RECENT DEVELOPMENTS IN TITLE INSURANCE LITIGATION

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I. INTRODUCTION

This year's class of cases had triumphs and disappointments for insurers and agents alike. Several courts continued to assist the Federal Deposit Insurance Corporation (FDIC) in re-writing closing protection letters (CPL) as open-ended indemnities. There were some interesting damage cases, involving everything from pollution fears to loss of privacy concerns. A trio of reinsurance cases centered around a large power plant project. Also, in an entertaining case, one buyer's imaginative efforts to convert a building violation notice to gold fell flat.

II. INSURED VERSUS INSURER

A. *Policy Terms*

1. Who Is the Insured?

LJC Financial, LLC v. Alliant National Title Insurance Co. is a Texas case that dealt with whether the loan broker was an "insured" under the title insurance policy. The insurer provided a title insurance policy to two lenders, and the lenders found a lien for unpaid property taxes after foreclosure.[1] The loan broker paid the overdue taxes and sued the insurer, arguing it had become an insured under the policy when it paid the taxes. The court rejected the argument, ruling that the loan broker was, in fact, not an insured under the policy.[2]

In *Stockton Mortgage, Inc. v. Tope*, another case addressing the issue of who is the "insured," the insured lender assigned all of its interest under the deed of trust to investors.[3] After the property became subject to an abatement action, the lender submitted a claim on its behalf and on behalf of the investors. Neither the lender nor the investors were deemed insureds under the policy.[4] However, in another opinion from

1. 2014 WL 7190872 (S.D. Tex. Dec. 16, 2014).
2. *Id.* at *7.
3. 183 Cal. Rptr. 3d186 (Ct. App. 2014).
4. *Id.* at 197.

this survey period, the U.S. District Court for the Eastern District of Pennsylvania held that coverage did continue after the loan was sold.[5] Similarly, in *First American Title Insurance Co. v. 273 Water St., LLC*, the owner's coverage was deemed to survive the conveyance of a portion of the insured property.[6]

2. What Is Insured?

Other cases addressed specifically what is insured under a title insurance policy. In an Idaho case, after the insured lender foreclosed on the subject property, it made a claim based upon the property's inclusion in a district limiting property development. The insurer had failed to identify the property as being subject to the limitation, arguing that this limitation on the property's development was covered under the policy's zoning and access endorsements; the court agreed that the policy covered this defect.[7]

However, several other opinions limited coverage this year. A New York court held that, despite the fact that a New York City Department of Transportation retaining wall along the street impaired physical access to the subject property, the insured still had legal access because the property abutted the public street.[8] In a Colorado case, where the insured's access to the subject property, located near Aspen, was via a revocable thirty-year license that had been negotiated by the insurer, the court ruled in favor of the insurer, noting that the insured "may be obligated to pay money or cure a lack of access in the future . . . but that question is for another day."[9] In a Connecticut case, *Chorches v. Stewart Title Guaranty Co.*, involving an undisclosed subterranean utility easement in favor of the insured's neighbors, the court determined that the easement amounted to trespass, for which there was no title insurance coverage.[10]

5. Colonial Mortg. Serv. Co. v. Commonwealth Land Title Ins. Co., 2014 WL 6237852, at *10–12 (E.D. Pa. Nov. 14, 2014).

6. 117 A.3d 857, 867 (Conn. App. Ct. 2015) (insureds conveyed property in 2011, but learned of the title dispute in 2005).

7. Commonwealth Land Title Ins. Co. v. Sun Valley Credit, LLC, 2015 WL 807055, at *7 (D. Idaho Feb. 26, 2015).

8. 43 Park Owners Grp., LLC v. Commonwealth Land Title Ins. Co., 995 N.Y.S.2d 148, 150 (App. Div. 2014). *See also* Demetrio v. Stewart Title Ins. Co., 3 N.Y.S.3d 75, 78 (App. Div. 2015) (internal citations omitted) (harmless error case, wherein attachment to Schedule A of owner's policy referenced seven lots instead of one, and where deed and other documents listed only one lot, court held owner's policy insured the one lot, stating "[i]nsurance contracts are to be interpreted according to the reasonable expectations and purposes of ordinary business people when making ordinary business contracts").

9. Fid. Nat'l Title Ins. Co. v. Woody Creek Ventures, LLC, 2014 WL 1774821, at *5 (D. Colo. May 5, 2014) (reviewing access cases from around the country); *see also* Sec. Savs. Fed. Credit Union v. First Am. Title Ins. Co., 585 Fed. App'x 591 (9th Cir. 2014) (lack of subdivision approval may make lots hard to sell, but court held title remains marketable).

10. 48 F. Supp. 3d 151, 157 (D. Conn. 2014). *See also* CH Props., Inc. v. First Am. Title Ins. Co., 43 F. Supp. 3d 83 (D.P.R. 2014).

In addition, the U.S. District Court for the Eastern District of Michigan held that an insured that purchased two commercial buildings, which contained a geothermal water supply system at foreclosure and was subsequently sued by the installer based upon an agreement it had with the former owner, was not covered under its title insurance policy. The court ruled that the supply system equipment was either personal property, which would not be subject to coverage, or a fixture, the interest in which the installer had not protected by filing a lien of record prior to the foreclosure sale.[11]

3. Exclusions

In *Metropolitan National Bank v. Commonwealth Land Title Insurance Co.*, a case involving Exclusions 3(a) and 3(b), the existing lienholder executed a subordination agreement prior to closing.[12] The borrower defaulted and the new lender posted the property for foreclosure. The subordinated lienholder sued, alleging the subordination was void for lack of consideration, the new lender's fraud, or both. The new lender's title insurer denied coverage based upon the "acts of the insured" under Exclusions 3(a) and 3(b). Reversing summary judgment for the insurer, the Missouri Court of Appeals decided that the new lender's claim required a trial, holding that the new lender's actions or its knowledge, not currently included in the record, should be proven by the insurer.[13]

BB Syndication Services v. First American Title Insurance Co.[14] was a case in which the Seventh Circuit provided a scholarly review of Exclusion 3(a) cases, ultimately holding that a construction lender "created" or "suffered" a mechanic's lien by continuing funding long after owners stopped contributing money and cost overruns were significant.[15] In yet another Exclusion 3(a) case, a California court held that the errors of the insured's attorney created the alleged title defect.[16] The attorney's negligence was equated to the alleged intentional tort of the insured in acquiring title, and consequently there was no coverage.[17]

11. Geo Fin., LLC v. Univ. Square 2751, LLC, 2014 WL 7369940, at *6 (E.D. Mich. Dec. 29, 2014).

12. 456 S.W.3d 61, 62 (Mo. Ct. App. 2015).

13. *Id.* at 67–68.

14. 780 F.3d 825 (7th Cir. 2015) (reviewing Bankers Trust Co. v. Transam. Title Ins. Co., 594 F.2d 231 (10th Cir. 1979); Brown v. St. Paul Title Ins. Corp., 634 F.2d 1108 (8th Cir. 1980); Am. Savings & Loan Ass'n v. Lawyers Title Ins. Corp., 793 F.2d 780 (6th Cir. 1986); Chicago Title Ins. Co. v. Resolution Trust Corp., 53 F.3d 899 (8th Cir. 1995); Home Fed. Sav. Bank v. Ticor Title Ins. Co., 695 F.3d 725 (7th Cir. 2012).

15. *Id.* at 832.

16. RNT Holdings, LLC v. United Gen. Title Ins. Co., 179 Cal. Rptr. 3d 175, 186 (Ct. App. 2014).

17. *Id.*

In an opinion appearing to misconstrue Sections 7(a), 7(b), 2(c), and 9 of a 1992 American Land Title Association (ALTA) policy, the insured bank made two construction loans on adjoining lots; the borrower planned to build a fourplex on each lot.[18] Location endorsements were issued as part of the loan policy. The borrower built both structures on one lot and a parking lot on the other. When the borrower defaulted, the bank made a full credit bid at foreclosure and then made a claim on its loan policy because a fourplex was not built on the second lot. The trial court granted summary judgment to the insurer on the basis that the full credit bid discharged the insurer's liability. On appeal, the Idaho Supreme Court said the full credit bid did not terminate the loan policy because the "payments made" provision under Section 2(c) of the policy did not include a full credit bid. In other words, the full credit bid was not a payment.[19]

4. Exceptions

The Court of Appeals of Kentucky reviewed a dispute between the insureds and their insurer when the insurer denied coverage pertaining to a development restriction based upon Exclusion 3(c).[20] After the insureds sued, the insurer sought to dismiss the suit based upon a separate provision excluding coverage for "easements or servitudes appearing in the public records."[21] The court agreed that this exclusion barred coverage, determining that, although "servitude" is not defined in the policy, the plain meaning of the word, i.e., "a right by which something (as a piece of land) owned by one person is subject to a specified use or enjoyment by another," made the exclusion applicable in this context.[22]

In a Texas case, a condominium unit seller sued its title insurer and escrow agent after the condominium association, which had a right of first refusal in connection with the resale of any unit, alleged it never consented to the purchase.[23] The court held that there was no coverage because the policy excluded from coverage the condominium declaration and its terms and conditions, which contained the right of first refusal.[24]

18. Bank of Idaho v. First Am. Title Ins. Co., 329 P.3d 1066, 1067 (Idaho 2014).
19. *Id.* at 1071.
20. Pasha v. Commonwealth Land Title Ins. Co., 2014 WL 5510931, at *4 (Ky. Ct. App. Oct. 31, 2014) (internal citations omitted) (unpublished).
21. *Id.* at *2.
22. *Id.* at *4.
23. IQ Holdings, Inc. v. Stewart Title Co., 451 S.W.3d 861 (Tex. App. 2014).
24. *Id.* at 873.

B. *Claims Procedure*

1. Notice/Limitations

Notice was held timely in a number of cases this year. In a Puerto Rico case, the insurer was held liable for the insured's defense costs in state court actions filed in 2005, even though the notice of claim was not filed until 2009.[25] The insurer provided testimony that it knew of, and was monitoring, the state court actions before the tender. As such, the insurer "suffered no prejudice due to [the insured's] late notice on the request for 'representation.'"[26] Similarly, in a New York case, the insured gave notice of claim, and the insurer hired counsel to quiet title.[27] However, a judgment voiding the deed to the borrower was entered in a separate action in which the insured was not a party. Although the insured notified the insurer of that suit after judgment was final, the court still held that notice was not late.[28] Also, in an Oregon case, *Ventana Partners, LLC v. Lanoue Development, LLC*, the insured purchased property intending to build condominiums.[29] The project failed, and litigation, including a suit to quiet title, ensued. The insured failed to tender its claim until it was in the final stages of settlement of the litigation. The Oregon Court of Appeals, however, deemed such notice sufficient.[30]

Notice was deemed late in a case where a sheriff's sale of a condominium extinguished a mortgage interest in the condominium.[31] The mortgagor received notice of the sheriff's sale prior to the sale, but provided notice to its insurer only after the property had been sold. After the insured made a claim, the insurer determined that notice had not been timely and limited its liability to the purchase price of the property at the sheriff's sale. Notably, the insurer did not deny coverage entirely. After suit was filed, the U.S. District Court for the District of Massachusetts granted the insurer's motion for summary judgment, determining that, had it received notification before the sale, it could have satisfied the outstanding execution or acquired the property at sale.[32]

Several cases also addressed the statute of limitations. In *Feduniak v. Old Republic National Title Insurance Co.*, a case addressing multiple issues within the title insurance context, the insureds purchased a home in Peb-

25. CH Props., Inc. v. First Am. Title Ins. Co., 43 F. Supp. 3d 83, 89 (D.P.R. Sept. 9, 2014).
26. *Id.* at 99.
27. Emigrant Mortg. Co., Inc. v. Commonwealth Land Title Ins. Co., 4 N.Y.S.3d 491 (App. Div. 2015).
28. *Id.*
29. 340 P.3d 107, 108 (Or. Ct. App. 2014).
30. *Id.* at 120.
31. CitiMortgage Inc. v. Shapiro, 2015 WL 412869, at *1 (D. Mass. Jan. 30, 2015).
32. *Id.* at *2.

ble Beach, California, without knowing that it was subject to an open-air easement.[33] The California Coastal Commission sued on the easement. In subsequent litigation the insured brought against the insurer, the insurer argued that the statute of limitations had run. Specifically, the insurer argued that the claim accrued when the suit on the easement had been filed. The court disagreed, holding that the limitations period for an insurer's the duty to defend starts when a third party suit concludes.[34] In an Illinois case, the statute of limitations on an action with respect to a title agent's failure to pay off a lien was held not to begin running until the insured lender learned of the agent's breach.[35] Also, in a more favorable opinion for insurers, the Texas Court of Appeals provided that the limitations period for an investor to sue the title insurer and its agent began when the investor sued the developer because it was only then that the investor knew of the title company's role at the time.[36]

2. Duty to Defend

Several cases considered the scope of the insurer's duty to defend its insured. The Seventh Circuit held that the "in for one, in for all doctrine" does not apply in Illinois. Instead, the insurer has to defend covered claims only.[37] The court addressed the insured's warning that disastrous consequences would befall policyholders if courts enforce limited-defense language in title insurance policies, stating "that's just the nature of title insurance; the premiums charged for this form of insurance reflect the limited scope of coverage."[38] In a case construing New Jersey law, however, a federal court held that the insurer had to defend both covered and non-covered claims. The court determined that the insurer could seek apportionment of costs only when the case had concluded.[39]

Other cases addressed specific issues regarding whether the insurer had met its duty to defend. In an Illinois case, the court held that an insurer met its duty to defend when it hired counsel for the insured only two

33. 2015 WL 412869, at *1 (N.D. Cal. Feb. 13, 2015); *but see* Shepard v. Holmes, 2014 WL 7338525 (Wash. Ct. App. Dec. 23, 2014) (unpublished) (where buyer was not told of consolidation deed, but it was of record on closing date, court held that the statute of limitations on claims pertaining to her owner's policy began on the date of purchase of property).

34. *Id.*

35. Bank of Am., N.A. v. Chicago Title Ins. Co., 2014 WL 4435857, at *3 (N.D. Ill. Sept. 9, 2014).

36. Krot v. Fid. Nat'l Title Co., 2014 WL 7464084, at *5 (Tex. App. Dec. 31, 2014).

37. Philadelphia Indem. Ins. Co. v. Chicago Title Ins. Co., 771 F.3d 391, 397 (7th Cir. 2014). *See also* First Clover Leaf Bank v. Nat'l Land Title Ins. Co., 2015 WL 392728 (Ill. Ct. App. Jan. 5, 2015).

38. *Philadelphia Indem. Ins. Co.*, 771 F.3d at 400.

39. Colonial Mortg. Serv. Co. v. Commonwealth Land Title Ins. Co., 2014 WL 6237852, at *17–18 (E.D. Pa. Nov. 14, 2014).

days before the answer deadline.[40] The court also held that the insurer was not liable for fees charged by the firm the insured had engaged.[41] In a Louisiana dispute involving two separate chains of title, the insurer hired defense counsel to represent the insured, but the insured dismissed the counsel prior to consummation of a settlement agreement.[42] The insurer terminated coverage based on the insured's failure to cooperate. The Louisiana appellate court, however, determined that there had been no breach of the duty to cooperate because the insurer did not prove it was materially prejudiced. Notably, the opinion did not address if the insurer must pay the fees of the new firm hired by the insured.[43] In *Ganelli v. Chicago Title Insurance Company*, a case that was discussed in last year's survey article, the Third Circuit held that an insured may proceed to trial on a claim that the insurer was not reasonably diligent in waiting twenty months to file a quiet title suit.[44] Finally, a federal court construing Florida law provided that Condition 9(a) barred the insured's suit against its insurer for not diligently pursuing a defense while the third party suit remained pending.[45]

3. Claims Handling

In *Chorches*, discussed above,[46] the insured received $15,000 to settle an easement claim. The insured signed a settlement agreement and accepted an endorsement from the insurer adding the easement to the owner's title policy. When another round of litigation arose with neighbors, the insured made a title claim, which the insurer denied. The court held that the insurer owed no duty to the insured because the settlement agreement and endorsement terminated the insurer's liability.[47]

4. Subrogation

In a Texas case involving subrogation, owners of the subject property did not get an adverse judgment released in their bankruptcy.[48] Five years

40. Ogden Plaza Garage Co. v. First Am. Title Ins. Co., 2014 WL 6704366 (N.D. Ill. Nov. 21, 2014) (unpublished).

41. *Id.* at *5.

42. Breaux II v. Cozy Cottages, LLC, 151 So. 3d 183, 190 (La. Ct. App. 2014).

43. *Id.*

44. 2014 WL 2724459, at *4 (3d Cir. 2014).

45. JFK Enters., LLC v. Old Republic Nat'l Title Ins. Co., 2015 WL 556952, at *2 (M.D. Fla. Feb. 10, 2015). *See also* 212 Marin Blvd., LLC v. Chicago Title Ins. Co., 2014 WL 8849641 (N.J. Super. Ct. App. Div. May 20, 2015) (holding insurer required to pay insured's defense costs arising from lawsuits concerning former railroad right-of-way).

46. *See supra* text § II.A.

47. Chorches v. Stewart Title Guar. Co., 48 F. Supp. 3d 151 (D. Conn. 2014).

48. Romero v. Stewart Title Guar. Co., 2015 WL 348870, at *1 (Tex. App. Jan. 27, 2015) (not reported).

later, when the owners sold the property, the adverse judgment was located. The title agent waived the judgment, erroneously believing the bankruptcy action had released it. The sellers' counsel, who had represented them in the bankruptcy as well, purchased the adverse judgment for $5,000 and then made a $30,000 claim against the insurer. The insurer paid the attorney and, pursuant to its subrogation rights, sued the sellers for breach of warranty. The insurer prevailed, despite the sellers' lack-of-reliance argument. The court held that reliance does not need to be proven for breach of warranty.[49]

C. *Damages*

1. Owner Policy

Several cases addressed the issue of damage calculations in owner policies. In the unpublished opinion of *Weber Estates Investments, LLC v. Chicago Title Insurance Co.*, the Illinois Court of Appeals held that, in assessing the correct measure of damages related to a missed pipeline easement, the damages did not include the cost of relocating the pipeline.[50] Similarly, the California Court of Appeal held in *Gaviota Holdings, LLC v. Chicago Title Insurance Co.* that the measure of damages for an undisclosed recorded easement was loss of value.[51] In *Gaviota*, the purchasers of oceanfront land were aware of a long-term lease to Exxon and Venoco, but were unaware that the previous owner had also entered into a recorded easement for a portion of the property. This easement allowed Exxon and Venoco access across the sole entrance to the property. The easement caused the owner to lose privacy rights because the entrance to his proposed single-family luxury residence could not be made private. In affirming the trial court's damage calculation of $1.51 million, the *Gaviota* court agreed with long-standing California law that when a title policy neglects to disclose an easement, damages are calculated as the diminution in value caused by the easement.[52]

The Missouri Court of Appeals examined a case in which Stewart Title issued owners policies to two different buyers for the same one-acre tract of land.[53] In *Spalding v. Stewart Title Guaranty Co.*, the plaintiff, one of the buyers, purchased 419 acres to develop the property into several lakefront

49. *Id.*

50. 2014 WL 4793008, at *5 (Ill. Ct. App. Sept. 25, 2014) (unpublished).

51. 2014 WL 7334429 (Cal. Ct. App. Dec. 23, 2014) (unpublished) (quoting Overholtzer v. N. Counties Title Ins. Co., 116 Cal. App. 2d 113, 130 (1953)).

52. *Id.* at *7.

53. Spalding v. Stewart Title Guar. Co., 2014 WL 4694716, at *2 (Mo. Ct. App. Sept. 13, 2014), *aff'd*, 463 S.W.3d 770 (Mo. May 12, 2015).

lots and lots with lake access. To do this, the builders were required to partially remove the existing dam, create a new dam, and expand the existing lake. During the development stages, the plaintiff buyer was contacted by a third party claiming he owned a one-acre portion of the property, which would be part of the new proposed extended lake. The plaintiff contacted Stewart Title and requested that Stewart pay the third party the requested sales price of $1.1 million so that the plaintiff could obtain clear title to the one acre. Stewart Title tendered only $10,000, claiming that was the measure of the plaintiff's damages. The plaintiff commenced litigation for, inter alia, breach of contract. The Missouri Court of Appeals affirmed the trial court decision awarding the plaintiff $1.1 million in damages, holding that the correct compensation of loss was the actual damages sustained.[54]

Dillon v. Southern Management Corp. Retirement Trust addressed whether a title insurer's payment of attorney fees during a quiet-title action precluded the prevailing party insured from recovering attorney fees under Utah Code § 78B-5-826.[55] The Supreme Court of Utah affirmed the trial court's holding that it did not.[56]

2. Loan Policy

In *First American Bank v. First American Transportation Title Insurance Co.*, the Fifth Circuit held that, under Louisiana law, a vessel title insurance policy that clearly covered the difference between the value of the vessel as insured versus the value of the vessel subject to a lien or title defect of some sort, the damage amount was to be calculated at the time of the sale of the vessel, not the time of discovery.[57] The appellate court further agreed with the trial court that title insurance only guaranteed payment up to the insured amount; it did not guarantee that this amount equaled the fair market value of the vessel or that the underlying mortgage debt would paid in full.[58]

Likewise, the Texas Court of Appeals held that under the plain language of a title policy defining the amount of insurance as the loan value at the time insurance was obtained, this amount was to be calculated as the value of the fee-simple estate, not the principal loan amount.[59] Similarly, a federal court construing Louisiana law ruled that under the plain language of a title insurance policy where the title was not merchantable

54. *Id.* at *10.
55. 326 P.3d 656 (Utah 2014).
56. *Id.* at 668–69.
57. 759 F. 3d 427 (5th Cir. 2014).
58. *Id.* at 432–33.
59. First Am. Title Ins. Co. v. Patriot Bank, 2015 WL 2228549, at *3 (Tex. App. May 12, 2015).

due to a prior first priority lien that the damages were to be calculated as the value as insured minus the insured risk against the property.[60]

By contrast, in *Triangle Holdings, II, LLC v. Stewart Title Guaranty Co.*, an Oregon court held that a lender was not entitled to recover its attorney fees related to settling claims to clear construction liens on the insured property when the insurer ultimately agreed to pay the lender the full amount under the liens.[61] The *Triangle Holdings* court reasoned that, despite the insurer not paying the claims within six months, the insured had not suffered any damages per se that gave rise to any monetary recovery so as to satisfy the requirements of the applicable Oregon statute that governed attorney fees.[62]

3. Bad Faith

Hawaii's Intermediate Court of Appeals ruled that communications with a claims counsel, when the claims counsel also acts as an insurer's agent in a non-legal capacity, will remain confidential in nature and, therefore, not discoverable in a bad faith action.[63] The *Anastasi* court explained that the attorney-client privilege, as codified in Rule 503(b) of the Hawaii Rules of Evidence, is not nullified simply because a plaintiff files a bad faith action.[64] The court also considered the lower court's grant of summary judgment in favor of the insurer on the bad faith claim. The appellate court held that, under Hawaii's heightened standard of good faith required during a reservation of rights situation, the insurer must show that it promptly investigated the claim, provided defense counsel whose sole client is the insured, and did not put its own financial condition over that of the insured.[65]

D. *Closing Protection Letters*

1. Standing

In *Federal Deposit Insurance Corp. v. First American Title Insurance Corp.*, the Eleventh Circuit found that the FDIC had standing to sue the insurer for breach of contract under a closing protection letter (CPL) related to two real estate transactions that closed prior to the bank's failure.[66] The appellate court affirmed the trial court's findings that the ninety-day period, the

60. First Cmty. Bank v. Commonwealth Land Title Ins. Co., 2014 WL 4720153, at *9 (M.D. La. Sept. 22, 2014).
61. Triangle Holdings, II, LLC v. Stewart Title Guar. Co., 337 P.3d 1013, 1017 (Or. Ct. App. 2014).
62. *Id.*
63. Anastasi v. Fid. Nat'l Title Ins. Co., 341 P.3d 1200, 1218 (Haw. Ct. App. 2014).
64. *Id.* at 1216.
65. *Id.* at 1228 (citing Delmonte v. State Farm Fire & Cas. Co., 975 P.2d 1158, 1175 (Haw. Ct. App. 1999)).
66. 611 Fed. App'x 522, 527 (11th Cir. 2015).

time within which the FDIC was to notify insurer of the loss, ran from the time the FDIC discovered the facts that revealed the claim. Moreover, the court held that First American's lack of "standing" to pursue an affirmative defense did not bar the court's subject matter jurisdiction over the matter.[67] The Southern District of Florida reached the same conclusion when addressing cross-motions for summary judgment.[68] Likewise, the Eastern District of Michigan held that the FDIC enjoyed the same rights as the failing bank under CPLs and struck affirmative defenses challenging the same.[69]

The Tennessee Court of Appeals affirmed a decision granting summary judgment in favor of a title insurer in a declaratory judgment action.[70] It held that under Tennessee law, the CPLs to the bank were separate contracts from the related mortgage title insurance policies such that they could have been retained by the bank upon assignment. The court also held that the subject assignment of the mortgages necessarily included the assignments of the CPLs because the assignment included language transferring all other information and documentation collected regarding the mortgage.[71] The Michigan Court of Appeals similarly held that a title insurer had standing to challenge the existence and effect of a mortgage assignment and that a provision of a CPL that established liability for the fraud or dishonesty of the issuing agent was sufficient to establish liability, although it was a question of fact. An inaccurate HUD-1 statement, however, was insufficient to establish liability under the CPL.[72]

2. Late Notice

In *Federal Deposit Insurance Corp. v. Fidelity National Title Insurance Co.*, the FDIC as receiver brought an action in 2014 pursuant to CPLs related to twenty-four mortgage loans after it was discovered that the mortgage broker had obtained these loans in 2007 as part of a fraudulent scheme.[73] In denying the insurer's motion for summary judgment based upon late notice of the claim, the court found that the issue as to when the FDIC had actual notice of its claims under the CPLs was a question of fact and thus

67. *Id.* at 534.
68. Fed. Deposit Ins. Corp. v. Attorney's Title Ins. Fund, 2014 WL 4384270, at *3 (S.D. Fla. Sept. 3, 2014).
69. Fed. Deposit Ins. Corp. v. First Am. Title Ins. Co., 2015 WL 418122, at *5 (E.D. Mich. Jan. 30, 2015).
70. First Am. Title Ins. Co. v. Citizens Bank, 2015 Tenn. LEXIS 517, at *12 (Tenn. Ct. App. June 15, 2015).
71. *Id.* at *12–13.
72. Fifth Third Mortg.–MI, LLC v. First Am. Title Ins. Co., 2015 WL 1069341, at *6–7 (Mich. Ct. App. Mar. 10, 2015) (unpublished).
73. 2015 WL 2237877 (E.D. Mich. May 12, 2015).

not suitable for summary judgment.[74] Likewise, the Connecticut Superior Court held that the plaintiff's notice to its insurer was not late as long as it was given within ninety days of the discovery date, but that the liability issue was an issue for the finder of fact.[75] Under Florida law, CPLs act as indemnification contracts but are separate and distinct from title insurance.[76] As such, the notice provision at issue was found to be dispositive, supporting a denial of the claim if notice was not given within the requisite ninety-day window.[77] While the ninety-day period began to run from the date when the lender discovered the loss, the court held that the bank had sufficient "notice" at the time that the borrower failed to secure a valid, enforceable first priority lien.[78] The loan was under-securitized such that notice of the claim was found to be untimely when it was commenced more than nine months after the lender first gained this knowledge.[79]

3. Bad Faith

In *Bancorp Bank v. Lawyers Title Insurance Corp.*, the court granted a motion to dismiss a bad faith claim based upon the alleged bad faith denial or delay in determination of a claim under a CPL that contained a fraud provision and not the underlying policy itself.[80] The court held that a bad faith claim itself must be predicated upon an insurance policy.[81]

III. INSURER VERSUS AGENT

An insurer sued its agent's depository bank for $3.5 million after an agent had stolen funds from its escrow account.[82] The bank asserted that discovery of its records would violate the Bank Secrecy Act[83] or the Anti-Money Laundering Act.[84] The trial court reviewed the policies behind the federal acts and held disclosure would not violate them. Only express statements that a suspicious activity report[85] was or was not filed are

74. *Id.* at *2.
75. JPMorgan Chase Bank v. Old Republic Nat'l Title Ins. Co., 2015 WL 670871, at *3, *5 (Conn. Super. Ct. Jan. 22, 2015) (unpublished).
76. Regions Bank v. Stewart Title Guar. Co., 2015 WL 433486, at *6 (D.S.C. Feb. 3, 2015).
77. *Id.* at *9.
78. *Id.* at *12.
79. *Id.*
80. 2014 WL 3325861, at *4 (E.D. Pa. July 8, 2014).
81. *Id.* at *7.
82. First Am. Title Ins. Co. v. Westbury Bank, 2014 WL 4267450, at *1 (E.D. Wis. 2014).
83. Bank Secrecy Act, Pub. L. No. 94-508, 91st Cong. (1970).
84. Housing and Community Development Act of 1992, Pub. L. No. 102-550, 102d Cong. § 1500 (1992).
85. 31 U.S.C. § 5318 (g)(2)(A)(i).

privileged.[86] Information collected as part of the bank's ordinary activities is not privileged.[87]

In *Fidelity National Title Insurance Co. v. Worthington*, the insurer sued the borrower and his sister, who was also the title agent, over failure to disclose an unpaid contractor debt.[88] The claim against the sister was dismissed. The appellate court affirmed the trial court judgment in favor of the brother[89] because he had no affirmative duty under Utah law to disclose the mechanic's lien risk. He therefore did not commit fraud or engage in civil conspiracy.[90]

In *United General Title Insurance Co. v. Karanasos*, a New York agent filed a Chapter 7 bankruptcy action.[91] On appeal, the district court held that the agent's debt to an underwriter for a policy claim was not likely dischargeable.[92] The debtor-agent had failed to disclose in his schedules (1) the insurer's state court action to overturn that deed as a fraudulent conveyance and (2) that he had conveyed his interest in his residence to his wife within a year of filing bankruptcy.[93]

A federal court in New York held that an insurer could not sue a notary that took a dead person's acknowledgment for indemnification or contribution.[94] An insurer can pursue remedies for breach of notary regulation or fraud in general.[95] The opinion was not clear on whether the defendant was an employee of the title agent, however.[96]

IV. DUTIES OF TITLE/ESCROW AGENT

A. *Handling Escrow Funds*

In *Hopper v. Lawyers Title Insurance Corp.*, the California Court of Appeal affirmed the trial court's dismissal of an action against a title insurer for failing to release funds held as collateral in an escrow account.[97] The appellate court agreed with the trial court's finding that the plaintiff did not satisfy any of the conditions predicate to the title company's releasing the security because the funds were held to indemnify the insurer against pay-

86. 31 U.S.C. § 5318 (g)(2)(A)(i).
87. 12 C.F.R. § 21.11 (k) (1) (ii) (2).
88. 344 P.3d 156 (Utah Ct. App. 2015).
89. *Id.* at 161.
90. *Id.*
91. 2014 WL 4388277 (E.D.N.Y. Sept. 5, 2014).
92. *Id.* at *7.
93. *Id.* at *9.
94. U.S. Bank, N.A. v. Commonwealth Land Title Ins. Co., 2015 WL 1291151 (S.D.N.Y. Mar. 23, 2015).
95. *Id.* at *3.
96. *Id.*
97. 2014 WL 1989689 (Cal. Ct. App. May 16, 2014) (unpublished).

ment on a future action against a previously defaulted third deed of trust and related default judgment.[98]

The California Court of Appeal affirmed a decision entering a judgment in favor of the purchasers seeking a release of escrow funds to a third party not included in escrow instructions, but denied an award of attorney fees, finding that such an award was only allowed under the third party claim provision, not in an action under the contract.[99]

In *Stewart Title of Louisiana v. Chevron, U.S.A., Inc.*, a title company rightfully deposited escrow funds tendered by a third party on behalf of the purchaser with the court when a dispute arose between parties to the escrow after the purchaser defaulted.[100] The appellate court affirmed the decision that the seller was entitled to the deposited funds as liquidated damages under the agreement and that the fact that a third party deposited the funds on behalf of purchaser was irrelevant under the terms of the agreement.[101]

The Texas Court of Appeals in *Flagstar Bank, FSB v. Walker* found that a title agent hired by an escrow agent to perform title work owed no fiduciary duty to the lender issuing the line of credit.[102] Likewise, in *Armenta v. First American Fund Control, Inc.*, the California Court of Appeal affirmed the trial court's grant of summary judgment in favor of the escrow holder, finding that it owed no fiduciary duty to a third party even when it created a separate escrow account that issued checks and accepted deposits for the related construction project.[103]

B. *Handling Documents*

In *Commonwealth Land Title Insurance Corp. v. Funk*, when a dispute arose among competing mortgages, the Superior Court of Delaware dismissed a third party action instituted by the title insurance company to recover the sums it paid under the policy against the closing agent.[104] The *Funk* court held that indemnification rights must arise from a contractual relationship and that under Delaware law, contribution claims are present only among joint tortfeasors that share liability to an injured party.[105]

In *Stommel v. LNV Corp.*, the U.S. District Court for the Central Division of Utah found in favor of a plaintiff purchaser in a preemptive suit to prevent foreclosure of her primary residence.[106] The previous owner in

98. *Id.* at *6.
99. Rideau v. Stewart Title of Cal., Inc., 185 Cal. Rptr. 3d 887, 894–95 (Ct. App. 2015).
100. Stewart Title of La. v. Chevron, U.S.A., Inc., 2015 WL 1500656 (La. Ct. App. 2015).
101. *Id.* at *2.
102. Flagstar Bank, FSB v. Walker, 451 S.W. 3d 490, 498 (Tex. App. 2014).
103. 2015 WL 1933186, at *6 (Cal. Ct. App. Apr. 29, 2015).
104. 2015 WL 1870287 (Del. Super. Ct. Apr. 22, 2015) (unpublished).
105. *Id.* at *4.
106. 2015 WL 417883 (D. Utah Jan. 30, 2015).

Stommel had encumbered the property with first and second mortgages as well as a third deed of trust. When the plaintiff purchaser's title agency contacted the lien holder regarding the payoff for the third deed of trust, however, it was told that there was no amount due; the lien was cautionary to prevent the purchaser from further encumbering the property.[107] Despite this, the holder of the third deed of trust did not record a complete reconveyance prior to going into receivership.[108] After the FDIC took over, nearly three years later, it threatened to foreclose on the third deed of trust. In granting the plaintiff's summary judgment motion on her declaratory and injunctive relief claims, the court found that because the third deed of trust had no value, it could not be the basis for a foreclosure action.[109]

Likewise, a California Court of Appeal found no liability on the part of the title company for allegedly fully releasing a third deed of trust instead of partially releasing the same when the title company filed the release only as an accommodation to the lender.[110] There was thus no continuing duty beyond that of recording the document since the escrow had already closed.[111]

C. *Duty to Search Title*

In *Cummings v. Stephens*, the Supreme Court of Idaho held that a title insurer generally is not an abstractor of title and has no independent duty to examine title.[112] The *Cummings* court reversed the trial court's decision after a bench trial finding liability against the title insurer for including an incorrect legal description where there was no evidence presented showing that the title company assumed a duty to act as an abstractor of title.[113] Similarly, the Arizona Court of Appeals affirmed a decision granting summary judgment in favor of a title company finding, in part, that a title company has no obligation to search for fraud or title defects.[114]

Yet, the Texas Court of Appeals found that summary judgment in favor of a title company related to a "title run" it issued on behalf of a law firm for the firm's client was not warranted because whether the title company breached its duty of ordinary care was a question of fact.[115] Specifically,

107. *Id.* at *1.
108. *Id.*
109. *Id.* at *8.
110. Kipperman v. First Am. Title Co., 2015 WL 301730 (Cal. Ct. App. 2015) (unpublished).
111. *Id.* at *9.
112. 336 P.3d 281, 299 (Idaho 2014).
113. *Id.*
114. Touch Stone AZ-Central Props., L.L.C. v. Title Mgmt. Agency of Ariz., L.L.C., 2014 WL 1778356, at *4 (Ariz. Ct. App. May 1, 2014) (unpublished).
115. Dawkins v. First Am. Title Co., LLC., 2014 WL 4536288 (Tex. App. Sept. 11, 2014) (summary judgment upheld under state's economic loss rule).

the appellate court determined that whether the title company had a duty to further investigate if any additional tax liens were filed against the property under names similar to those used in the title search after locating liens using middle initials only, and not any alternative names of the owners, constituted a genuine issue of material fact.[116] In *Brooks v. Terry Abstract Co.*, the Arkansas Court of Appeals found that even though the title company did not create an abstract, its act of creating and delivering a title search to a licensed attorney and title agent retained by the lender created an implied contract between the parties.[117]

D. *Closing Instructions*

When addressing a title company's duties regarding closing instructions, a title company facilitating a like kind exchange owed a duty of care independent of that created by the contract.[118] The Supreme Court of South Dakota found that the title company breached its duty of care in not ascertaining the exact type of exchange that the medical supply company retaining its services required.[119] Thus, when the title company's actions caused the medical supply company to suffer additional tax consequences, it was liable for those sums.[120]

In *Sean & Shenassa 26, LLC v. Chicago Title Co.*, the California Court of Appeal affirmed a judgment in favor of a title company on the purchasers' claims for breach of fiduciary duty and negligent performance of a contract.[121] The insurer secured an interim binder for a California Land Title Association (CLTA) policy, not the American Land Title Association (ALTA) policy that the purchasers had requested.[122] Similarly, in *Edwards v. Escrow of the West*, the court found that the title company did comply with all escrow instructions when it obtained an ATLA policy free from other liens and encumbrances except for the subject loan.[123] Although there were several tax liens not noted and excluded from payment through escrow, the borrowers had knowledge of these liens and the fact that all would not be satisfied.[124]

116. *Id.* at 4.
117. 2014 WL 1327760, at *4 (Ark. Ct. App. Apr. 2, 2014) (unpublished). Summary judgment in favor of title company was affirmed because action was not commenced within the applicable three-year statute of limitations. *Id.*
118. Kreisers Inc. v. First Dakota Title Ltd. P'ship, 852 N.W. 2d 413, 420 (S.D. 2014).
119. *Id.*
120. *Id.* at 423.
121. 2014 WL 5500512 (Cal. Ct. App. Oct. 31, 2014) (unpublished).
122. *Id.* at *1.
123. 2014 WL 4071223, at *4 (Cal. Ct. App. Aug. 19, 2014) (unpublished).
124. *Id.* at *2–3.

E. *Duty to Disclose*

In conformity with settled law in most states, the Seventh Circuit in *Edelman v. Belco Title & Escrow, LLC* confirmed that under Illinois law an escrow agent has a duty to act according to the escrow instructions.[125] The *Edelman* case was unusual in that, despite the presence of an escrow, the plaintiff lender tendered the loan funds directly to the borrower in reliance upon the borrower's promise that the loan would be in first position.[126] In actuality, there was a pre-existing mortgage on the property that was included in the title search that would remain in first position, yet was not included in the loan agreement.[127] In rejecting the plaintiffs' argument that the escrow officer had a duty to alert them of the discrepancy between the title search and the language of the contract, the appellate court upheld the trials court's grant of summary judgment.[128] The *Edelman* court held that an escrow agent has no obligation to request additional instructions from the parties or any other additional duties to the plaintiffs beyond following the escrow instructions, especially when no direct contact was made between the plaintiffs and the escrow officer, and the funds were disbursed outside of escrow.[129]

Similarly, in *Bushman v. American Title Co. of Washtenaw*, a Michigan federal court held that an action for fraud and violation of Michigan's Consumer Protection Act (MCPA) cannot lie against title insurers for including real estate transfer taxes that were not owed in several settlement statements.[130] Specifically, the court found that the plaintiffs' fraud claims failed because the plaintiffs admitted that they had access to the tax laws and respective property values and that the title company owed no professional duty of care to the plaintiffs.[131] The court dismissed the MCPA claim because title agents are licensed by the Michigan Department of Insurance and Financial Services and thus are exempt under the language of the statute.[132]

In *Fontenot v. Land American Commonwealth Title of Houston*, the Texas Court of Appeals upheld a jury verdict in favor of a title company in a fraud and breach of duty action commenced by a seller, where the seller claimed that the title company breached its duty by not explaining the substance of the deal that placed his lien in second priority, thereby caus-

125. 754 F. 3d 389, 396 (7th Cir. 2014).
126. *Id.* at 391.
127. *Id.*
128. *Id.* at 397.
129. *Id.* at 396.
130. 101 F. Supp. 3d 714, 721 (Apr. 2, 2015).
131. *Id.* at 718.
132. *Id.* at 721.

ing him damages.[133] The issue, however, was not whether a duty existed, but whether the breach caused the plaintiff's damages, as outlined in the applicable jury instruction.[134] The appellate court thus found that the evidence supported the decision that the first priority lien holder's foreclosure on the property caused the plaintiff's damages, not the failure of the title company to explain the documents.[135] Notably, had the land been developed or the loan paid, the plaintiff would not have suffered damages.[136]

In *Dailey v. Thorpe*, the same court similarly found that an escrow officer's fiduciary duties do not extend beyond matters addressed during the closing of the transaction.[137] There, the plaintiffs based their breach of fiduciary duty claim upon the fact that they did not receive their full payment under their agreement wherein the purchaser would self-pay the balance of the purchase price after paying a $10,000 down payment through escrow at closing. The court reasoned that this event could only have occurred after closing of escrow, such that the escrow company could not have breached any duty regarding the same.[138] The court dismissed the conspiracy claims because the evidence clearly showed that the plaintiffs agreed to self-finance the remaining balance of the purchase price and carefully reviewed and understood the HUD-1 statement providing the same.[139]

F. *Duties to Third Parties*

In *Flagstar Bank, FSB v. Lawyers Title Co.*, the California Court of Appeal affirmed the trial court's grant of summary judgment in favor of the title company on the lender's breach of contract, fraud, and conspiracy to commit fraud claims.[140] The lender alleged it was to be paid through escrow where the title company followed escrow instructions of the lender, a party to the escrow, and issued a lender's policy as instructed. The *Flagstar Bank* court found that since the third party was neither a party to the contract nor a third party beneficiary, it did not have standing to bring an enforcement action.[141] Likewise, there was no evidence that the title company had any knowledge of the alleged fraud such that it could be held liable.[142]

133. 2014 WL 4260114, at *11 (Tex. App. Aug. 24, 2014).
134. *Id.* at *7.
135. *Id.* at *8.
136. *Id.* at *4.
137. Dailey v. Thorpe, 445 S.W. 3d 785, 789 (Tex. App. 2014).
138. *Id.* at 789–90.
139. *Id.* at 789.
140. 2014 WL 1725746, at *5 (Cal. Ct. App. May 2, 2014) (unpublished).
141. *Id.* at *3.
142. *Id.*

V. REINSURANCE

Cases concerning reinsurance agreements among title insurers have been rare. This year three cases arose when First American Title Insurance Company issued an $825 million loan policy on the construction of a West Virginia power plant.[143] First American secured reinsurance from Old Republic National Title Insurance Co. and Stewart Title Guaranty Co.

After the plant was completed, three contractors filed mechanic's lien claims.[144] The borrower–operator, Longview Power, LLC, filed a Chapter 11 action. The lender assigned cash proceeds, but not the policy itself, to Longview.[145] Longview then brought an adversary action against First American, which filed a motion to dismiss.[146] The bankruptcy court denied the motion, finding that Longview could pursue the claim against First American concerning the claim by two of the contractors.[147]

The claim of the third contractor was settled with First American's participation.[148] It made demands on the reinsurers, Old Republic and Stewart Title. Old Republic paid its share with a reservation of rights under the reinsurance agreement.[149] It then sued First American in federal court in Florida for negligence, breach of contract, rescission, and unjust enrichment.[150] The court held that only the claim for negligence could proceed.[151]

Stewart Title filed a similar action in federal court in Houston in *Stewart Title Guaranty Co. v. First American Title Insurance Co.*[152] The opinion in that action did not state whether Stewart Title paid First American. The Texas court found the two cases similar and transferred the case to Florida under the "first to file" rule.[153] Old Republic's case was filed eight days before Stewart Title's complaint.[154]

143. *In re* Longview Power, LLC, 516 B.R. 282 (Bankr. D. Del. 2014).
144. *Id.* at 285.
145. *Id.* at 288.
146. *Id.*
147. *Id.* at 293.
148. Old Republic Nat'l Title Ins. Co. v. First Am. Title Ins. Co., 2015 WL 1349817, at *1 (M.D. Fla. Mar. 25, 2015).
149. *Id.*
150. *Id.*
151. *Id.* at *4.
152. Stewart Title Guar. Co. v. First Am. Title Ins. Co., 2015 WL 1393134 (S.D. Tex. Mar. 25, 2015).
153. *Id.* at *2.
154. *Id.* at *1.

VI. GOVERNMENT REGULATIONS OF THE TITLE INDUSTRY

Two cases this year construed Real Estate Settlement Procedures Act (RESPA)[155] violations in light of the U.S. Supreme Court's decision in *Freeman v. Quicken Loans, Inc.*[156] In *Freeman*, the Court held that fee markups by a service provider when not split with another party do not violate 12 U.S.C. § 2607(b) (RESPA § 8(b). Here, the service provider did not violate § 2607(b) because it was not sharing a fee with one or more parties; it was marking up fees and retaining the entire sum.[157]

In the first of the two cases, *Clements v. LSI Title Agency, Inc.*, the Eleventh Circuit held that a record fee markup and split of a closing fee by two parties who both contributed services did not violate § 8(b).[158] The second case, *White v. PNC Finance Service Group, Inc.*, involved a claim that a lender's mortgage insurance subsidiary charged an unreasonably high premium.[159] Ruling on the defendant's motion to dismiss, a federal district court held that the case could proceed. The court reasoned that *Freeman* applied only to § 8(b) and not to 12 U.S.C. § 2607(c).[160]

This survey period also featured the first published case in which the Consumer Financial Protection Bureau (CFPB) sued a title agent for a RESPA violation.[161] A law firm in Louisville, Kentucky, set up nine title agencies, each with a different real estate brokerage firm.[162] There was one examiner for all nine companies. CFPB asserted that the nine companies did little or no work and were merely a fabricated means of generating referral fees.[163] The law firm argued the safe harbor for affiliated business arrangements set forth in 12 U.S.C. § 2607 (c)(4). The court held that the issue as to whether the safe harbor test as construed in *Carter v. Welles–Bowles Realty, Inc.*[164] applied precluded granting the law firms' motion for judgment on the pleadings.[165]

155. 12 U.S.C. §§ 2601–2607.
156. 132 S. Ct. 2034 (2012).
157. *Id.* at 2041.
158. 779 F. 3d 1269, 1273 (11th Cir. 2015).
159. 2014 WL 4063344 (E.D. Pa. Aug. 15, 2014).
160. *Id.* at *7.
161. Consumer Fin. Prot. Bureau v. Borders & Borders, PLC, 2015 WL 631196 (W.D. Ky. Feb. 12, 2015).
162. *Id.* at *1.
163. *Id.* at *4.
164. 736 F. 3d 722 (6th Cir. 2013).
165. *Id.* at 4.

VII. BANKRUPTCY

In *In re Wolf*, Wolf filed forged deeds describing three parcels owned by Gambino.[166] Attorneys Title Guaranty Fund (ATG) issued policies to Wolf and his lender. When Gambino sued to quiet title, ATG defended its insureds.[167] After an Illinois state court found that Wolf participated in fraud and forgery, ATG purchased Wolf's loan and Wolf subsequently filed a Chapter 7 action.[168] ATG sought to have the loan and other expenses incurred in its defense excepted from discharge under Bankruptcy Code § 523(a)(2)(A) (proved by false pretenses) and § 523(a)(6) (resulted from willful and malicious conduct).[169] The bankruptcy court held that the debt was non-dischargeable only under § 523(a)(2)(a) based on the state court judgment.[170] Because fraud was shown under the more specific § 523(a)(2)(A), it could not establish non-discharge ability under the general § 523(a)(6).[171]

Finally, *In re Drier* involved a New York attorney, Marc Drier, who operated a Ponzi scheme through his law firm.[172] The firm's receiver filed a Chapter 11 bankruptcy in 2008.[173] Alarmex had a claim against Dreier's firm for sales proceeds. The bankruptcy court held that Alarmex must show that a separate account was set up for its proceeds or otherwise had the burden to trace them in Dreir's accounts.[174] The bankruptcy estate had no claim to them because they were not property of the estate.[175]

166. 519 B.R. 228 (Bankr. N.D. Ill. 2014).
167. *Id.* at 238.
168. *Id.*
169. *Id.*
170. *Id.* at 265–66.
171. *Id.*
172. 2014 WL 3866590 (S.D.N.Y. Aug. 6, 2014).
173. *Id.* at *1.
174. *Id.* at *6.
175. *Id.* at *5.