TITLE INSURANCE:
RECENT CASES

ABA TIPS

TITLE INSURANCE
LITIGATION COMMITTEE

ANNUAL CONVENTION MEETING

Boston, Massachusetts

August 8, 2014

Jerel J. Hill
1420-B Stonehollow Drive
Kingwood, Texas 77339

281-358-3560 (Phone)
281-358-0030 (Fax)
jerel@jjhlawoffice.com
RECENT DEVELOPMENTS IN TITLE INSURANCE LAW

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I. INTRODUCTION

This year’s survey included over 120 cases. I have learned the following; The courts are construing CPLs to be open-ended indemnities. Damages are higher if the property was formerly owned by a celebrity. The Fifth Circuit issued one opinion of great insight and one that converted a survey exception to a survey guarantee. On a positive note, there were very few bad faith cases. I will begin with the Insured v. Insurer battleground.

II. INSURED vs. INSURER

A. Policy Terms

1. Who is the Insured?

   a. Policy issued to Mulhearn as trustee. He tendered defense of action where he was sued individually and as trustee. Held, insurer only had to defend him as the trustee. Insurer liable for his defense costs as trustee after defense tendered and before it was accepted after original denial. Mulhearn v. Lawyers Title Insurance Co., 2014 WL 213554 (Cal. App.) (unpublished).

   b. Mere loan participant (even a 95% one) is not an insured under a loan policy. Shamrock Bank of Florida v. First American Title Insurance Co., 2014 WL 1304694 (S.D. Ill.).


   e. Owner can pursue claim on missed easement after conveying most of property to seller as deed in lieu of foreclosure. “. . . [T]he loss [the insured] alleges was sustained when it discovered the defect in title, at a time it owned all 75 acres. Because [the Insured] owned the property at the time it allegedly incurred the loss, its damage claim is not barred by the “continuation in force” provision of the policy.” Centennial Development Group, LLC v. Lawyers Title Insurance Corp., 310 P. 3d 23 (Ariz. App.).

2. What is insured?

   a. Use of “development and special declarant’s rights in and to the condominiums” in Schedule A prevented insurer from securing a summary

b. Insurer not liable for Insured not acquiring air rights not listed in Schedule A. *Union Street Tower LLC v. First American Title Insurance Co.*, 42 Misc. 3d 1229 (A). NOTE: The air rights for adjacent lot were apparently listed in the sales contract. Perhaps plaintiff should have sued the escrow agent for failing to obtain said rights or disclosing how and when they could be secured. See *Dixon v. Shirley*, 558 S. W. 2d 112 (Tex. Civ. App – Corpus Christi 1977, no writ.).

c. Dedication instrument concerning building in historical district did not constitute a title defect. “. . . within the title policy’s covered risks.” Insured was aware of the dedication, but believed the sellers’ representation that it had been “taken care of”. There apparently was not a Schedule B exception for the document. The court also noted that even if it fell within coverage, Exclusion 3(a) would have applied. *McGonagle v. Stewart Title Co.*, 432 S. W. 3d 535 (Tex. App. – Dallas 2014).

d. Agent recorded mortgage to paper mill without the legal description. When error discovered, insurer cured this defect. Insured subsequently acquired title through sale by bankruptcy court. Market value of the paper mill had drastically declined due to large operating losses. *Held*, insured’s damages caused by the decline in market value of the collateral, not the title defect. Insured argued that under *Citicorp Savings of Illinois v. Stewart Title Guaranty Co.*, 840 F. 2d 526 (7th Cir. 1988), insurer breached on policy date and insured did not have to accept the insurer’s curative action. Court rejected *Citicorp* and noted it may have been negated by a 2006 Illinois Supreme Court case. *In the Matter of West Feliciana Acquisition, L.L.C.*, 744 F. 3d 352 (5th Cir. 2014).


f. Edwards purchased property after two abstracts of judgment were recorded against him. The commitment did not list the AJs. He later sued insurer for fraud and various causes of action. Summary judgment for insurer. Affirmed under Arizona statute, commitment is not a representation of title. The court may have concluded that a commitment or policy did not insure him against his debts. Insurer recovered attorneys’ fees from the pro se plaintiff. *Edwards v. First American Title Insurance Co.*, 2014 WL 575953 (Ariz. App.).
g. Access coverage. See Guenther v. Old Republic National Title Insurance Co., 2014 WL 912168 (D. Idaho) (Insurer can present at trial alternate access argument) and 2013 WL 5424004 (D. Idaho) (Earlier opinion in same case – access is more than just physical access). Kloster v. Roberts, 2014 WL 470742 (Wash. App.) (Insured had alternate access route besides unrecorded easement shown on plat attached to the commitment – also, several exceptions applied.)

h. In two cases on loan policies, one court held the policy was terminated by a novation - the execution of a renewal note, while the other held that a release of lien did not terminate coverage – the loan and the lien securing were void due to forgery. See Pekkola v. Fidelity National Title Insurance Co., 2013 WL 3873233 (D. Or.) and Countrywide Home Loans, Inc. v. United General Title Insurance Co., 971 N.Y.S. 2d 353 (App. Div. 2013).

3. Exclusions

a. Created, suffered, assumed or agreed to 3(a)

1. K.R. Playa (“KRP”) bought 16 tracts in Tulum, Mexico. It was aware of a 1981 Expropriation decree that KRP believed covered 10 of the tracts. Apparently KRP thought that since the Mexican government had not exercised control over the property for 25 years, it was not ever going to enforce the decree. KRP obtained a $41 million loan from Citigroup. Stewart Title issued owner and loan policies that did not except to the decree. The Mexican government stopped KRP’s development and this suit was filed. Jury held that 3(a) applied to ten tracts and KRP had no damages on the other six tracts. Opinion implies that same defense applied on both the owner and loan policies. Appellate court affirmed. Insurer’s expert seemed to concede KRP had $4 million in damages on the 6 tracts. Citigroup Global Markets Realty Corp. v. Stewart Title Guaranty Co., 417 S.W. 3d 592 (Tex. App. – Houston [14th Dist.] 2013).

2. Lender closed its construction loan. Title commitment required that a deed be secured from the borrower’s company to him individually. The requirement was not met, but the loan policy was issued anyway. Held, 3(a) did not apply. The lender “. . . although negligent, did not intend to cause the defect . . .” First Citizen Bank & Trust Co. v. Stewart Title Guaranty Co., 320 P. 3d 406 (Colo. App. 2014).

3. Customized endorsements trumped 3(a) in a Florida case. The dispute was over the effect of a density agreement referred to in the endorsement. At

4. Before plaintiff bought existing loan, it saw title report that listed two liens not shown on the loan policy. It purchased loan believing the liens were invalid or had been paid. Assignee’s claim survived motion to dismiss. *Johnsen and Allphin Properties v. First American Title Insurance Co.*, 2013 WL 6230344 (D. Utah).

5. Insurer did not present evidence of affirmative action by insured’s predecessor to qualify as defense under 3 (a). See *Shamrock Bank of Florida infra at p.3*.

4. Exceptions

a. Survey exception in vacant land owner policy amended to read “shortage in area.” Fifth Circuit held, this meant insurer guaranteed location of flowage easement as (incorrectly) shown on survey. The court treated the revised exception as if it was affirmative coverage on survey matters. The magistrate judge had entered summary judgment for the insurer. Of course, the flowage easement was excepted to in Schedule B. *Lawyers Title Insurance Corp. v. Doubletree Partners, L.P.*, 739 F. 3d 848 (5th Cir. 2014), aff’g in part and rev’g in part 866 F. Supp. 2d 604 (E. D. Tex. 2012).

b. U. S. Forest Service letter to Insured on alleged encroachments was not a “forced removal” under the ALTA Residential Policy. The survey exception had not been amended. The court rejected the insured’s assertion that this ruling meant the survey exception trumped the forced removal coverage.

c. Insured bought acreage with description based on prior survey. The survey exception was not deleted. Four years later insured secured new survey that showed less area. New surveyor correctly located a 1961 conveyance to the Highway Commission. Insured sued and Insurer defended based on survey exception. Appellate court reversed summary judgment for Insurer. There was ambiguity on boundary location in the legal description. It is a fact matter to be litigated upon remand. *Patel v. Lawyers Title Insurance Corp.*, 2013 WL 6002069 (Ark. App.).


e. Exception to lease covered litigation concerning the lease that was pending as of the policy date. *Yen v. Chicago Title Insurance Co.*, 2013 WL 5429458 (Cal. App.) (unpublished).

f. Alaska Supreme Court *held* owner could not sue agent and/or insurer for correctly described easement exception. However, it did not rule on whether or not an agent has to advise that buyer the easement may be invalid. The trial court held there was no such tort duty. In other words, a commitment is not a legal opinion. *Windel v. Mat-Su Title Insurance Agency, Inc.*, 305 P. 3d 264 (Alaska 2013).

**B. Claims Procedure**

1. **Notice/Limitations**


   b. Agent stole lender’s funds and did not record mortgage. Two years later insured gave claim notice to the insurer. Three years after that, it sued insurer. Tenth Circuit held limitations did not begin until insurer denied the claim. Opinion does not clearly distinguish between insurer and agent. *Bank of America, N.A. v. Dakota Homestead Title Insurance Co.*, 553 Fed. Apx.
764 (10th Cir. 2013). NOTE: So insured can sit on claim for years before submitting it without worrying about limitations?


   d. Did limitations accrue on policy date if insured was aware of adverse liens? *San Jacinto Z, LLC v. Stewart Title Guaranty Co.*, 2014 WL 1317696 (Cal. App.) (unpublished). This case also holds there is duty to defend a post-policy date eminent domain proceeding and there is no duty to defend another case that was completed before tender.

### 2. Duty to Defend

   a. “In for one, in for all” defense rejected for title insurers in Massachusetts. Opinion differentiates title insurance and general liability insurance. Borrower sued lender to set aside note due to lender’s conduct. She did not deny she signed note and mortgage. In other words, title insurance is not behavior insurance and the ghost of Moskopoulos walks again. *Deutsche Bank, N.A., v First American Title Insurance Co.*, 991 N.E. 2d 638 (Mass. 2013). See also *San Jacinto Z, LLC* case (infra this page) where insured conceded tortuous conduct not covered – a la Moskopoulos and last year’s *Liberty National Enterprises L.P.* case.

   b. Insurer had no duty to defend because petition alleged insured had actual knowledge of unrecorded lien. Paragraph 3(a) applied. On another issue, insurer did not have conflict of interest because it insured lender and subsequent buyer. *Fogg v. Fidelity National Title Insurance Co.*, 89 A. 3d 510 (D.C. App. 2014). NOTE: I am not sure the 3(a) defense negates the duty to defend unless the insured admits it had actual knowledge.

   c. Maryland court held there was no duty to defend when insured sold property, then was sued by neighbors over use of easement and pier. Insured did not tender defense until after the case went to trial. Title was not even an issue. However, in dicta the opinion states “in for one, in for all” is the rule in Maryland. *Back Creek Partners, LLC v. First American Title Insurance Co.*, 75 A. 3d 394 (Md. App. 2013). A Fourth Circuit case also said this is the Maryland law. *Cornerstone Title & Escrow v. Evanston Insurance Co.*, 555 Fed. Appx. 230 (4th Cir. 2014) (Title Agent suing its e & o carrier).
d. No duty to represent owner insured at county building permit hearing. County was not challenging insured’s title. *Guenther v. Old Republic Title Insurance Co.*, 2013 WL 5424004 (D. Idaho).


3. **Claims Handling**

a. Insurer has right to cure title under 4(b) but it is not obligated to do so. See *U.S. Bank case infra* at page 7.

b. After closing but before deed was recorded, name of grantor was changed from “the Lanson Co.” to “Lanson Milk Co.” Ten years later, buyer learned of error and made claim. Insurer offered to indemnify insurer who was handling refinance transaction and offered to reinsure itself. Insured refused. No one besides the insured attacked his title. Since he had suffered no loss, insurer did not have to take any further action under 4(b). See *Castin v. First American Title Insurance Co.*, 2014 WL 576269 (Ohio App.).

c. Insurer can amend answer to include defense based on release executed in prior litigation with “serial litigants.” It took the insurer’s counsel a few months to locate the release. It involved another case with the litigants in another State. Indeed, the litigants had failed to identify that case in a discovery request. *HSBC Bank, USA, N.A. v. Resh*, 2013 WL 6230670 (S. D. W. Va.).

d. Federal case on loan policy had proper venue in district where the land is located rather than district where title agent has its office. *PNC Bank, N.A. v. Fidelity National Title Insurance Co.*, 2013 WL 4039436.

4. **Subrogation**


b. Mechanic lien indemnity from owners to title insurer included mechanic liens filed after policy date. Most of the opinion is the judge denying a recusal motion. She had been a partner of the insurer’s expert witness from 1980-
1992. Also, the defendant’s attorney said she had him fired.  *Old Republic National Title Insurance Co. v. Warner*, 2013 WL 2403597 (N.D.W.Va.).


d. Cause of action against company overseeing construction disbursement request accrued when lender learned that mechanic lien had been filed. Consequently, title insurer’s subrogation suit against said company was barred under Illinois law.  *Stewart Title Guaranty Co. v. Inspection and Valuation International, Inc.*, 2013 WL 5587293 (N.D. Ill.).

e. Vargas pretended to be majority owner of entity that owned property. After insurer paid policy limits of $1,000,000.00, it sued Vargas. *Held*, Vargas liable for fraud, but not for punitive damages. *Levi v. Commonwealth Land Title Insurance Co.*, 2013 WL 5708402 (S.D.N.Y.).


C. Damages

1. Owner / Leasehold Policies

   a. Owner policy for $9 million did not list unused public road across the property. It was subsequently reduced to a six foot wide walkway to the shore. Insured’s sought $5 million, insurer offered $17,000.00. Jury found there were $2.2 million in damages. Insured’s expert testified property was more valuable because it was formerly owned by Katherine Hepburn. *First American Title Insurance Co. v. 273 Water Street, LLC*, 2013 WL 3871443 (Conn. Super.).

   b. Insurer admitted liability, but disputed damages. Jury found insurer had not breached the policy and insured’s loss in value to entire tract was $73,000. Trial court judgment found insurer not liable for any damages. Appellate court reversed, stating the two jury answers were contradictory. *Borowski v. Stewart Title Guaranty Co.*, 842 N. W. 2d 536 (Wis. App. 2013) NOTE: Answers are not necessarily opposed. Jury could have decided that insurer met its policy obligations by offering $3,500.00 to
insured when the claim was tendered. Other factors could have caused the $73,000.00 loss.

c. Neighbor – assignee of insured secured $33,000 award against insurer in easement dispute. Punitive damages against insurer were set at $1,000,000.00. Wisconsin Supreme Court, in scholarly opinion, reduced punitive damages to $210,000.00. *Kimble v. Land Concepts, Inc.*, 845 N. W. 2d 395 (Wis. 2014). NOTE: This case also mentioned infra at page 1.

d. Damages awarded by jury for missed mineral interest were significantly less than insurers’ pretrial offer. Under Texas law, the insurers could recover their costs as an offset against the damages. The court set the value on a per acre basis then multiplied by ½ for the interest missing. *May v. Ticor Title Insurance*, 422 S.W. 3d 93 (Tex. App. – Houston [14th Dist.] no writ yet).

e. Insurer can discover financial documents of insured to determine market value of lost leasehold estate. It is possible the lease had a negative value. *Commonwealth Land Title Insurance Co. v. OMG Americas, Inc.*, 2013 WL 5435716 (D. Utah).

2. *Loan Policies*

a. Loan policy described several tracts. Lender’s foreclosure of six tracts yielded property valued in excess of secured debt. Lender’s position on seventh tract lost due to foreclosure of prior lien. Lender and title agent had discussed escrow for that lien prior to closing, but it was not completed. Court *held*, lender could go to trial on possible loss on seventh tract, reversing summary judgment for insurer. Paragraph 7 (a) and 9 (b) misconstrued. *Doss & Associations v. First American Title Insurance Company, Inc.*, 754 S. E. 2d 85 (Ga. App. 2013).

b. Is this a Southeast trend? The “war” on 9 (b) continues. Loan policy covered several parcels. Credit bid on one parcel by insured exceeded policy amount. South Carolina Supreme Court *held* lender could recover damages for loss of second lien position on another parcel. *Preservation Capital Consultants, LLC v. First American Title Insurance Co.*, 751 S. E. 2d 256 (S. C. 2013).

c. 9 (b) still thrives in Arizona. Full credit bid terminated loan policy. However, lender can proceed on bad faith issue concerning lack of access

d. Damages under loan policy cannot be set until foreclosure by construction lender is completed.  See 8 (b).  *Credit Suisse* infra at page 4.

e. However, 8 (b) does not apply if insurer admits lien defective and insurer is not pursuing litigation against borrower.  In this case, loan policy limits are due.  The lender does not have to first attempt to foreclose.  The lender cannot recover its attorney’s fees in suit against insurer per Colorado law.  *First Citizens Bank & Trust Co. v. Stewart Title Guaranty Co.*, 320 P. 3d 406 (Colo. App. 2014).

f. Insurer’s expert said lender had $4 million loss, jury said zero?  See *Citigroup Global Markets Realty Corp.* infra at page 5.

3. **Bad Faith**

a. Trial court rejected insurer’s motion to dismiss bad faith claim.  Delay in coverage decision may have been unreasonable – it took seven months and was delivered the night before a foreclosure sale by a competing lienholder.  *Johnsen and Allpin Properties v. First American Title Insurance Co.*, 2013 WL 6230344 (D. Utah).

b. Trial court will allow insured to add claim for punitive damages in *Credit Suisse* case.  See infra at pages 6 and this page above.

D. **Closing Protection Letters**

1. Federal court held CPL was an indemnity contract, not a title policy, under Maryland law.  Limitations did not start until loss suffered – despite CPL language.  Moreover, loan assignee could make a claim under the CPL – even though it purchased the loan over three years after the closing!  Case will proceed to trial.  *Heritage Pacific Financial, LLC v. First American Title Insurance Co.*, 2013 WL 4401040 (D. Md.).

E. Insurer’s Liability for Agent’s Acts

1. Insurer not liable for agent’s acts as escrow agent. Title insurance license application with Illinois did not amend or supplement the agency agreement. No CPLs had been issued to the lenders who made these loans. Rosenberg v. B.H. Kahn and Associates, 2013 WL 3015860 (Ill. App.). See also Branch Banking and Trust Co. v. Fidelity National Title Insurance Co., 2013 WL 6844653 (M.D. Tenn.).

2. Insurer not liable in tort for agent’s post-closing statements concerning an easement. Agent was wrong - the easement did not benefit the insured’s property. However, this was post-closing and the damage was done before the representations were made. McCollan v. Brewer, 112 A. D. 3d 1191 (N.Y.A.D. 2013).

3. Insurer not vicariously liable to convict because agent made it too easy for him to defraud lenders. “Your agent made me a crook!” Alas, his behavior broke the causal chain. He had no claim against either the agent or its underwriter. Anderson v. Preferred Title & Guaranty Agency, Inc., 2014 WL 585966 (Ohio App.).

III. Insurer vs. Agent

A. Agent’s E&O Coverage

1. Agent delayed recording documents to facilitate theft of escrow funds. Insurer sued agent, who tendered defense to its E & O carrier. Held, “customer” funds exclusion in e & o policy applies – all of the insurer’s claims arise out of the misuse of customer funds. The failure to record documents was not a separate act of negligence, but part of the scheme. Bethel v. Darwin Select Insurance Co., 735 F. 3d 1035 (8th Cir. 2013).

B. Insurer vs. Agent’s Employee and Agent’s Customer

1. Insurer can sue closer and borrower for failing to record mortgages as fraud and civil conspiracy, but not under civil RICO. *Fidelity National Title Insurance Co. v. Craven*, 2013 WL 3778388 (E.D. Pa.).

2. Insurer recovered judgment against party who orchestrated fraudulent loans. She was paid almost $500,000.00 from agent’s escrow account for no valid reason. Since theft was from agent’s account, not the insurer’s, insurer proceeded under subrogation rights of its insureds. Insurer sued her for conspiracy to commit fraud. *Stewart Title Guaranty Co. v. Sanford Title Services, LLC*, 2013 WL 5566493 (D. Md.).

C. Agency Contracts.

1. Insurer sued agent for unpaid premiums. Agent asserted contract was invalid because tiered contract where agent paid smaller percentage if agent remitted over $100,000.00 a year was RESPA violation. *Held*, provision was severable and would not void entire contract. Agent did perform services for its portion of the premium. Portion of case on another of agent’s claims was reversed. *Dewrell Sacks, LLC v. Chicago Title Insurance*, 749 S.E. 2d 802 (Ga. App. 2013).

2. Agent liable to insurer if insured prevails in action against insurer. Insured does not have to sue agent first. *See Doss & Associates* infra at page 11.

IV. Duties of Title/Escrow Agent

A. Handling Escrow Funds

1. California agent closed first lien refinance. A federal tax lien was the second lien. Agent did not secure release or subordination from the IRS. It paid existing first lien, closing costs, and disbursed balance to borrowers. District court *held* IRS could sue the agent for conversion and waste. The opinion ignores (1) subrogation and (2) the fact the IRS was not a party to the escrow. In essence, the agent was said to have “converted” the funds that should have gone to the IRS. *Bedrock Financial Corp. v. First American Title Co.*, 2014 WL 1600452 (E.D. Cal.).

2. Escrow agent can insist on wired funds – even if it discloses this requirement the day before closing. Texas “good funds” rule allows cashier checks, but this does not mean the insurer and agent must accept them. *Capcor at Kirbyman*. 

3. Chumley was independent contractor working for Hawk, who was a fee attorney for Lawyers Title. Chumley accepted a $1.8 million deposit from Cooper. Escrow agreement was executed stating funds were for contemplated transaction. There was not a contract yet. The funds were not to be moved without Cooper’s consent. Chumley and others diverted $1.7 million of the funds to other deals. Cooper sued Chumley, Hawk, and Lawyers Title. Trial court granted summary judgment against Lawyers Title for the $1.8 million. Court of appeals reversed. There is genuine issue on Lawyer’s Title’s control over the escrow account. Jury needs to decide if the account belonged to Hawk or Lawyers Title. **Lawyers Title Co. v. J.G. Cooper Development, Inc.**, 424 S. W. 3d 713 (Tex. App. – Dallas 2014, no writ yet).

4. FDIC can sue agent in tort and contract for failing to follow lender’s closing instructions. It did not matter that the FDIC was not a party to the escrow. In addition, the FIRREA six year statute of limitations applied. Suit was barred under Missouri law. **FDIC v. St. Louis Title, LLC** 2014 WL 200368 (E.D. Mo.).

5. Loan had been assigned, but no transfer was of record when escrow agent paid assignor. **Held**, assignee’s servicer had no cause of action against agent. Servicer was not a party to the escrow or a third party beneficiary of the escrow agreement. **Aurora Loan Services, LLC v. Security Title Agency, Inc.**, 2014 WL 458133 (Ariz. App.).

**B. Handling Documents**

Agent closed commercial loan. The deed of trust stated the borrower could not file subordinate liens. Agent later recorded four subordinate liens at borrower’s request. After lender declared a default, borrower sued agent for negligence in filing the liens. Court held agent had no tort duty under Washington law to refrain from recording documents. **Centurion Properties, III LLC v. Chicago Title Insurance Co.**, 2013 WL 3350836 (E.D. Wash.).

**C. Duty to Search Title**

2. New York agents liable for negligence when they showed borrowers in title on commitments before properties were conveyed to the borrowers. *FDIC v. Horn*, 2014 WL 1236053 (E. D. N.Y.).

3. Agent missed environmental restrictions and easements in title exam on 2006 file. Agent discovered error before 2007 closing and tried to remedy by having 2006 deed of trust released (ending title insurer’s liability) and inserting the missed items in the new loan policy. E&O carrier sued agent for declaration “prior acts” exclusion applied. *Held*, policy issued after first closing so exclusion did apply. The agent’s failure to find the documents as part of the first closing was the basis for what happened in the second closing. *American Guarantee & Liability Insurance Co. v. The Abram Law Group, LLC*, 555 Fed. Appx. 919 (11th Cir. 2014).

4. Appellate court found agent had no tort duty to search in Washington. See Kloster at page 3 above. Likewise, this is also Utah law. *Johnsen and Allphin Properties* discussed infra at page 12.

**D. Closing Instructions**

1. Title agent found liable for full amount of construction loan because performance bond not secured per loan instructions. Loan funds went from title agent to construction disbursing agent that paid out funds to borrowers based on false invoices. Opinion has extensive discussion of escrow agent liability in California. Also, it is the only case I have seen where the escrow agent was compared to a night security guard at a jewelry store! *Strohbach v. United General Title Insurance Co.*, 2013 WL 3286218 (Cal. App.) (unpublished).

2. One year limitations period in escrow instructions was enforced by title agent. It did not pay a questionable $30,000.00 bonus to selling agent. Bonus roughly equaled the sum added to the loan amount for no apparent reason. *Openiano v. First American Title Co.*, 2013 WL 5372878 (Cal. App.) (unpublished).

3. Closing instructions provided borrower must sell another property before loan closed. Condition was not satisfied. Lender sued mortgage broker and title agent. *Held*, loan is current and plaintiff has suffered no damages. A $1,000 a day provision in closing instructions for breach was an unenforceable penalty. Moreover, the defendants could recover their costs from the plaintiff. *Shore Financial Services, Inc. v. Lakeside Title and Escrow Agency, Inc.*, 2013 WL 2223781) (Mich. App.).

**E. Duty to Disclose**

1. Escrow agent was handling A to B1 contract. When it seemed B1 was not moving forward to closing, A signed contract with B2. Agent accepted that contract and closed it. B1 sued A and title agent. *Held*, agent violated duty of loyalty to B1 by accepting second contract. However, it did not have a duty to disclose the second contract to B1 unless the first contract so provided (very unlikely) or if disclosure was necessary to prevent fraud (there were no fraud allegation in B1’s petition). Case will proceed to trial on damages. The owner policy issued to B2 included an exception for the A-B1 contract. NOTE: It is a basic tenet of escrow procedure - do not accept a second contract until the first one is released. This is the first Texas case I have seen on this issue. *In Re SMIC Ltd.*, 2013 WL 4078704 (Bkrtcy. N.D. Tex.).

2. Agent was sister corporation of seller. Lender alleged agent was aware of fraudulent value information being provided to the lender. District court *held* that Florida economic loss rule did not bar this cause of action. Negligent misrepresentation and fraudulent inducements are exceptions to the rule that apply here. *FDIC v. Lennar Corp.*, 2014 WL 201663 (M.D. Fla.).

**F. Right to Cure Title**

Agent has standing in Illinois to challenge tax deed adverse to interest of buyer it issued policy to. *In Re County Treasurer*, 999 N.E. 2d 748 (Ill. App 2013).

**G. Duties to Third Parties**

1. As part of refinance agent contacted third party lienholder who agreed to release his lien as long as he was granted a new, subordinate lien after closing. Agent prepared a new deed of trust but it listed the wrong entity as the grantor. The error was not discovered until five years later when another lienholder filed suit to establish its lien priority. Reversing a trial court judgment for the agent, the appellate court held agent could be liable in negligence to a non-party for an

2. Pace executed note in favor of Bank One. Pace then sold property and its buyer (Stiles) was to pay Bank One. Stiles sold to Cross Point and the title agent did not locate and pay off the Bank One lien. When the agent bought the Bank One note and sued Pace, it counterclaimed for negligence. *Held*, agent had no tort duty to Pace as a non-party to the escrow. Opinion has a scholarly review of Arizona law on escrow agent duties. *Yavapai Title Agency, Inc. v. Pace Preparatory Academy*, 2013 WL 3368935 (Ariz. App.).

3. See also *FDIC v. Lennar Corp.*, infra at p. 17. The court used a “stream of commerce” type analysis to find an agent may be liable to a downstream lender for false information third parties provided the original lender. See page 6 of that opinion.

4. As part of short sale, seller provided escrow agent (Heritage) with a letter from the FDIC, the second lien holder. FDIC would release its lien for heavily discounted payoff if all terms of its letter were satisfied. Heritage closed, but did not verify that all the FDIC’s requirements were met. FDIC refused the payoff. Title insurer paid FDIC and, in the name of the buyer, sued FDIC. Subsequently, FDIC brought third party action against Heritage alleging negligence and breach of contract. Trial court awarded Heritage summary judgment. Heritage had no duty to FDIC. The letter was addressed to the seller, not Heritage. The opinion has an excellent review of California case law on when a lender is or is not a party to the escrow. Court found that Heritage had no duty to FDIC and FDIC was not a third party beneficiary of the escrow instructions. “Only parties that actually submit instructions to escrow can rightfully be considered parties to it.” *Jafari v. FDIC*, 2014 WL 868937 (S. D. Cal.). NOTE: This is a 12 page opinion with little wasted space.

V. Government Regulations of the Title Industry

A. Federal

1. Sixth Circuit torpedoes HUD ten fact “bona fide provider” test for affiliated business entities. Defendant agent qualified for statutory safe harbor. The additional requirements of the HUD policy statement were disregarded. *Carter v. Welles-Bowen Realty, Inc.*, 736 F. 3d 722 (6th Cir. 2013).
2. Title agent paid real estate agents (REA) under employment agreement and marketing agreement. REA did not provide any services to the title agent. Consumers sued title agent under RESPA because these agreements were not disclosed to them. In a motion decision, district court dismissed some defendants, but allowed most of case to proceed. It also certified the case as a class action. *Baehr v. The Creig Northrop Team, P.C.*, 2014 WL 346635 (D. Md.).


B. State

1. Washington Supreme Court held insurer liable for the marketing practices of an independent agent. The agent had violated the State’s anti-kick back regulations. Insurer liable under the insurance code and common law. The agency agreement with the insurer did not limit the agent’s authority. *Chicago Title Insurance Co. v. Washington State Office of the Insurance Commissioner*, 309 P. 3d 372 (Wash. 2013).

2. Commonwealth “Cents per Thousand” program allowed agents to vary premium charged based on non–risk factors. Indiana Department of Insurance issued order finding program was discriminatory in premium charges, unsafe business practice, and caused Commonwealth to under-report premium taxes. Court of Appeals affirmed district court ruling for IDOI. Commonwealth also ordered to recalculate premium tax by reviewing every title insurance transaction during the period “CPT” was in effect. *Commonwealth Title Insurance Co. v. Robertson*, 5 N.E. 3d 394 (Ind. App. 2014).

3. Title agent not liable to condo association for developer’s failure to escrow funds as required by Michigan Condominium Act. Agent’s duty to not disburse until roads completed did not arise because it never received the funds. *Clarkson Holdings, Ltd. v. Avington Park Condominium Association Inc.*, 2013 WL 2420973 (Mich. App.).


5. Maryland Attorney General sued title agent under Protection of Homeowners in Foreclosure Act in *Cornerstone Title & Escrow* case infra at page 8.
VI. Miscellaneous

A. Bankruptcy

1. Plaintiff’s 1031 exchange was supposed to close Friday before Land America’s 1031 subsidiary filed bankruptcy. It did not due to alleged breach by escrow company (NAT). Plaintiff received his funds 16 months later – thus losing 1031 status. Trial court judgment against agent for breach of contract upheld, but damage award reversed. The 1031 company’s bankruptcy was not foreseeable. Appellate court also reversed issue of escrow agent’s possible tort liability. Opinion has a long dissent. Ash v. North American Title Company, 223 Cal. App. 4th 1258 (2014).

2. Debt created by debtor’s providing false lien affidavit to title insurer is non-dischargeable – See In Re Speisman, 495 B.R. 398 (N.D. Ill. 2013) and Stewart Title Guaranty Co. vs. Roberts –Dude, 497 B.R. 143 (S.D. Fla. 2013).

3. Title insurer, as itself and not as assignee of lender insured, can recover from debtor for forging wife’s name on deed of trust and have claim excepted from discharge. In Re Welch, 494 B.R. 654 (E.D.N.C. 2013).

4. Whether title insurer’s second lien was worthless or had full value depended on valuation date of debtor’s property. Bankruptcy judge set valuation as of confirmation hearing. Thus the insurers’ claim was secured due to increase in value of collateral after case filed. In Re Cahill, 2013 WL 6229144 (Bkrtcy. D.N.H.).

5. Debtor – contractor had contingent interest in escrow fund held by insurer. However, debtor failed to perform. Escrow fund was not property of the estate. Bankruptcy judge referred dispute to State court. In Re Expert South Tulsa, LLC, 2014 WL 642711 (Bkrtcy. D. Kan.).

6. Agent’s thefts from escrow account causing insurer’s loss under CPLs were non-dischargeable under Bullock standard. Agent’s debts to insurer were non-dischargeable. In Re Colson, 2013 WL 5352638 (Bkrtcy. S.D. Miss.) and 2013 WL 3964641 (Bkrtcy. S.D. Miss.).

B. Insurers vs. other Types of Carriers

1. Agent’s theft of funds caused title insurer to pay damages under 14 CPLs. Insurer then made claim on its E&O policy. Held, coverage properly denied by e&o carrier. The agent’s acts were not by an entity the insurer was “legally

2. Stewart had an attorney – agent in Florida that participated in fraudulent loans and misappropriated escrow funds. Stewart made a claim on its financial institutions bond. It claimed the losses were caused by employee dishonesty. The bonding company’s defenses were (a) the attorney was not Stewart’s employee and (b) the attorney’s acts only indirectly caused Stewart’s losses under title policies and CPL. Federal district court examined the bond and Stewart’s contract with the attorney. It determined the attorney was an employee under the terms of the bond. However, the attorney’s acts were only indirectly responsible for Stewart’s loss. Financial loss caused under Stewart’s CPLs and policies issued to third parties are not “directly” caused by employee misconduct. *Stewart Information Services Corp. v. Great American Insurance Co.*, 2014 WL 583965 (S.D. Tex.).

C. Presentation – 8/8

1. Kimble p. 3 and p. 11
2. McGonagle p. 4
3. West Feliciana p. 4
5. Credit Suisse p. 6
6. Doubletree Partners p. 6
7. A. Gugliotta Development p. 7
8. Yen p. 7
10. Deutsche Bank p. 8
11. San Jacinto Z p. 8
12. Back Creek Partners and Cornerstone Title & Escrow p. 8
13. Sterling p. 9
14. 273 Water Street p. 10
15. Doss & Associates, Preservation Capital, and Equity Income p. 11
16. First Citizens p. 12
17. Heritage Pacific and Bank of America p. 12
19. Strobach p. 14
20. Shore Financial p. 16
NOTE: The author thanks Susan Taylor, Kelly Westover, and Amy Steindorff for their assistance in preparing this outline. It is number 17.