premises in satisfaction of mortgage, to recover, under fire insurance policy covering him as “mortgagee,” for loss or injury to property thereafter damaged or destroyed by fire*, 19 A.L.R. 4th 778.

62 *See infra* at Appendix C3, ALTA 2006 Loan Policy, Condition 2:

2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

63 *See infra* at Appendix C4, Comparison of ALTA 1992 Loan Policy and ALTA 2006 Loan Policy, Condition 2 COMMENTS.

64 *See infra* at Appendix C1, ALTA 1992 Loan Policy, Condition 2(a) (emphasis added):

2. CONTINUATION OF INSURANCE.

(a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insureds; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

65 *See infra* at Appendix C1, ALTA 1992 Loan Policy, Condition 2(c)i & ii:

(c) Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:

(i) the Amount of Insurance stated in Schedule A;

(ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of foreclosure, amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition of the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made.

66 *See infra* at Appendix C3, ALTA 2006 Loan Policy, Condition 8(c):

8. DETERMINATION AND EXTENT OF LIABILITY

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of

(i) the Amount of Insurance,

(ii) the Indebtedness,

(iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy

...

(c) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions or has conveyed the Title, then the extent of liability of the Company shall continue as set forth in Section 8(a) of these Conditions.

2006 Condition 8(c) was Condition 7(b) in the 1992 ALTA policy. *See infra* at Appendix C1, ALTA 1992 Loan Policy, Condition 7(b):

7. DETERMINATION AND EXTENT OF LIABILITY.

...

(b) In the event the insured has acquired the estate or interest in the manner described in Section 2(a) of these Conditions and Stipulations or has conveyed the title, then the liability of the Company shall continue as set forth in Section 7(a) of these Conditions and Stipulations.

The 1992 ALTA policy repeated the formula in Conditions 2(c) and 7(b), while the 2006 deleted that repetition. *See infra* Appendix C3, ALTA 2006 Loan Policy, Condition 10(b):

67

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY

...

b) The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

*See infra* Appendix C1, ALTA 1992 Loan Policy, Condition 9(c):

9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

...

(c) Payment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

68 *See infra* at Appendix C3, ALTA 2006 Loan Policy, Condition 2 at Appendix C1; ALTA 1992 Loan Policy, Condition 2(a).

69 *See supra* § 1:11 citing cases applying this rule of insurance law to title insurance policies.

70 *Bank of Idaho v. First American Title Ins. Co.*, 156 Idaho 618, 329 P.3d 1066 (2014).

71 *Bank of Idaho v. First American Title Ins. Co.*, 156 Idaho 618, 620, 329 P.3d 1066, 1068 (2014).

72 *Bank of Idaho v. First American Title Ins. Co.*, 156 Idaho 618, 621–623, 329 P.3d 1066, 1069–1071 (2014).

73 *Bank of Idaho v. First American Title Ins. Co.*, 156 Idaho 618, 621, 329 P.3d 1066, 1069 (2014).

74 *Bank of Idaho v. First American Title Ins. Co.*, 156 Idaho 618, 621, 329 P.3d 1066, 1069 (2014) (emphasis added).

75 *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013).

76 *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 319, 751 S.E.2d 256, 261 (2013).

77 *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 319–320, 751 S.E.2d 256, 261 (2013).

78 *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 319, 751 S.E.2d 256, 261 (2013).

79 *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256, 261 (2013).

80 *Preservation Capital Consultants, LLC v. First American Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256, 261 (2013).

81 *Doss & Associates v. First American Title Ins. Co., Inc.*, 325 Ga. App. 448, 754 S.E.2d 85 (2013), cert. denied, (May 19, 2014).

82 *Equity Income Partners LP v. Chicago Title Ins. Co.*, 2013 WL 6498144 (D. Ariz. 2013). *In accord* *American Sav. and Loan Ass'n v. First American Title Ins. Co. of New York*, 78 A.D.2d 624, 432 N.Y.S.2d 706 (1st Dep't 1980). *Compare* *Alliance Mortgage Co.*

§ 6:19.Defects causing “no loss or damage”—Existence of..., 1 Title Ins. Law §...

v. Rothwell, 34 Cal. Rptr. 2d 700, 714, 716 (App. 1st Dist. 1994), review granted and opinion superseded, 37 Cal. Rptr. 2d 57, 886 P.2d 606 (Cal. 1994) and judgment aff'd, 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352, 900 P.2d 601 (1995) (recognizing that, in spite of mortgagee's purchase of property by full credit bid at nonjudicial foreclosure sale, insured mortgagee could bring a tort action against insurer for intentional and negligent misrepresentation).

- 83 Equity Income Partners LP v. Chicago Title Ins. Co., 2012 WL 3871505, \*1 (D. Ariz. 2012).
- 84 Equity Income Partners LP v. Chicago Title Ins. Co., 2013 WL 6498144, \*1 (D. Ariz. 2013).
- 85 *See generally* Equity Income Partners LP v. Chicago Title Ins. Co., 2012 WL 3871505, \*1 (D. Ariz. 2012) discussed *infra* Chapters 6 & 10.
- 86 *See* Equity Income Partners LP v. Chicago Title Ins. Co., 2012 WL 3871505 (D. Ariz. 2012) discussed *infra* Chapters 6 & 10.
- 87 Equity Income Partners LP v. Chicago Title Ins. Co., 2013 WL 6498144, \*8–9 (D. Ariz. 2013).
- 88 Equity Income Partners LP v. Chicago Title Ins. Co., 2013 WL 6498144, \*9 (D. Ariz. 2013).
- 89 Equity Income Partners LP v. Chicago Title Ins. Co., 2012 WL 3871505, \*5 (D. Ariz. 2012) (emphasis added).
- 90 Equity Income Partners LP v. Chicago Title Ins. Co., 2012 WL 3871505, \*5 (D. Ariz. 2012).
- 91 M & I Marshall & Ilsley Bank v. Wright, 2011 WL 2713973, \*1 (D. Ariz. 2011).
- 92 M & I Marshall & Ilsley Bank v. Wright, 2011 WL 2713973, \*1 (D. Ariz. 2011).
- 93 M & I Marshall & Ilsley Bank v. Wright, 2011 WL 2713973, \*3–4 (D. Ariz. 2011).
- 94 M & I Marshall & Ilsley Bank v. Wright, 2011 WL 2713973, \*4 (D. Ariz. 2011).
- 95 M & I Marshall & Ilsley Bank v. Wright, 2011 WL 2713973, \*4 (D. Ariz. 2011).
- 96 M & I Marshall & Ilsley Bank v. Wright, 2011 WL 2713973, \*4 (D. Ariz. 2011).
- 97 M & I Marshall & Ilsley Bank v. Wright, 2011 WL 2713973, \*4 (D. Ariz. 2011).
- 98 Bank of America, Na v. First American Title Ins. Co., 2014 WL 1271227 (Mich. Ct. App. 2014), appeal granted, 497 Mich. 896, 855 N.W.2d 747 (2014).
- 99 This in many contexts is better determined by appraisal than by the amount of the lender's foreclosure bid. *See also infra* § 10:16 discussing other contexts when the fair market value of the land is not appropriately measured by the amount of the lender's bid in foreclosure.
- 100 Barlow Burke, Law of Title Insurance § 3:02.
- 101 Barlow Burke, Law of Title Insurance § 3:02.
- 102 Barlow Burke, Law of Title Insurance § 3:02.
- 103 Barlow Burke, Law of Title Insurance § 3:02.
- 104 Barlow Burke, Law of Title Insurance § 3:02.
- 105 In the measuring of “actual loss” under a closing protection letter rather than the lender's loan policy, the U.S. District Court for the Eastern District of Michigan required the title insurer to pay the difference between the original loan amount and the “book value” for which the loan could be sold to another lender in the secondary mortgage market. *See JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 795 F. Supp. 2d 624, 631–32 (E.D. Mich. 2011). *See also infra* §§ 20:15 to 20:21 discussing title insurers' closing protection letters.
- 106 *See dicta* in Karl v. Commonwealth Land Title Ins. Co., 20 Cal. App. 4th 972, 984, 24 Cal. Rptr. 2d 912, 920 (4th Dist. 1993).
- 107 George Lefcoe, Real Estate Transactions 3d Ed. at 238.3 (1996).
- 108 George Lefcoe, Real Estate Transactions 3d Ed. at 238.3 (1996).
- 109 George Lefcoe, Real Estate Transactions 3d Ed. at 238.3 (1996).
- 110 George Lefcoe, Real Estate Transactions 3d Ed. at 238.3 (1996).

# EXHIBIT B

## 2 Title Ins. Law § 20:20 (2014-2015 ed.)

Title Insurance Law

Database updated August 2015

Joyce D. Palomar

Chapter 20. Title Insurers' Liability for Escrow and Closing Services \*

## References

§ 20:20. Title insurance underwriter's liability for agents' escrows and closings—Pursuant to closing protection letter—Measure of loss under closing protection letters

Several questions have arisen about the amount an addressee is entitled to recover under a closing protection letter. What is the measure of an addressee's "actual loss" and the title insurer's liability under a closing protection letter? When has the addressee sustained an actual loss? Does the policy's integration clause bring the closing protection letter under the policy's conditions and stipulations, so that the policy's limitations on the insurer's liability control? Likewise, since the closing protection letter is separate from the policy for purposes of state insurance regulations on single-line insurance, is it separate from the policy for purposes of measuring the recipient's damages?

A title insurance policy is a promise to indemnify if loss results from a title defect, not a guarantee of the status of title.<sup>1</sup> Analogously, the closing protection letter is a promise to reimburse if loss results from an agent's failure to follow closing instructions or to apply settlement funds honestly,<sup>2</sup> not a guarantee that the agent will not err or use settlement funds dishonestly. Thus, if, despite the agent's error or fraud, the addressee recovers the full amount of money entrusted to the agent and suffers no other actual losses, then the addressee has no claim under the closing protection letter.<sup>3</sup>

Yet, when the addressee has sustained an "actual loss" "in connection with" a closing, pre-2011 ALTA closing protection letters did not limit the addressee's recovery to only the settlement funds lost or the amount recoverable under the terms of the title insurance policy. Pre-2011 ALTA Closing Protection Letters agreed to reimburse for "actual loss incurred" "in connection with such closing" when such "loss arises out of" the agent's fraud, dishonesty, or negligence in handling the lender's funds or documents or failing to comply with closing instructions relating to the status of the title, obtaining necessary documents, or disbursing funds.<sup>4</sup> Nowhere did the CPL limit the actual loss payable to reimbursement of funds given to the agent or attorney for settlement or closing. The cases of *Herget National Bank v. U.S. Life Title Insurance Company* and *First Financial Savings & Loan Association v. Title Insurance Company of Minnesota* have been cited for the proposition that a closing protection letter covers only the loss of settlement funds and no consequential or incidental damages, but they are clearly distinguishable.<sup>5</sup> The insured closing letters issued in those cases were not standard ALTA forms. Instead, the letter in *Herget* only agreed to "reimburse for any loss of your settlement funds transmitted by you to [our issuing agent]."<sup>6</sup> The letter in *First Financial* similarly promised, according to the court, only to "reimburse ... for any loss of settlement funds transmitted to [the agents] due to their ... fraud or dishonesty...."<sup>7</sup> Thus, the measure of the addressee's actual loss under closing protection letters that are not so limited should include *at least* the settlement funds lost due to the agent's errors or fraud.

If the closing agent or attorney defalcates with funds intended to pay off a seller's mortgage, the insurer ordinarily is obligated to pay off the prior mortgage for the benefit of the addressee who was intended to receive a first lien or a clear title to the property.<sup>8</sup> Because misappropriation of funds delivered to the agent to pay the seller or a prior lienor could cause more damage to the buyer or lender than simply the loss of that money, such damage also may be considered encompassed in the pre-2011 CPLs' broad promise to reimburse the addressee's "actual loss" "in connection with such closing."

Neither did pre-2011 ALTA closing protection letters expressly contain or incorporate the title insurance policy's conditions limiting the amount of the insured's loss for which the insurer is liable.<sup>9</sup> Thus, the measure of the addressee's "actual loss" under the letters has included even the amount of loan funds that exceeds the value of the land subject to the lender's insured lien, if the addressee cannot recover the excess amount because of the title agent's fraud.<sup>10</sup> In *First American Title Insurance Co. v. Vision Mortgage Corp.*,<sup>11</sup> Vision Mortgage Corp. had approved a loan to Zarifian and obtained a lender's title insurance policy from First American. First American also gave Vision Mortgage a closing protection letter that named attorney Levenson as an approved attorney and protected Vision Mortgage for losses caused by Levenson's fraud or dishonesty. Ultimately, it was determined that Zarifian was a fictitious person created by Levenson and that Levenson had forged Zarifian's signature on closing documents. When no mortgage payments were made, Vision Mortgage proceeded to foreclose on the property and notified First American that it expected reimbursement for the foreclosure. First American contended that the closing protection letter was only meant to secure first-lien status together with the policy, and, since Vision Mortgage received a first lien, it had no indemnifiable loss under either the letter or the policy. First American claimed that any loss that Vision Mortgage sustained was caused by its lending more than the value of the land subject to its first lien due to its own overvaluation of the property.

The court acknowledged that, under a closing protection letter, even if the title agent or approved attorney commits fraud, the addressee will not have a claim if the addressee recoups his full bargain and does not sustain a loss. However, in this case, the fact that the borrower did not exist guaranteed an immediate default and eliminated the possibility of the mortgagee's recovering on a deficiency judgment.<sup>12</sup> "Thus, of the three remedies for which a lender bargains in a bona fide transaction (payment, foreclosure and recovery of any deficiency), only one was available to Vision Mortgage (foreclosure) as a direct result of Levenson's fraud."<sup>13</sup> The court concluded that the mortgagee's loss was caused by the approved attorney's fraud, within the terms of the closing protection letter, regardless of the insured mortgagee's overvaluation of the property.

The *Vision Mortgage* decision illustrates that the title insurer's obligation to indemnify under a closing protection letter is not limited by the terms of the title insurance policy.<sup>14</sup> According to First American, under the policy, Vision Mortgage would have had no loss because it held a first lien on the land as the policy insured. However, a standard ALTA Closing Protection Letter protects against all "actual loss incurred by you in connection with such closing" which "arises out of" "fraud or dishonesty of the Issuing Agent or Approved Attorney" in handling funds and documents. Here, because of the approved attorney's fraud in connection with closing a sham transaction, Vision Mortgage lost its legal right to pursue a deficiency judgment against the borrower. The title insurer, thus, was obligated to make good the entire loss its approved attorney caused. In its 2008 revision of its closing protection letter forms, ALTA added an exclusion that seems to incorporate into the contract the argument First American had made in *Vision Mortgage*: "Any liability of the Company for loss does not include liability for loss resulting from ... the failure of any collateral to adequately secure a loan connected with a real estate transaction."<sup>15</sup> This exclusion would not have made a difference in *Vision Mortgage*, since the court concluded that the fundamental cause of the loss was the attorney-agent's scam, not the mortgagee's subsequently lending more than the value of the land. Nevertheless, one may expect to see this exclusion raised frequently in response to claims on lenders' 2008 ALTA Closing Protection Letters, along with their exclusion for loss resulting from "the lack of creditworthiness of any borrower..."<sup>16</sup>

Citing *First American Title Ins. Co. v. Vision Mortgage Corp., Inc.*, the U.S. District Court for the Northern District of Illinois agreed that ability to foreclose on the mortgage lien does not mean an insured lender has no "actual loss" under a closing protection contract as it might under a loan title insurance policy.<sup>17</sup>

... Plaintiff was able to successfully foreclose on the mortgage despite Traditional Title's alleged non-compliance with the closing instructions. Chicago Title appears to urge that the upshot of this successful foreclosure is that Plaintiff was made whole—that in the end, Fifth Third received no less than what it bargained for.

This is an implausibly short-sighted assessment of the circumstances underlying this transaction.

It may well be that a foreclosure, even at a severe loss, that arises as a result of, say, a downturn in the real estate market, still leaves a lender with no less than what the lender bargained for. A foreclosure that arises because the borrower was fraudulently manufactured (that is, the borrower for all practical purposes did not exist) is another story—Plaintiff bargained for a bona fide borrower. Without that, an immediate default was all but guaranteed. Taking Plaintiff's allegations as true, the sham-nature of the bargain cannot be excused or ignored simply because one of the remedies that would have been available to Plaintiff had the transaction been legitimate remained available to the Plaintiff despite the fraud. Cf. *First American Title Insurance Company v. Vision Mortgage Corporation, Inc.*, 298 N.J.Super. 138, 689 A.2d 154, 157 (N.J.Super.Ct.App.Div.1997). Plaintiff has adequately pled an actual loss for which Chicago Title could be liable under the CPC.<sup>18</sup>

The court's decision in *American Title Insurance Co. v. Variable Annuity Life Insurance Co.*<sup>19</sup> further supports the view that recovery under a closing protection letter is separate from recovery under the policy. Even termination of the title insurance policy by payment of policy limits does not relieve the title insurer of its separate obligation under a pre-2011 closing protection letter to pay additional losses caused by the title agent's errors or defalcation. American Title had issued the lender in a refinancing transaction an insured closing letter that promised to replace settlement funds that were lost as a result of the fraud or dishonesty of American Title's closing agent, Summit Title Company. Summit was given a check from the refinancing lender, Variable Annuity, to pay off the prior lienor, Morian. When Morian attempted to cash the check Summit gave her, it was returned for insufficient funds. Summit went out of business shortly thereafter. Morian's estate subsequently initiated proceedings to foreclose its first lien. Variable Annuity demanded that American Title honor the insured closing letter and pay the outstanding balance on the Morian loan. This would have put Variable Annuity in the first lien position it would have held had Summit not misappropriated the funds to pay off Morian.

American Title instead tendered to Variable Annuity the policy limits of its title insurance policy, minus the payments the borrower had made, in full satisfaction of policy liability.<sup>20</sup> This did reimburse Variable Annuity for “the full amount of the funds it had loaned.” However, Morian's estate continued its foreclosure action and Variable Mortgage demanded that American Title settle that lawsuit. American Title denied any further obligation and warned that, if Variable Annuity paid off the prior Morian lien, American would consider it a voluntary payment and would not reimburse Variable Annuity. In an effort to prevent foreclosure by the Morian estate, Variable Annuity paid the Morian estate the amount of the principal, interest, and attorney's fees that had accrued on its debt since 1986. Variable Annuity then sued American Title for the difference between what it had to pay the Morian estate and what American Title had paid under the loan policy.

The appellate court held that American Title's payment of the loan policy limits had compensated Variable Annuity for not having the first lien on the house as insured, but that payment did not address Variable Annuity's potential liability and costs from pending lawsuits by its borrower and the prior lender for their losses resulting from Summit's defalcation.<sup>21</sup> The court also found that Variable Annuity's payment of the prior lien was not voluntary and that, having denied liability under the insured closing letter despite repeated demands, American Title waived the right to approve or consent to Variable Annuity's settlement of the prior lien. The court concluded that Summit's defalcation was exactly what the insured closing letter anticipated. Accordingly, the court awarded Variable Annuity the additional amount it paid to the Morian estate in settlement of the prior lien over what it had received from American Title under the policy.<sup>22</sup> ALTA's 2011 CPL amendments attempted to resolve this issue and limit the underwriter's liability by stating that payment to the owner under the policy or to the owner of the indebtedness under the lender's policy shall reduce the underwriter's liability under the CPL.<sup>23</sup>

When measuring the amount of a lender's loss payable under a closing protection letter, the point in time when the loss actually occurs also may be an issue. When the loss actually occurs depends on the facts of the case, not merely on the language of the closing protection letter. When the closing agent diverts loan funds and the intended mortgage lien is never created, it has been held the lender's actual loss from the closing agent's fraud occurs and should be measured when the agent

diverted the funds received from the lender to the closing agent's own use, not when the lender subsequently discovered the fraud and sold the loan at book value.<sup>24</sup>

In comparison, when the insured lien was created, but the closing agent's failures to follow closing instructions and disclose prior liens resulted in the lien being fourth in priority, the lender and its assignees were held to not suffer actual loss until foreclosure sale left the insured lien unpaid.<sup>25</sup>

Somewhat surprisingly, in its 2008 revision of its standard closing protection letters, ALTA did not expressly limit the underwriter's liability to the settlement funds the addressee entrusts to the agent or the amount of the addressee's title insurance policy.<sup>26</sup> Usually those amounts and the amount the agent has the opportunity to misappropriate will be the same, but *American Title Insurance C. v. Variable Annuity Life Insurance Co.*, illustrates how an addressee's loss may exceed the amount the agent actually misappropriates.

ALTA's 2011 amendment subsequently did limit the underwriter's liability to the funds entrusted to the agent or attorney and added other limitations to resolve some of the issues discussed above. The 2014 ALTA CPLs continue these limitations, stating that the underwriter's liability under the CPL shall not exceed the least of:

- (a) the amount of the addressee's funds;
- (b) the underwriter's liability under the policy at the time written notice of a claim is made on the CPL;
- (c) the value of the lien of the insured mortgage; or
- (d) the value of the title insured or to be insured under the policy at the time written notice of a claim is made on the CPL.<sup>27</sup>

Separate from the question of the amount the title insurer must pay under the closing protection letter's terms is the question of the damages an addressee may recover if the insurer is found to have *breached the letter's contract* to indemnify for the addressee's actual loss. For example, in letters discussed above that restrict the promise of indemnification only to "settlement funds," the insurer arguably has not promised to also reimburse for attorney's fees the addressee spends to recover those settlement funds. However, if an underwriter breached the closing letter's contract entirely, that breach of contract may entitle the addressee to attorney's fees in states that permit recovery of attorney's fees by the successful party in actions for breach of contract.<sup>28</sup> Additionally, though the closing letter is not itself an insurance policy, because it is incidental to the title insurance policy, the addressee has been held to be entitled to recover attorney's fees spent to enforce the addressee's rights under the letter pursuant to state statutes that permit an award of counsel fees in actions upon insurance policies.<sup>29</sup>

In comparison, however, courts have held that, because a closing protection letter is not a policy of insurance, statutory penalties for bad-faith denial of an insurance claim are not available.<sup>30</sup>

ALTA Closing Protection Letters expressly decline to protect addressees against loss of their settlement funds while on deposit with a bank due to a bank failure, unless the agent failed to deposit the funds in another bank specifically named in the closing instructions.<sup>31</sup> Neither are ALTA Closing Protection Letters intended to cover an escrow agent's disbursement of construction loan proceeds. ALTA's 1987–1998, 2011 and 2014 letters expressly exclude mechanic's and material liens in connection with an addressee's purchase, lease or construction loan transactions, as do the 2008 letters within their broader exclusion of all "defects, liens, encumbrances or other matters."<sup>32</sup> For coverage of construction loan disbursements, a lender or purchaser should consider endorsements to its title insurance policy. The ALTA Construction Loan Policy is reproduced at [Appendix G](#) to this treatise and Construction Loan Endorsements are discussed at [§ 9:9](#) and reproduced at [Appendix G1](#). Upon payment of the addressee's loss under a closing protection letter, the title insurer becomes subrogated to the position of the addressee.<sup>33</sup> However, whether those rights will benefit the insurer is complicated when the insurer has issued title insurance policies to both the lender and the borrower.<sup>34</sup> For example, if an approved attorney steals funds that were to be used to satisfy a pre-existing mortgage, the insurer may seek to purchase the preexisting mortgage by paying the amount due

and taking an assignment of the mortgage. If the title insurer obtains an assignment, it may protect its new insured lender by subordinating the preexisting mortgage and providing the new lender with first-mortgage status.<sup>35</sup> However, the insurer then would want to foreclose on what has become the second mortgage. “The title insurer, in effect, would recoup its loss by moving against its own insured, the purchaser of the property, who paid for the title insurance.”<sup>36</sup> This likely would not be permitted under the equitable principles of subrogation. See §§ 8:10 to 8:16. Thus, the title insurer would have to pay off the preexisting mortgage but not be able to recoup its loss.<sup>37</sup>

Like title insurance policies, closing protection letters provide that the title insurer's liability is reduced to the extent an insured impairs the title insurer's right of subrogation. In the context of a closing protection letter, the lender's selling the loan after notice of an agent's fraud does not impair all the title insurer's subrogation rights. Though the title insurer would not then be able to foreclose the loan and pursue a deficiency judgment against the borrower, the title insurer still may step into the shoes of the defrauded lender and sue the title agent and others for fraud.<sup>38</sup>

*Does a Full Credit Bid prevent recovery on a Closing Protection Letter?*

Title insurance policies also provide that the title insurer's liability is reduced by the amount of payments on the indebtedness secured by the insured mortgage.<sup>39</sup> Title insurers have contended that either a lender's full credit bid in foreclosure, or a lender's failure to obtain a deficiency judgment against the debtor following a lower bid, equals a full “payment” of the indebtedness. Section 6:19 *supra* discusses whether the “Full Credit Bid Rule” bars attempts by such a lender to recover the lender's loss from an insurance company. The U.S. District Court for the Northern District of Illinois in 2010 held in *Freedom Mortgage Corp. v. Burnham Mortgage, Inc.* that damages were not available to the insured lender against Tigor for breach of its Closing Protection Letter as to three full credit bid properties.<sup>40</sup> The court ruled that the Full Credit Bid Rule bars future litigation on contract claims as well as future litigation on tort claims, including for fraud or negligence.<sup>41</sup> “Because a mortgagee is entitled to one satisfaction of his debt and no more, the bidding in [full] of the debt to purchase the mortgaged property, thus cutting off other lower bidders, has always constituted a satisfaction of the debt ... [A] full credit bid means that there is no deficiency in the property.”<sup>42</sup>

The Michigan Court of Appeals also has applied the Full Credit Bid Rule to prohibit an insured lender's indemnity claims under a title insurer's closing protection letters.<sup>43</sup> The Michigan Court of Appeals stated, however, that it was bound to apply 2008 precedent holding that the Full Credit Bid Rule applies to title insurers, but this precedent might be wrong since Michigan statutorily limits the Full Credit Bid rule to protect only “the mortgagor, trustor or other maker of the obligation or any other person liable thereon.”<sup>44</sup> At this writing in 2015, the case is on appeal to the Michigan Supreme Court to ask whether title insurers have liability on the debt.

The U.S. District Court for the District of Arizona in 2013 in *Equity Income Partners, LP v. Chicago Title Insurance Co.* also held that the insured lender's full credit bid precluded it from pursuing a claim under either its policy or Closing Protection Letter.<sup>45</sup> In comparison, in *Marshall & Ilsley Bank v. Wright*, the same court had ruled that the insured lender's “full credit bid” did not preclude claims related to problems with forgery and invalidity of the mortgage lien. Therefore, that insured was able to sue under its Closing Protection Letter.<sup>46</sup> The reader is referred to § 6:19 *supra* for a more complete analysis of these cases.

Westlaw. © 2015 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

Footnotes

- \* Ch 20 originally was coauthored by Prof. Joyce Palomar and attorney Kristy D. Freeman. Ms. Freeman is an attorney with Thompson & Knight L.L.P. in Dallas. Real estate law is her primary practice area. *See* p. xii.
- 1 *See* §§ 1:1 *et seq.*
- 2 *Heritage Pacific Financial, LLC v. First American Title Ins. Co.*, 2013 WL 4401040, \*5 (D. Md. 2013) *Not Reported in F.Supp.2d.*; *Walsh Securities, Inc. v. Cristo Property Management, Ltd.*, 858 F. Supp. 2d 402, 419 (D.N.J. 2012), on reconsideration in non-

relevant part, 2012 WL 3629045 (D.N.J. 2012); *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 2014 WL 1622193 (6<sup>th</sup> Cir. 2014), affirming 795 F. Supp. 2d 624, 629 (E.D. Mich. 2011).

- 3 *Heritage Pacific Financial, LLC v. First American Title Ins. Co.*, 2013 WL 4401040, \*6 (D. Md. 2013) *Not Reported in F.Supp.2d* (holder of closing protection letter suffers actual loss from the agent's malfeasance when foreclosure on the property is completed and the loan is left unpaid); *Walsh Securities, Inc. v. Cristo Property Management, Ltd.*, 858 F. Supp. 2d 402, 419 (D.N.J. 2012), on reconsideration in non-relevant part, 2012 WL 3629045 (D.N.J. 2012) (lender was required to prove it had repurchased the mortgage loans that were part of the approved attorneys' fraudulent scheme).
- 4 *See infra* Appendix D. *See also* closing protection letters quoted in *Walsh Securities, Inc. v. Cristo Property Management, Ltd.*, 858 F. Supp. 2d 402 (D.N.J. 2012), on reconsideration in non-relevant part, 2012 WL 3629045 (D.N.J. 2012); *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 795 F. Supp. 2d 624, 626–627 (E.D. Mich. 2011), affirmed by 2014 WL 1622193 (6<sup>th</sup> Cir. 2014).
- 5 *Herget Nat. Bank of Pekin v. USLife Title Ins. Co. of New York*, 809 F.2d 413 (7th Cir. 1987).
- 6 *Herget Nat. Bank of Pekin v. USLife Title Ins. Co. of New York*, 809 F.2d 413, 416 (7th Cir. 1987) (emphasis added).
- 7 *First Financial Savings & Loan Association v. Title Insurance Company of Minnesota*, 557 F. Supp. 654, 662 (N.D. Ga. 1982) (emphasis added). Actually, this author would dispute the court's holding in *First Financial* because the court ignored additional language in the insured closing letter which said the insurer was also liable for “direct loss or damage resulting to you from their failure to comply with your written closing instructions.” In that case, the agents had been told to issue certificates that the loans were closed after they were closed. The agents issued the certificates even though the loans had not been closed. The insurer should have been liable under the letter for the “direct loss or damage” that resulted to the addressee from the agents' failure to comply with the addressee's written closing instructions, even if the loss was not of “settlement funds.”
- 8 Nielsen, *Title & Escrow Claims Guide*, p. 446 (1996). *See American Title Ins. Co. v. Burke & Herbert Bank & Trust Co.*, 813 F. Supp. 423, 20 U.C.C. Rep. Serv. 2d 564 (E.D. Va. 1993), aff'd, 25 F.3d 1038 (4th Cir. 1994) (“Pursuant to these letters, American Title was obligated to reimburse the payees for the losses arising from the nonpayment of the dishonored checks.”). *See also Clients' Sec. Fund of the Bar of New Jersey v. Security Title and Guar. Co.*, 134 N.J. 358, 634 A.2d 90 (1993):

In *Sears Mortg. Corp. v. Rose*, 134 N.J. 326, 634 A.2d 74 (1993), we determined that a closing attorney who had been retained by the purchaser and designated by the title insurance company as its approved attorney to effectuate the purchase of insurance was a dual agent of both the buyer and the title insurer.... We held that responsibility for the attorney's theft of the purchase moneys should be placed on the insurer because, as between both principals, the insurer exercised greater control over the attorney and was in a better position to have avoided the loss.... [I]n a transaction involving a ... lender that has a closing-protection letter from the title insurer, the insurer becomes subrogated to the position of the lender on the payment for the loss. If a closing attorney steals funds that were to be used to satisfy a preexisting mortgage, the insurer seeks to purchase the preexisting mortgage by paying the amount due and taking an assignment of the mortgage. If the title company obtains an assignment, it subordinates the preexisting mortgage to the new one and provides first-mortgage status for the latter. However, it then forecloses on what has become a second mortgage. Commonwealth, in effect, would recoup its loss by moving against its own insured, the purchaser of the property, who paid for the title insurance. Sometimes, however, the holder of the preexisting mortgage will not agree to an assignment, perhaps out of concern for the loss that the buyer and/or seller would suffer if the title-insurance company forecloses on the property. In that case, Commonwealth would pay off the preexisting mortgage and would not recoup its loss.... We are satisfied that because Commonwealth is responsible for the attorney's misappropriation, it must protect the purchaser against the loss. However, when the purchaser is paying for the property in full with his or her own funds, as in this case, there will be no new mortgage to which the existing mortgage can be subordinated. Hence, it is only fair that Commonwealth be required to pay off and cancel the existing mortgage. The trial court ordered Commonwealth to pay off the Sears mortgage and issue Kaiser an owner's title-insurance policy free of the Sears mortgage encumbrance. It also denied

Sears a judgment of foreclosure and ordered Commonwealth to pay Rose's and Kaiser's attorney's fees. We agree with that disposition.... Although Sears had a statutory right to foreclose on the Rose mortgage ..., the trial court instead ordered Commonwealth to reimburse Sears for the full amount due on the mortgage so that Kaiser could remain in his home.... [I]f Commonwealth had promptly satisfied its obligations under Kaiser's title insurance policy, the Sears mortgage would not have remained unsatisfied. Kaiser should not be punished for the uncertain state of the law at the time Gillen stole the Sears payoff funds. Although Sears had the statutory right to foreclose on the defaulted mortgage, that remedy is designed, ultimately, only to satisfy the monetary obligation that underlies the mortgage.... That objective will be accomplished by Commonwealth's satisfaction of the mortgage.

- 9 See §§ 5:3, 6:18 to 6:23, and 10:8 to 10:17 for title insurance policies' insuring clauses, exclusions, and conditions defining and limiting a title insurer's liability for insureds losses.
- 10 See *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 2014 WL 1622193 (6<sup>th</sup> Cir. 2014), affirming 795 F. Supp. 2d 624 (E.D. Mich. 2011); *First American Title Ins. Co. v. Vision Mortg. Corp., Inc.*, 298 N.J. Super. 138, 689 A.2d 154 (App. Div. 1997).
- 11 *First American Title Ins. Co. v. Vision Mortg. Corp., Inc.*, 298 N.J. Super. 138, 689 A.2d 154 (App. Div. 1997).
- 12 "Here Vision did not get what it bargained for. While it is true that Vision had first lien status, despite Levenson's fraud, and that the validity of its mortgage was not affected by that fraud, this was a sham transaction from the outset." *First American Title Ins. Co. v. Vision Mortg. Corp., Inc.*, 298 N.J. Super. 138, 689 A.2d 154, 157 (App. Div. 1997). See also *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 2713973, \*2, 4 (D. Ariz. 2011); *Walsh Securities, Inc. v. Cristo Property Management, Ltd.*, 858 F. Supp. 2d 402, 419 (D.N.J. 2012), on reconsideration in part, 2012 WL 3629045 (D.N.J. 2012).
- 13 *First American Title Ins. Co. v. Vision Mortg. Corp., Inc.*, 298 N.J. Super. 138, 689 A.2d 154, 157 (App. Div. 1997).
- 14 *First American Title Ins. Co. v. Vision Mortg. Corp., Inc.*, 298 N.J. Super. 138, 689 A.2d 154, 156 (App. Div. 1997). Accord *JP Morgan Chase Bank, N.A. v. First American Title Ins. Co.*, 2014 WL 1622193 (6<sup>th</sup> Cir. 2014), affirming 795 F. Supp. 2d 624 (E.D. Mich. 2011).
- 15 See *infra* letters reproduced at Appendix D to D2 and discussion *supra* § 20:15.
- 16 See ALTA 2008 Closing Protection Letters reproduced *infra* at Appendix D to D2.
- 17 *Fifth Third Mortg. Co. v. Kaufman*, 2013 WL 474506, \*3 (N.D. Ill. 2013). In accord *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 2713973, \*2, 4 (D. Ariz. 2011). For case law construing the meaning of "loss" under loan title insurance policies, see *supra* Chapter 10.
- 18 *Fifth Third Mortg. Co. v. Kaufman*, 2013 WL 474506, \*3 (N.D. Ill. 2013). In accord *M & I Marshall & Ilsley Bank v. Wright*, 2011 WL 2713973, \*2, 4 (D. Ariz. 2011).
- 19 *American Title Ins. Co. v. Variable Annuity Life Ins. Co.*, 1996 WL 544431 (Tex. App. Houston 14th Dist. 1996), writ denied, (Apr. 18, 1997) (nonpublished case).
- 20 *American Title Ins. Co. v. Variable Annuity Life Ins. Co.*, 1996 WL 544431, \*5 (Tex. App. Houston 14th Dist. 1996), writ denied, (Apr. 18, 1997).
- 21 *American Title Ins. Co. v. Variable Annuity Life Ins. Co.*, 1996 WL 544431, \*9 (Tex. App. Houston 14th Dist. 1996), writ denied, (Apr. 18, 1997):

By entering into the insured closing letter, VALIC sought to "insure" that it could close financing and refinancing transactions at a title company's agent's office without fear that its funds would be lost due to the "fraud or dishonestly" of the agent. In exchange for providing this assurance, ATIC sold additional title policies through its agent. Summit's defalcation falls squarely within what was anticipated by the insured closing letter. As discussed below, ATIC's failure to pay under the insured closing letter resulted in damages to VALIC of \$322,655.54 plus interest and attorney's fees incurred since 1986. The amount of damages from the breach of the insured closing letter is well in excess of the \$353,193.48 paid by ATIC to VALIC under the title policy. Thus, VALIC sustained damages from ATIC's breach of the insured closing letter. Furthermore, when VALIC settled with the Morian Estate and the Tenenbaums, both

parties had pending claims against ATIC and/or VALIC for their damages resulting from Summit's defalcation. Because ATIC refused to acknowledge any additional liability, under the insured closing letter or its policy, VALIC felt forced to “buy-its-peace” and avoid this exposure. The settlement terminated the foreclosure proceedings by the Morian Estate and avoided wrongful foreclosure proceedings, and the resulting potential actual and punitive damages.

22 American Title Ins. Co. v. Variable Annuity Life Ins. Co., 1996 WL 544431, \*13 (Tex. App. Houston 14th Dist. 1996), writ denied, (Apr. 18, 1997).

23 See *infra* Appendix D3 and D4.

24 JP Morgan Chase Bank, N.A. v. First American Title Ins. Co., 2014 WL 1622193, \*8 (6<sup>th</sup> Cir. 2014), affirming 795 F. Supp. 2d 624, 632 (E.D. Mich. 2011).

25 Heritage Pacific Financial, LLC v. First American Title Ins. Co., 2013 WL 4401040, \*6-7 (D. Md. 2013) *Not Reported in F.Supp.2d*. (statutes of limitation for breach of contract and detrimental reliance did not begin to run until foreclosure on the property was completed and the loan was left unpaid).

26 The amount of the policy and the settlement funds entrusted to the agent generally will be the same, since the amount of a lender's policy usually is the funds the lender passes to the borrower's seller via the escrow agent, and the amount of an owner's policy usually is the purchase price, which generally will equal whatever funds the buyer passes to the seller via the escrow agent plus the loan amount. See discussion *supra* at § 4:2.

27 See *infra* Appendix D3 and D4.

28 See, generally, American Title Ins. Co. v. Variable Annuity Life Ins. Co., 1996 WL 544431 (Tex. App. Houston 14th Dist. 1996), writ denied, (Apr. 18, 1997) (unpublished opinion); Sears Mortg. Corp. v. Rose, 134 N.J. 326, 634 A.2d 74 (1993); Clients' Sec. Fund of the Bar of New Jersey v. Security Title and Guar. Co., 134 N.J. 358, 634 A.2d 90 (1993).

29 Sears Mortg. Corp. v. Rose, 134 N.J. 326, 634 A.2d 74 (1993); Clients' Sec. Fund of the Bar of New Jersey v. Security Title and Guar. Co., 134 N.J. 358, 634 A.2d 90 (1993).

30 Bancorp Bank v. Lawyers Title Ins. Corp., 2014 WL 3325861, \*5 (E.D. Pa. 2014); Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp., 288 Ga. App. 642, 649, 655 S.E.2d 269 (2007); Metmor Financial, Inc. v. Commonwealth Land Title Ins. Co., 645 So. 2d 295, 297 (Ala. 1993).

31 ALTA Closing Protection Letters 2008 & 2014, reproduced at Appendix D. See also Appendix D to D4.

32 See *infra* Appendix D to D4

33 See JP Morgan Chase Bank, N.A. v. First American Title Ins. Co., 795 F. Supp. 2d 624, 633 (E.D. Mich. 2011) (though FDIC's selling the loan prevented the title insurer from being able to foreclose it and pursue a deficiency judgment against the borrower, the title insurer's ability to sue the title agent and borrower for fraud was not impaired), affirmed by 2014 WL 1622193 (6<sup>th</sup> Cir. 2014); Sears Mortg. Corp. v. Rose, 134 N.J. 326, 634 A.2d 74 (1993); Clients' Sec. Fund of the Bar of New Jersey v. Security Title and Guar. Co., 134 N.J. 358, 634 A.2d 90 (1993); Lawyers Title Ins. Corp. v. Frontier Title Co., 1989 WL 44186 (N.D. Ill. 1989).

34 See, e.g., Sears Mortg. Corp. v. Rose, 134 N.J. 326, 354, 634 A.2d 74, 88 (1993):

Security reimbursed SMA for the loss by paying off the existing mortgage on the property. It then became, under the terms of the closing-protection letter, “subrogated to all rights and remedies which [SMA] would have had against [Hart].” Security argues that on payment of the loss and its subrogation to SMA's “rights and remedies,” it became entitled to recoup its loss from Hart because SMA would have had the identical right of recovery. We are satisfied that Security was liable to SMA for the loss attributable to the attorney's theft and that Security should not be able to pass that loss back to Hart. Two reasons support that result. Security owed Hart an independent obligation, arising out of its duty as a title insurer, to indemnify Hart as its putative insured for the loss incurred through Witkowski's theft. Second, although Security, as a subrogee, succeeded to the rights of SMA against Hart, its claim against Hart was no stronger than SMA's claim; and, under the circumstances, SMA did not have the right to recover from Hart the loss attributable to the closing attorney's embezzlement.

35 Sears Mortg. Corp. v. Rose, 134 N.J. 326, 354, 634 A.2d 74, 88 (1993).

36 Sears Mortg. Corp. v. Rose, 134 N.J. 326, 354, 634 A.2d 74, 88 (1993).

37 Sears Mortg. Corp. v. Rose, 134 N.J. 326, 354, 634 A.2d 74, 88 (1993). *Accord* Clients' Sec. Fund of the Bar of New Jersey v. Security Title and Guar. Co., 134 N.J. 358, 634 A.2d 90 (1993). Clients' Security Fund is the companion case to Sears. In Clients' Security

Fund, the insurer claimed that it was entitled to recoup the loss paid to the lender from the purchaser. The court stated two reasons why the insurer could not recover from the purchaser: (i) the purchaser was a putative insured, and thus, the insurer had an independent obligation to the purchaser to indemnify the purchaser for losses occurring from the theft; and (ii) the insurer's subrogation rights are no greater than the rights of the lender to recover from the purchaser, and in this instance, the lender would not be entitled to recover for the theft. 634 A.2d at 96. Therefore, as between the lender and the purchaser, the lender should bear the loss of the attorney's theft and the insurer should bear the loss as between the insurer, lender and purchaser. 634 A.2d at 98.

- 38 JP Morgan Chase Bank, N.A. v. First American Title Ins. Co., 795 F. Supp. 2d 624, 633 (E.D. Mich. 2011), affirmed by 2014 WL 1622193 (6<sup>th</sup> Cir. 2014).
- 39 See *infra* Appendices for ALTA 1992 Loan Policies Conditions 2(c)(ii), 7(b) & 9(c) and 2006 Loan Policy, Conditions & Stipulations 2., 8(c) & 10(b).
- 40 Freedom Mortg. Corp. v. Burnham Mortg., Inc., 720 F. Supp. 2d 978, 1008 (N.D. Ill. 2010).
- 41 *Contra* Alliance Mortgage Co. v. Rothwell, 34 Cal. Rptr. 2d 700, 714–716 (App. 1st Dist. 1994), review granted and opinion superseded, 37 Cal. Rptr. 2d 57, 886 P.2d 606 (Cal. 1994) and judgment aff'd, 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352, 900 P.2d 601 (1995) (recognizing that, in spite of mortgagee's purchase of property by full credit bid at nonjudicial foreclosure sale, insured mortgagee could bring a tort action against insurer for intentional and negligent misrepresentation).
- 42 See discussion in Freedom Mortg. Corp. v. Burnham Mortg., Inc., 720 F. Supp. 2d 978, 1007 (N.D. Ill. 2010) of courts applying the FCB Rule to bar even fraud or negligence claims if the lender was aware of the facts before tendering the bid.
- 43 See e.g., Bank of America, Na v. First American Title Ins. Co., 2014 WL 1271227 (Mich. Ct. App. 2014), appeal granted, 497 Mich. 896, 855 N.W.2d 747 (2014); New Freedom Mortg. Corp. v. Globe Mortg. Corp., 281 Mich. App. 63, 761 N.W.2d 832 (2008).
- 44 Bank of America, Na v. First American Title Ins. Co., 2014 WL 1271227 (Mich. Ct. App. 2014), appeal granted, 497 Mich. 896, 855 N.W.2d 747 (2014). The court's 2008 opinion applying the Full Credit Bid Rule reasoned that the rule of *caveat emptor* applies and the lender has a burden to make an informed bid. Therefore, with the full credit bid the insurer presumably accepted the land subject to the title defects that lessened its value to less than the amount the lender bid. New Freedom Mortg. Corp. v. Globe Mortg. Corp., 281 Mich. App. 63, 761 N.W.2d 832 (2008).
- 45 Equity Income Partners LP v. Chicago Title Ins. Co., 2013 WL 6498144, \*9 (D. Ariz. 2013).
- 46 M & I Marshall & Ilsley Bank v. Wright, 2011 WL 2713973, \*4 (D. Ariz. 2011).