

RECENT DEVELOPMENTS IN TITLE
INSURANCE LAW

Jerel J. Hill and Steven R. Parker

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Jerel J. Hill, a solo practitioner in Houston, is immediate past chair of the TIPS Title Insurance Litigation Committee. Steven Parker is an associate in the Birmingham, Alabama, office of Balch & Bingham LLP, and a vice chair of the Title Insurance Litigation Committee.

I. INSURED VERSUS INSURER

A. *Who Is the Insured?*

The definition of insured in an owner policy was at issue in *Kee Kwok v. Transnation Title Insurance Co.*¹ An owner policy was issued to a limited liability company. A year later, the LLC was transferred to two of its members as trustees for a family trust. When a dispute arose with a neighbor over use of an easement, the insurer denied coverage under the policy because the trust was not the insured. In subsequent litigation, the court held for the insurer, finding that the transfer was not by operation of the law and therefore the trust was not an insured. The policy form in this case was a CLTA Standard Coverage policy issued in 2004.²

A New Jersey case involved a transfer from an individual insured to her trust.³ As in the *Kee Kwok* case, the appellate court held that the transfer to the trust was not by operation of law and therefore the trust could not make a claim for a dispute with the state over ownership of tidelands property. The court refuted arguments that the trust was a transferee upon dissolution or a distributee from a fiduciary successor.⁴

B. *What Is Insured?*

In a case adjudicated by the Minnesota Court of Appeals, the legal description in the insureds' deed and title policy described 7.1 acres.⁵ Based on representations by the sellers, the insureds believed that they had purchased an additional nine acres and sued the insurer for lack of access and defective title. The court held that the insureds had access and title to the 7.1 acres described in the policy. The "lost" nine acres were not considered as a covered risk because the additional land was not included in the description of the property insured.

In *GCIGP, LLC v. Stewart Title Guaranty Co.*, the court ruled that a claim asserted by mechanics lien claimants against a removable item is covered by the Texas owner policy. The claim was for work that occurred prior to the inception date of the policy.⁶ The insurer asserted that the removables were personal property. The appellate court dismissed this argument, ruling that the claim was made while the fixture was part of the real property and that fixtures become personal property only after a court decision sanctions their removal.⁷

1. 89 Cal. Rptr. 3d 141 (Cal. Ct. App. 2009).

2. See *Proto-Cam Inc. v. Transam. Title Ins. Co.*, 2008 WL 2553340, at *1-2 (Mich. Ct. App. June 26, 2008); *Shotmeyer v. N.J. Realty Title Ins. Co.*, 948 A.2d 600 (N.J. 2008).

3. *Carney-Dunphy v. Title Co. of Jersey*, 2009 WL 1874060 (D.N.J. June 30, 2009).

4. *Id.* at *7.

5. *Fee v. Stahey*, 2008 WL 4849844 (Minn. Ct. App. Nov. 10, 2008).

6. 290 S.W. 3d 287 (Tex. App. 2009).

7. *Id.* at 294.

In *Thurlow v. Ticor Title Insurance Co.*,⁸ the insured's neighbor wrongfully blocked his access. The insurer refused to file suit on the insured's behalf. The insured then sued the insurer for breach of the duty to defend. The appellate court held the insurer had no affirmative duty to file suit against the neighbor because, in general, the policy covers defense but not prosecution of suits.⁹ Another interpretation of *Thurlow*, not articulated by the court, is that a title insurer is not liable for damage done by trespassers.¹⁰ The neighbor's action was apparently not based on a claim of superior title.

C. Exclusions and Exceptions

1. Exclusions

A neighbor's claim to relocate an easement was not detectable in the land records on the policy date. The insurer declined to defend a suit brought by the neighbor against the insured. A Michigan court ruled the claims were not covered by the owner policy because (1) the easement was not in the public records on the policy date, and (2) in any event, it was a post-policy date matter¹¹ that was first known to anyone (other than the neighbor) until after the policy's expiration.¹²

In *Glenn v. First American Title Insurance Co.*, the plaintiff's house had been condemned and was demolished a week after she purchased it.¹³ There was nothing filed in the real property records, but notices had been filed in a city office. The insured sued its insurer for loss. The insurer argued that city condemnation records were not public records as set forth in Paragraph 1(b).¹⁴ The court agreed with the insurer, finding that public records are those giving notice of ownership and liens against real property. Although the city records were available to the public, they did not evidence ownership and liens against real property as required by the policy exclusion.

Two cases this year dealt with the exclusion for matters “. . . created, suffered, assumed, or agreed to by the insured . . .” under Paragraph 3(a) of the owner policy.¹⁵ Alexandra Murnan, acting as trustee, acquired property and a title policy while there were several federal tax liens of record against her. She was the sole beneficiary of the trust during her lifetime.¹⁶ After a

8. 2009 WL 2358307 (Conn. Super. Ct. July 7, 2009).

9. *Id.* at *4.

10. *See, e.g.*, *Sw. Title Co. v. Woods*, 449 S.W.2d 773 (Tex. 1970).

11. *See* ALTA 2006 Owner Policy ¶ 3(d), available at www.alta.org/forms/.

12. *Campbell v. Ticor Title Ins. Co.*, 209 P.3d 859 (Wash. 2009).

13. *Glenn v. First Am. Title Ins. Co.*, 2009 WL 1830745 (Mich. Ct. App. June 25, 2009).

14. *Id.* at *3.

15. ALTA 1992 Owner Policy ¶ 3(a), available at www.alta.org/forms/.

16. *Murnan v. Stewart Title Guar. Co.*, 585 F. Supp. 2d 825 (E.D.Va. 2008), *reh'g granted*, 2009 U.S. Dist. LEXIS 51597 (E.D. Va. Jan. 12, 2009), vacated in part, 607 F. Supp. 2d 745 (E.D. Va. 2009).

tax lien prevented a planned sale of the property, she brought suit against the insurer. The insurer denied liability, citing the items were excluded as “. . . created, suffered, assumed, or agreed to . . . [by Murnan].” She argued the liens were against her as an individual, not as trustee. A federal district court in Virginia held that Murnan knew about the tax liens and as trustee “suffered” the liens to attach.¹⁷ Thus, under Paragraph 3(a), there was no coverage. This case follows the principle that tax debtors cannot escape liability for taxes by conveying their real estate to entities that they control and securing title policies for the property.

In a California case, the insurer paid for the settlement of a boundary dispute with the insured’s neighbor.¹⁸ The neighbor subsequently sued the insured alleging he had not built a wall as required by the settlement agreement. The insurer refused to defend the action and prevailed with the court ruling that this action was outside the scope of the owner policy. A second suit against the insured dealt with construction of the settlement agreement, not the original encroachment issue. The insured’s post-settlement behavior was “. . . created, allowed or agreed to . . .” by the insured.¹⁹ Because the behavior occurred long after the policy date, the post-policy date exclusion also applied.

Paragraph 9(c) of the owner policy was at issue in *Chicago Title Insurance Co. v. Arkansas Riverview Development, LLC*.²⁰ This provision provides that the insurer is not liable for “. . . liability voluntarily assumed by the insured in settling any claim or suit without [the insurer’s] prior written consent . . .” The insured’s policy failed to except to the original lease of air space. The lease provided the city and a neighbor must consent to any assignment of the lease rights. A large portion of an office building on the property was within the air space lease area. After extensive negotiations, the insured settled with the city and the neighbor. The insured kept the insurer fully advised of the settlement negotiations. The insurer had many opportunities to assert that it would deny coverage for a settlement without written consent. Consequently, the court held the insurer had waived its rights under Paragraph 9(c).²¹

2. Exceptions

The effect of Schedule B exceptions was discussed in several cases this year. In most cases, insurers prevailed in relying upon the exceptions. Two

17. *Id.* at 747.

18. Beck v. Old Republic Nat’l Title Ins. Co., 2009 WL 189847 (Cal Ct. App. Jan. 28, 2009).

19. *Id.* at *4.

20. 2009 WL 1258274 (E.D. Ark. May 5, 2009).

21. See *Chicago Title Ins. Co. v. Ark. Riverview Dev., LLC*, 573 F. Supp. 2d 1152 (E.D. Ark. 2008) (prior opinion in same case on other exclusion issues).

of these cases dealt with procedural issues in cases involving exceptions. In three, specific Schedule B exceptions applied to prevent an insurer's liability. A general exception for recorded easements and restrictions was the basis of the insurer's defense in *Seba v. Lawyers Title Insurance Corp.*²² Interestingly, the document in question was recorded, but not located by the title agent because it was “. . . not accessible using standard search methods.”²³ In addition, insurers prevailed by asserting the parties-in-possession exception in two New York cases.²⁴

However, liability was found when the agent missed a maintenance easement.²⁵ The insurer argued that the survey exception applied and that the easement's existence would have been disclosed if the insured had obtained a survey. The court held for the insured, finding that the easement was a title defect of record. The easement itself was not visible on the ground. Therefore, the insurer was liable.²⁶

Two Georgia cases dealing with procedure in exception cases were *Lawyers Title Insurance Corp. v. Stribling*²⁷ and *Crawford v. Lawyers Title Insurance Corp.*²⁸ The former held that an insurer has the burden to prove a Schedule B exception applies when it denies coverage. In the latter case, a summary judgment for the insurer based on a restriction exception was reversed because the insurer did not introduce a complete copy of the owner title policy into evidence.

D. Measure of Damages

In *First Internet Bank of Indiana v. Lawyers Title Insurance Co.*,²⁹ the agent's closer failed to secure a release of a prior lien. The property was later sold by a bankruptcy trustee. The insurer paid the insured bank the amount it would have received if it had the first lien. The bank argued that the loss should be measured when the loss of priority was discovered. The collateral's value had declined between the date of the discovery of the defect and the date of the bankruptcy sale. The appellate court agreed with the insurer and cited a line of California cases for the proposition that the date for measuring damages is different for owner and loan policies.³⁰ The loss

22. 2008 Mich. App. LEXIS 2510 (Dec. 18, 2008), *cert. denied*, 765 N.W.2d 330 (Mich. 2009).

23. *Id.*

24. *Doyle v. Siddo*, 865 N.Y.S.2d 126 (N.Y. App. Div. 2008); *236 W. 40th St. Corp. v. Chicago Title Ins. Corp.*, 864 N.Y.S.2d 416 (N.Y. App. Div. 2008).

25. *Morton v. Attorneys Title Ins. Fund, Inc.*, 2009 WL 1975901 (Fla. Dist. Ct. App. July 10, 2009).

26. *Id.* at *3.

27. 670 S.E. 2d 154 (Ga. Ct. App. 2008).

28. 675 S.E. 2d 232 (Ga. Ct. App. 2009).

29. 2009 WL 2092782 (S.D. Ind. July 13, 2009).

30. *Id.* at *6.

is set for loan policies when the lender forecloses or otherwise liquidates its security interest.

Two courts considered the issue of whether an insurer can forgo its defense obligation by tendering payment of a partial loss to an insured. In the first case, a neighbor claimed a portion of the insured's lot by adverse possession.³¹ After initially agreeing to defend, the insurer secured an appraisal of the portion of the property in dispute and then tendered the appraisal amount, \$26,300, to the insured. The offer was declined; the insured asserted the loss in value exceeded \$5 million. The insurer then filed a declaratory judgment action in federal court, asserting that a tender of the appraisal value terminated its obligation to defend under Paragraph 6(a) of the policy.³² The insured maintained that only tender of the policy amount (\$16 million) would terminate the duty to defend.³³ The court held that 6(a) requires the payment of ". . . the amount of insurance under this policy, . . ." i.e., the policy amount, to terminate the duty to defend.³⁴

The second case, *Fleishour v. Stewart Title Guaranty Co.*,³⁵ also involved an adverse possession claim. In that case, the insurer tendered \$1,000 to the insureds rather than defend them and did not state the basis for its calculation of \$1,000 in damage. The insureds then filed a declaratory judgment action. The court denied the insurer's motion for summary judgment. However, unlike the court in *Grafton Partners*, the court here seemed willing to agree that the insurer could terminate the duty to defend by tendering less than the full policy amount.³⁶ The court, though, did not accept the insurer's unsupported, unilateral offer of \$1,000.

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

Title agents in most states act simultaneously in two roles: (1) as an escrow agent to the seller and buyer in closing the sales contract; and (2) as the title insurer's agent in examining title, issuing the commitment, satisfying curative requirements, collecting the premium, and issuing the title policies. When acting as escrow agent, the title agent is acting for the parties to the transaction, not the insurer. Consequently, the agent is liable for its actions in such capacity but the insurer is not. On the other hand, the insurer may be liable for the agent's actions in the title insurance portion of the transaction.

31. *First Am. Title Ins. Co. v. Grafton Partners, LLC*, 2009 WL 792263, at *3 (D. Mass.).

32. ALTA 1992 Owner Policy ¶ 6(a).

33. *First Am. Title Ins. Co.*, 2009 WL 792263, at *3.

34. *Id.* at *4.

35. 640 F. Supp. 2d 1088 (E.D. Mo. 2009).

36. *Id.* at 1094. The court accepted the argument that Paragraph 7 of the ALTA owner policy on settlement of claims does restrict the duty to defend in Paragraph 5.

Three opinions this year recognized this distinction between the agent as escrow agent and as title agent. In *Proctor v. Metropolitan Money Store Corp.*,³⁷ plaintiffs were facing foreclosure. Two lenders “rescued” them by acquiring title to their homes. Plaintiffs were left in possession but only had options to repurchase for an amount significantly larger than the prior debt. Plaintiffs alleged two title agents assisted the lenders in defrauding them. The pleadings asserted the agents showed expenses as paid by the buyer when the seller actually paid them, failed to follow the lender’s closing instructions, and made changes to the settlement statements without the lender’s approval.³⁸

The plaintiffs also sued the two insurers, alleging they were liable for the title agent’s misdeeds. The court entered summary judgment for the insurers stating that the “employment of an agent for the purposes of issuing title insurance does not (at least by itself) establish an agency relationship for purposes of settlement and closing activities undertaken by that agent.”³⁹ Despite the agency agreements, the closing protection letters (CPLs), and the insurers’ role in auditing agents, there was no respondent superior liability for the agents’ function as escrow agents.

The other two similar holdings were *Pal Properties LLC v. Tigor Title Insurance Co.*⁴⁰ and *Arevalo v. Fidelity National Financial, Inc.*⁴¹ The former involved an agent who stole escrow funds. The insurer was held not liable to the buyer because the agent was not acting for the insurer when it collected and distributed escrow funds. *Arevalo* involved an agent who regularly overcharged for recording fees. Charging for this service was found not to be part of the agent’s role as title agent, and the insurer was not held liable.

New Jersey does not follow the *Pal Properties* decision.⁴² Instead, the insurer must give notice that it is not liable for a theft of escrow funds by the closing attorney. This rule was construed in *New Jersey Lawyers Fund for Client Protection v. Stewart Title Guaranty Co.*,⁴³ where the court held that the insurer had a duty to deliver the notice directly to the parties. Because the insurer had relied on the attorney to distribute the notice, the insurer was liable for the attorney’s theft even though he was not a title agent and had misapplied the funds before the commitment was even issued.⁴⁴

37. 579 F. Supp. 2d 724 (D. Md. 2008).

38. *Id.* at 729.

39. *Id.* at 736.

40. 2008 WL 5158894 (Mich. Ct. App. Dec. 9, 2008).

41. 2009 WL 563726 (W.D. Tex. Mar. 4, 2009).

42. *See* *Sears Mortgage Co. v. Rose*, 634 A. 2d 74 (N.J. 1993).

43. 975 A.2d 1016 (N.J. App. Div. 2009).

44. *Id.* at 1022.

The associate of a St. Louis agent handled investments for a customer of the agent in *Bluehaven Funding, LLC v. First American Title Insurance Co.*⁴⁵ No title commitment, policy, or CPL was issued on the transactions and plaintiff never tried to communicate with the insurer about the transactions. The associate, who stole over \$2 million, conducted business at the agent's premises, and the insurer's advertising and promotional items were not visible there. The plaintiff also alleged that a follow-up of an agency audit would have disclosed the associate's activities. The court thoroughly reviewed the agency agreement and found no express authority. The agreement authorized only the agent to issue title insurance.⁴⁶ The advertising and promotional items did not bestow apparent authority and the audit concerned insured transactions, not the associate's conduct. Therefore, the court entered summary judgment for the insurer.

A Connecticut case featured a settlement statement reflecting that the buyer tendered the required earnest money and cash down payment. A CPL was issued by Fidelity National Title, but the loan policy was issued by the Connecticut Attorneys Title Insurance Co. The lender discovered the deception and sued the agent and Fidelity.⁴⁷ The court held that Fidelity was not liable under the CPL for the agent's dishonesty and failure to follow the closing instructions because the CPL mandated that the loan policy be issued by Fidelity.⁴⁸

II. INSURER VERSUS AGENT

A. *Responsibility for Claims*

A Wisconsin agent missed a mortgage against the seller that had been filed with an incorrect legal description because the lot, block, and subdivision name were wrong.⁴⁹ The agency agreement required the agent to conduct ". . . a complete search and examination of the public records . . . relevant to the insurance afforded by such policies . . ." ⁵⁰ The insurer paid the claim and sued the agent, alleging that the mortgage could have been located if the agent had searched the grantor/grantee index. The court construed the quoted provision in the agent's favor and declined to hold that the agent was obligated to find documents with incorrect legal descriptions. To do so would

45. 2009 WL 1421207 (E.D. Mo. May 20, 2009).

46. *Id.* at *5.

47. *Capital Mortgage Assoc. LLC v. Hulton*, 2009 WL 567057 (Conn. Super. Ct. Feb. 13, 2009).

48. *Id.* at *19.

49. *Stewart Title Guar. Co. v. R.E. Title Serv., LLC*, 769 N.W.2d 878 (Wis. Ct. App. 2009) (Table).

50. *Id.* at *1.

“... make [the agent] both the underwriter of the policy and the agent hired to conduct title searches and issue policies on [the insurer’s] behalf.”⁵¹

In two other cases, insurers recovered large judgments against agents for missed restrictions⁵² and failure to update title searches shortly before closing.⁵³ The insurer and agent in the latter case were also parties to a different suit involving a missed mortgage,⁵⁴ in which the court construed the agent’s duty to research under the agency agreement and found it was not liable for a misindexed lien.

B. *Exclusive Contracts*

A group of Colorado title agencies had exclusive contracts with First American Title Insurance Co. for the state. The agencies were sold to Fidelity National Title in violation of various agreements with First American. Shortly afterward, First American announced it would start direct operation in Colorado. The agencies sought an injunction to prevent First American from entering the market and soliciting their customers and employees.⁵⁵ In a careful, well reasoned opinion, the district court denied the injunction. Because the agencies had breached the agreements, it would not be reasonable to force First American to direct its Colorado title orders to a competitor, i.e., Fidelity National Title.⁵⁶

III. DUTIES OF TITLE/ESCROW AGENT

A. *Duty to Search Title*

A title agent was not liable to the seller of real property for failing to note the lack of access to a public road. In *Campbell v. Summit Plaza Associates*,⁵⁷ the buyers purchased a lot from a joint venture called Summit Plaza Associates (SPA). Title to the lot was insured by Land Title Guarantee Co. of Summit County. When the buyers learned that the lot lacked legal access to a public way, they notified Land Title, which retained attorneys to file an action in their name against the sellers seeking damages, an implied easement by necessity across the sellers’ property, and condemnation. The sellers filed a third-party complaint against Land Title alleging negligent

51. *Id.* at *5.

52. *Chicago Title Ins. Co. v. Runkel Abstract & Title Co.*, 610 F. Supp. 2d 973 (W.D. Wis. 2009).

53. *Stewart Title Guar. Co. v. Residential Title Serv., Inc.*, 607 F. Supp. 2d 959 (E.D. Wis. 2009).

54. *Stewart Title Guaranty Co. v. R.E. Title Services, LLC*, 2009 WL 1186810 (Wis. Ct. App.).

55. *Mercury Cos. v. First Am. Corp.*, 2008 WL 4861950 (D. Colo. Nov. 8, 2008).

56. *Id.* at *9.

57. 192 P. 3d 465 (Colo. Ct. App. 2008).

misrepresentation based on Land Title's failure to advise the parties of the defects in the title. The trial court granted summary judgment in favor of Land Title and dismissed the sellers' third-party complaint. Following a bench trial, the trial court awarded the buyers an easement for access implied by necessity over sellers' property; damages for breach of contract; and attorney fees, costs, and expenses. On appeal, the Colorado Court of Appeals held that the sellers assumed the obligation to convey good title to the buyers before the title commitment was issued by the title company and therefore could not have relied upon the title commitment.⁵⁸ Accordingly, the court held that the trial court "did not err in granting summary judgment on the negligent misrepresentation claim in favor of Land Title."⁵⁹

An agent recently found itself in court for reporting an existing encumbrance. In *Watson v. Land America Austin Title*,⁶⁰ Land America Austin Title (LAAT) and its agent conducted a title examination of seller's property that revealed recorded notices of a tax lien on the property. The seller brought an action against LAAT claiming that the lien was invalid and that he was unable to sell his property after the tax lien was reported on the title commitment. The district court granted LAAT's motion for summary judgment, holding that it had no obligation to investigate the seller's claim that the lien was invalid. The court further held that the seller's claims were without merit because none of the conduct alleged in the complaint violated any state or federal law.⁶¹ On the seller's pro se appeal, the Fifth Circuit affirmed the district court's decision, holding that seller's claims under numerous federal statutes did not state viable claims against LAAT.

B. *Handling Escrow Funds*

In *Johnson v. Schultz*,⁶² the court discussed whether the buyer or seller bears the risk of loss in a residential real estate sale when the attorney who handled the closing misappropriated funds held in escrow. In *Johnson*, the buyers hired an attorney to handle the closing on a real estate purchase. The attorney conducted the closing and tendered a check drawn from his

58. *Id.* at 477.

59. *Id.* The opinion followed *Jimerson v. First American Title Insurance Co.*, 989 P. 2d 258 (Colo. Ct. App. 1999), which held that a title insurer owes no contractual obligation to a seller of real property by virtue of the title commitment or title insurance policy issued to the buyer. Because there is no contractual arrangement between the seller and title insurer, a seller may not enforce obligations established by the title commitment and claim negligence in the title insurer's performance.

60. 338 Fed. Appx. 352 (5th Cir. 2009).

61. *Id.* at 354.

62. 671 S.E.2d 559 (N.C. Ct. App. 2009).

trust account to the sellers in January 2006. When the sellers cashed the check (five months later), it was returned for insufficient funds. The sellers sued the buyers, the closing attorney, and the buyers' lender for breach of contract, and sought rescission of the deed and recovery of title to the property or, in the alternative, money damages. The trial court dismissed the sellers' complaint, holding that they bore the risk of loss because they were entitled to receive the sales proceeds at the time the embezzlement occurred.⁶³

On appeal, the North Carolina Court of Appeals noted that the trial court applied the so-called entitlement rule, which generally places the risk of loss as to escrow monies on the buyer.⁶⁴ The court determined that the record did not contain any evidence that an escrow was created between the parties. The court cited its decision in *GE Capital Mortgage Services v. Avent*,⁶⁵ which established that courts should first allocate the risk of loss based on fault, and in the absence of fault, allocate fault based on the attorney-client relationship. If the attorney represents both the buyer and seller, the buyer and seller should share the loss.⁶⁶ Because the buyers admitted that they hired the closing attorney, they must bear the loss. However, because the trial court did not consider whether the attorney also acted as the sellers' attorney, the court remanded the case to the trial court to make this determination.⁶⁷

C. Handling Documents

In *Wall Street Mortgage Bankers, Ltd. v. Attorneys Title Insurance Fund, Inc.*,⁶⁸ the insurer issued a title insurance policy to the buyer, insuring the title on her newly purchased apartment. In its CPL to the lender, the insurer agreed to reimburse the lender for any actual loss incurred by it in connection with its agent's mishandling of the closing. When the insurer's agent allegedly failed to record a deed showing the title passed to the buyer and failed to provide the lender with a properly executed HUD-1 settlement statement, the lender sued. The agent filed a motion to dismiss alleging, among other things, that Florida's economic loss rule barred the lender's

63. *Id.* at 562.

64. *Id.* at 564. The court discussed the two basic methods used for completing real estate transactions: the escrow closing where the seller and buyer both enter into an escrow agreement containing instructions to the escrow agent from both the buyer and the seller, and, the most common practice in North Carolina, the settlement closing, where the closing attorney conducts the closing in accordance with instructions from the buyer's lender. *Id.* at 563-64.

65. 442 S.E.2d 98 (N.C. App. Ct. 1994). Prior to *Johnson, Avent* was the only North Carolina appellate case to apply the entitlement theory.

66. *Johnson*, 671 S.E.2d, at 565.

67. *Id.* at 570.

68. 2008 WL 5378126 (S.D. Fla. Dec. 23, 2008).

tort claims for breach of fiduciary duty, negligence, and conversion, and the lender's failure to join the agent's court-appointed receiver as a party to this suit.⁶⁹ The court granted the agent's motion to dismiss only as to the lender's conversion claim because the lender failed to allege the agent's intent to permanently deprive it of possession of any identifiable funds. The court concluded that it would have been premature and imprudent for the court to conclude that the lender's tort claims amounted to breach of contract claims because the court did not have the contract in hand.⁷⁰

Some agents have the parties to a closing execute a compliance agreement that expressly obligates the parties to sign corrected documents if errors or omissions are discovered after closing. It is possible the parties are already obligated to do so, but the forms can sometimes help when an agent needs a corrected document executed. A compliance agreement was mentioned in *Givens v. Ward*,⁷¹ where the parties executed a sales contract. The parties also executed an acceptance of title and closing agreements under which they agreed to "fully cooperate, adjust, and correct any errors or omissions and to execute any and all documents needed or necessary to comply with all provisions of the [sales contract]."⁷² Although the sales contract contained a reservation of mineral rights, the warranty deed executed by the parties did not. When the title agent requested that the parties sign a corrected deed with the mineral reservation, the buyers refused, and instead filed a declaratory action against the sellers seeking a judicial declaration that they owned the disputed mineral rights. The sellers asserted the affirmative defense of mistake and counterclaimed for reformation of the deed due to mistake and breach of the compliance agreement. The trial court granted summary judgment in favor of the buyers. On appeal, the Texas Court of Appeals concluded that ambiguities on the issue existed in the contract, and genuine issues of material fact remained on whether the deed varied from the agreement due to mutual mistake.⁷³ Consequently, the buyers were not entitled to judicial declaration that they owned the minerals. The court remanded and did not reach the question of whether the buyers breached the compliance agreement.⁷⁴

In *Jordsbaugen v. Port Ludlow Associates, LLC*,⁷⁵ Gregg and Patricia Jordsbaugen purchased a townhouse and detached single car garage from seller/

69. Florida's economic loss rule bars a tort claim when it is based on the same conduct that underlies a breach of contract claim. *Id.* at *2 (citing *Indemnity Ins. Co. v. Am. Aviation, Inc.*, 891 So. 2d 532, 536 (Fla. 2004)).

70. *Id.*

71. 272 S.W. 3d 63 (Tex. App. 2008).

72. *Id.* at 65.

73. *Id.* at 74.

74. *Id.*

75. 2009 Wash. App. LEXIS 996 (Wash. Ct. App. Apr. 28, 2009).

builder Port Ludlow Associates (PLA). First American Title Insurance Co. issued the title insurance policy, which did not guarantee the property line boundaries. A few months later, James and Linda Brown purchased a unit and detached garage adjacent to the Jordshaugens, for which First American also issued a title policy. At closing, First American had the Browns sign a statement of awareness indicating that a boundary line adjustment would be performed, and that it was not liable to the Browns for boundary disputes. The agent did not have the Jordshaugens sign one at their closing.

A couple of years later, the Jordshaugens learned that the Browns' garage was actually on their lot. First American denied the Browns' claim based on the statement of awareness they signed at closing that indemnified First American from such claims by the Browns. The insurer also declined to defend the Jordshaugens because no party, specifically the Browns, made a legitimate claim against their title. The Jordshaugens simply filed a claim seeking title to property that they did not believe they acquired at the time of their purchase.⁷⁶ The Jordshaugens filed a complaint against the Browns and PLA seeking to quiet title to their property. They also sent a second letter to First American purporting to submit a claim under their title insurance policy and tender to which First American did not respond. After amending their complaint to add claims against First American for failure to defend or insure, bad faith, and failing to respond to their claims and tenders, the Jordshaugens sent a final letter requesting confirmation of First American's acceptance of their tender of defense. First American sent a letter again stating that the allegations did not give rise to a claim under their title insurance policy because no party made a legitimate claim against their title, and consequently the Jordshaugens suffered no loss or damage to the property they believed they were purchasing.⁷⁷

First American admitted during trial that it mistakenly failed to provide the Jordshaugens with the statement of awareness at closing. The trial court entered judgment in favor of PLA on its third-party complaint against First American and rendered all remaining claims against it as moot. The trial court also reformed the property description, leaving the disputed garage with the Browns.⁷⁸ The Jordshaugens appealed the dismissal of claims against First American and sought attorney fees and expenses that they incurred to defend their title. The Washington Court of Appeals denied the request for costs and attorney fees, concluding that the Jordshaugens failed to assign error to any finding of fact, produce proof of loss statements that would require that First American respond to their claim, or cite any authority to support their request for costs and attorney fees.

76. *Id.* at *4.

77. *Id.* at *5.

78. *Id.* at *7.

Further, First American did not commit bad faith because it communicated its denial of the Jordshaugens' claim to them within thirty days.

In a California case, the court addressed the issue of whether a buyer must be ready to close at the end of the escrow period.⁷⁹ Rene Rivera and his mother, Rose, entered into a sales contract with Dave Fly. Fly selected Eastland Escrow, Inc. and Rene deposited \$1,000 into escrow. Rose was later substituted for Rene as the buyer. After the scheduled closing date, Fly signed amended escrow instructions stating that buyer and seller mutually agreed to cancel the escrow. Shortly thereafter, Fly sold the property to another buyer. Rose did not receive the amended instructions until almost a year later and did not sign the amended instructions. Months later when Rene inquired of Eastland about the escrow for the sale of the property to the other buyer, Eastland informed him that it was not involved with the subsequent escrow. It was later determined that Eastland had in fact handled the subsequent purchase escrow. The Riveras filed several amended complaints against Fly and Eastland for breach of contract, fraud, and breach of fiduciary duty.⁸⁰

The court granted Eastland's motion for judgment on the pleadings because the complaint against it was barred by the one-year contractual limitations period. The case against Fly proceeded to trial and judgment was entered in favor of Fly, finding that there was no evidence that Rose had either tendered the funds necessary to close escrow or that she had been approved for a loan by closing. The trial court also found that the Riveras could not offer any testimony as to their damages. On appeal, the California Court of Appeal found that the Riveras failed to prove that they were ready, willing, and able to perform on the contract at the time of closing and that there was no evidence that they had either tendered the funds necessary to close escrow or had been approved for a loan by the closing date.⁸¹

In *Vera v. Century 21 Masters Realty*,⁸² someone purporting to act on behalf of the principal under a power of attorney sold the owner's property. Stewart Title of California issued a policy of title insurance to the purchaser. After the transaction closed, it was discovered that the purported attorney-in-fact's documents, including the principal's signature on the grant deed, had been forged. As the result of settlement, the purchaser deeded the property to Stewart Title, which refused to return the property to the owner unless he paid approximately \$40,000 in fees and expenses. The owner spent two years living in his car because he was denied title, access, and use of his property until Stewart Title Guaranty Company quit-

79. *Rivera v. Fly*, 2009 WL 1059644 (Cal. Ct. App. Apr. 21, 2009).

80. *Id.* at *2-3.

81. *Id.* at *7.

82. 2009 Cal. App. Unpub. LEXIS 4751 (June 9, 2009).

claimed the property back to the owner.⁸³ The owner subsequently filed an action against Stewart Title and other defendants allegedly involved in the scheme to take his property. The trial court sustained the defendants' demurrers without leave to amend.⁸⁴ On appeal, noting that it may affirm only if the complaint fails to state a cause of action under any possible legal theory, the appellate court concluded that it was reasonably possible that the complaint could be amended to state a cause of action against Stewart Title for slander of title, and that the owner should be given an opportunity to amend his complaint.⁸⁵

Settlement negotiations that resulted in a higher purchase price were a foreseeable consequence of insurer's tortious conduct. Therefore, they did not break the chain of causation of damages and did not relieve the tortfeasor of liability. In *1939 Argyle, LLC v. FAMCO*,⁸⁶ the buyers agreed to purchase an apartment complex from the seller. Both agreed to use a dual agent for the transaction. The purchase agreement provided, among other things, that the purchase was contingent on buyers obtaining a loan for \$2 million. The purchase agreement also designated First American as the escrow agent. First American attempted to e-mail supplemental escrow instructions to the seller; however, because the agent used an erroneous e-mail address, the seller never received them. Subsequently, the seller sent a letter to the dual agent asserting that the time to remove the financing contingency had elapsed without action by the buyers, and that the seller was canceling the sale of the property. Subsequently, buyers gave the seller notice of waiver of the financing contingency and insisted on going forward with the deal. The seller, however, refused. The buyers sued the seller for specific performance that was granted by the trial court. Following an appeal by the seller, the parties reached a settlement under which the seller agreed to sell the property to the buyers for \$1.2 million more than the original sales price.

Four years later, the buyers filed suit against First American for breach of contract and negligence, alleging that as a result of First American's failure to timely deliver supplemental escrow instructions to the seller, the buyers paid an increased purchase price for the property. The jury found First American liable for breach of contract and negligence.⁸⁷ The trial court granted First American's motion for a new trial because it concluded

83. Stewart Title Guaranty company and Stewart Title of California are wholly owned subsidiaries of Stewart Information Services Corp. *Id.* at *4.

84. *Id.* at *3.

85. *Id.* at *5.

86. 2009 WL 1816053 (Cal. Ct. App. June 26, 2009).

87. *Id.* at *4. The jury also found that the buyers' claims were timely as they were equitably tolled during the litigation with the seller.

that an independent intervening cause, namely, the buyers' voluntary decision to settle their claim for more than the purchase price while the matter was on appeal, was the substantial factor giving rise to and causing the damages claimed by the buyers.⁸⁸ On appeal, the California Court of Appeal determined that the trial court's holding was erroneous. The court concluded that settlement and litigation are foreseeable consequences of tortious conduct, not independent intervening acts that intervene in the chain of causation of damages to relieve First American of liability. The court found that there was substantial evidence to support the jury's conclusions that First American's failure to timely deliver the escrow instructions was more likely than not the cause of the buyers' harm.⁸⁹ The court also held that the trial court did not abuse its discretion by concluding that the running of the statute of limitations with respect to the buyers' claims against First American was equitably tolled by a letter sent by the buyers' counsel to First American. The letter put First American on notice of the issues concerning whether it had transmitted certain documents to the sellers. Consequently, the letter and lawsuit against the seller were sufficient to toll the running of the statute of limitations on the buyers' claims against First American.⁹⁰

Delivery of a deed by the escrow holder to the buyer before the buyer complies with the seller's escrow instructions is an ineffective delivery to the buyer. The title insurer recorded a deed in favor of the buyer in *Laolagi v. First American Title Insurance Co.*⁹¹ before the buyer deposited into escrow any portion of the nearly \$1.9 million purchase price.⁹² The buyer was required to deposit \$100,000 of the total purchase price into escrow; however, the buyer's check was returned for insufficient funds. The sellers proceeded to sign documents to close escrow based on the buyer's representations that she would provide the necessary funds to purchase the property.⁹³ The buyer's escrow instructions authorized the escrow agent to deliver the funds tendered for the purchase of the property when the agent received the deed. The sellers authorized the escrow agent to deliver or record the deed when the agent received the balance of the sales proceeds.⁹⁴

The buyer never deposited any proceeds into escrow. However, due to a mistake on the part of the insurer, the deed was recorded. Subsequently,

88. *Id.* at *6.

89. *Id.* at *16.

90. *Id.* at *20.

91. 2009 WL 2351607 (Cal. Ct. App. July 31, 2009).

92. *Id.* at *1.

93. *Id.* at *4.

94. *Id.*

the buyer executed a grant deed conveying any interest in the property back to the sellers.⁹⁵ More than six years later, the buyer sued the insurer and the owners of the property seeking to perfect her title in the property by invalidating the corrective deed. On appeal, the California Court of Appeal held that there was no delivery of the sellers' deed because the condition that the sellers placed on its delivery and recordation never occurred.⁹⁶ Consequently, the court affirmed the trial court's grant of summary judgment in favor of the owners and insurer. The sellers were never divested of title, and the buyer could not claim an interest in the property based upon the invalid deed.

D. Duties to Nonparties

In *Phleger v. Countrywide Home Loans, Inc.*,⁹⁷ a limited agent defrauded his principal. Seventy-year-old Jean Phleger granted full power of attorney over her legal, financial, and real estate matters to Michael Edison, the owner of a wealth management firm. Edison represented to Phleger that he could increase Phleger's existing home equity line of credit to assist her with paying bills. He increased Phleger's line of credit, used it to pay off the prior credit line, and had the remainder wired to a Las Vegas joint account in his and Phleger's name. Stewart Title of California, Inc. was provided with a copy of Edison's power of attorney and prepared the escrow instructions. The title company followed Edison's instructions, relying on the power of attorney as justification for closing the transaction. After closing, Edison placed a loan on Phleger's home and spent the proceeds. Phleger sued Stewart Title, among others, for indemnity, negligence, and breach of fiduciary duty. Phleger alleged that Stewart Title breached its fiduciary duty to her by following the instructions of a nonparty and wiring funds to the joint account when it was presented with clear evidence of fraud. The court held that a genuine issue of material fact existed as to whether Stewart Title had clear evidence of fraud and had breached its duty to follow the closing instructions.⁹⁸ The court denied Stewart Title's motion to dismiss and permitted Phleger to proceed to trial.

IV. TITLE INSURANCE LITIGATION INVOLVING GOVERNMENT REGULATIONS

Several cases this year concerned parties who claimed insurers and agents violated the Real Estate Settlement Procedures Act of 1974 (RESPA) by not

95. *Id.* at *5.

96. *Id.* at *6.

97. 2009 WL 225416 (N.D. Cal. Jan. 29, 2009).

98. *Id.* at *7.

charging the appropriate reissue or refinance rate. RESPA is a consumer disclosure statute designed to inform consumers of their settlement costs and to prohibit kickbacks that can increase the cost of certain settlement services associated with obtaining a mortgage. RESPA requires that certain disclosures be made to borrowers at specific times. Some of the disclosures specify the costs associated with the settlement, delineate lender servicing and escrow account policies and details, and explain business relationships between settlement service providers. RESPA covers loans secured with a mortgage placed on a one-to-four family residential property, including most purchase loans, assumptions, refinances, property improvement loans, and equity lines of credit.

A. Federal Regulations

In *Cohen v. J.P. Morgan Chase & Co.*,⁹⁹ after the closing of her mortgage refinance, plaintiff noticed a post-closing fee on her HUD-1 settlement statement. Plaintiff disputed that post-closing services were performed and brought a proposed class action against the lenders seeking damages for violation of RESPA § 8(b).¹⁰⁰ Section 8(b) requires that no fee be charged for the rendering of a real estate settlement service other than for settlement services actually performed.¹⁰¹ The court held that post-closing services did not fit within the definition of settlement services under the definitions it had reviewed.¹⁰² The closing of a settlement is complete at the time when the property is transferred, and post-closing review takes place after this time. In a scholarly opinion, the court concluded that plaintiff paid a settlement service fee for which no compensable settlement services were performed.¹⁰³

A wire transfer was not a core service, and charging for it did not violate RESPA § 8(b). In *Contos v. Wells Fargo Escrow Co., LLC*,¹⁰⁴ plaintiffs alleged on behalf of themselves and the wire fee class that Wells Fargo Escrow (WFE) violated § 8(b) and Regulation X by charging plaintiffs a duplicative charge for additional services above the core services covered by the escrow fee.¹⁰⁵ WFE moved for summary judgment on plaintiffs' § 8(b) claim alleging that it performed services in connection with the incoming wire transfers.¹⁰⁶ Plaintiffs argued that the wire transfer services were part

99. 608 F. Supp. 2d 330 (E.D.N.Y. 2009).

100. *Id.* at 333.

101. RESPA, 12 U.S.C. § 2607(b).

102. *Cohen*, 608 F. Supp. 2d at 345.

103. *Id.* at 349.

104. 2009 U.S. Dist. LEXIS 43593 (W.D. Wash. May 20, 2009).

105. *Id.* at *16.

106. *Id.*

of the core services covered by the escrow fee, and WFE had collected an additional wire transfer fee without performing additional services. The court determined that WFE charged plaintiffs wire transfer fees for services actually performed that were not covered by the general escrow fee. Consequently, the plaintiffs' claim under RESPA § 8(b) failed as a matter of law.¹⁰⁷

In Maryland, refinance borrowers must pursue their remedies under the Maryland Insurance Code for excessive fees before pursuing a suit in federal court. In *Arthur v. Ticor Title Insurance Co. of Florida*,¹⁰⁸ plaintiff homeowners alleged that Ticor violated RESPA § 8 by charging them rates that were higher than the applicable rates on file with the Maryland Insurance Commissioner and by splitting its excessive charges with its local agents. The court, noting that RESPA is not a price control statute, held that Ticor and its agents performed services in return for the charges that they collected.¹⁰⁹ The court went on to conclude that plaintiffs' state law claims warranted dismissal, primarily for want of exhaustion. Under Maryland law, "when the statutory text creating an administrative remedy is not dispositive, there is a 'presumption that the administrative remedy is intended to be primary, and that a claimant cannot maintain the alternative judicial action without first invoking and exhausting the administrative remedy.'"¹¹⁰ The Fourth Circuit, affirming judgment of the district court, dismissed the plaintiff's RESPA claims.

Plaintiffs in *In Re California Title Insurance Anti-Trust Litigation*,¹¹¹ alleged that the five largest title insurers (at the time of the suit) collectively set noncompetitive rates, did not compete with each other, and hid improper inducements and kickbacks in violation of the Sherman Act and California's Business and Professions Code.¹¹² The court held that the plaintiffs did not state a claim under *Bell Atlantic Corp. v. Twombly*,¹¹³ which requires that plaintiffs' complaint allege enough facts that show the defendants agreed to fix title insurance rates in California.¹¹⁴ The court further

107. *Id.* at *21.

108. 569 F.3d 154 (4th Cir. 2009).

109. *Id.* at 159.

110. *Id.* at 161.

111. 2009 U.S. Dist. LEXIS 43323 (N.D. Cal. May 21, 2009).

112. CAL. BUS. & PROF. CODE § 16720 *et seq.*; § 17200 *et seq.*

113. 550 U.S. 544 (2007). *Twombly* involved an antitrust class action alleging an unlawful conspiracy based on the parallel conduct of a number of competitors in the local telephone and Internet service markets. The court ultimately found that the plaintiffs (telephone and Internet service subscribers) did not allege sufficient facts to support a "plausible" antitrust claim under § 1 of the Sherman Act. Allegations of parallel anticompetitive conduct by the carriers, in the absence of plausible factual allegations, did not preclude identical and reasonable independent conduct by the carriers.

114. *In Re Cal. Title Ins. Antitrust Litig.*, 2009 U.S. Dist. LEXIS 43323, at *16 (N.D. Cal. May 21, 2009).

held that parallel behavior in a concentrated market is insufficient to suggest a conspiracy because it is common for firms in a concentrated market to recognize their shared economic interest and reach similar price and output decisions independently.¹¹⁵ Defendants' motions to dismiss were granted with leave for plaintiffs to amend their complaint.¹¹⁶

In Texas, mortgage lenders require that borrowers purchase a lender title insurance policy as a condition of making a residential loan. Lenders also require borrowers to purchase title insurance policies when homeowners refinance their homes, and borrowers are entitled to a reissue discount. In *Hancock v. Chicago Title Insurance Co.*, plaintiffs refinanced their homes and purchased a reissue title insurance policy from Chicago Title.¹¹⁷ When they realized that they did not receive a reissue discount, they sued Chicago Title alleging that it charged more than Texas law allows for title insurance and that it split the excessive charges with its title agents. Specifically, plaintiffs alleged that because they were not given the reissue discount and were charged more than what Texas law allowed, neither Chicago Title nor its agents performed services for the part of the charges that exceeded the allowable rate. Chicago Title moved for summary judgment dismissing plaintiffs' RESPA claims, contending that because it and its agent actually performed services in connection with issuing the title insurance policies, plaintiffs' allegations were not actionable under § 8(b).¹¹⁸

The court rejected plaintiffs' argument that the court should defer to a controversial 2001 policy statement issued by the Department of Housing and Urban Development that interprets RESPA to apply to overcharges.¹¹⁹ As long as some work, or any portion thereof, is performed by the recipient of the fee, or any portion thereof, RESPA § 8(b) does not impose liability.¹²⁰ Chicago Title and its title agents performed actual services in exchange for the fees they received. The fact that it split excessive premiums with its title agents does not of itself convert the overcharges into RESPA violations.¹²¹ Accordingly, the court granted partial summary judgment in favor of Chicago Title, dismissing plaintiffs' claims under RESPA § 8(b) and for unjust enrichment.¹²² Plaintiffs' claims for breach of implied contract survived Chicago Title's summary judgment motion.

115. *Id.* at *23.

116. *Id.* at *30, 31.

117. 635 F. Supp. 2d 539 (N.D. Tex. 2009).

118. *Id.* at 543.

119. See RESPA Statement of Policy 2001-1, 66 Fed. Reg. 53052 (Oct. 18, 2001).

120. *Hancock*, 635 F. Supp. at 551.

121. *Id.* at 546 (quoting 12 U.S.C. § 2607(b)).

122. *Id.* at 561. The court dismissed plaintiffs' state law claims for unjust enrichment because Texas law does not recognize an independent cause of action for unjust enrichment.

Delaware is a file-and-use state. Title insurers file their rates with the state insurance department and use them after the effective date stated in their filings, unless the insurance commissioner disapproves the rates. Insurers are permitted to comply with the rate filing requirements through membership in a licensed rating bureau, such as the Delaware Title Insurance Rating Bureau (DTIRB). In *McCray v. FNTIC*,¹²³ plaintiffs alleged that title insurers and their corporate parents used DTIRB to fix title insurance prices in Delaware, and that DTIRB improperly included in its rate calculation the cost of kickbacks in the form of finder's fees, gifts, and other financial enticements.¹²⁴ Defendants contended that the plaintiffs' complaint should be dismissed because the filed rate doctrine bars the claims. Defendants also argued that the plaintiffs failed to allege sufficient facts to establish that the corporate parents entered into a conspiracy with their subsidiaries to fix title insurance prices.

The court noted that the Third Circuit has applied the filed rate doctrine to bar claims when the rates involved were filed with a federal agency.¹²⁵ Plaintiffs argued that the filed rate doctrine should not be applied because Delaware's regulatory regime is inadequate for two reasons: (1) it fails to provide for meaningful review of rates by not requiring express approval of rates; and (2) the regulatory regime is not comprehensive enough because it does not provide claimants with monetary relief for rates initially accepted by the department but later found to be unreasonable. The court cited Delaware's insurance statutes showing that title insurance rates are subject to genuine review by the insurance commissioner and therefore are subject to "meaningful review."¹²⁶ The court also determined that nothing prevented a claimant from filing a complaint with the commissioner and seeking prospective redress in the form of lower rates to compensate for filed rates that are later shown to have been excessive. As such, the court found Delaware's regulatory regime to be comprehensive for the purposes of applying the filed rate doctrine.¹²⁷

Purchasers of title insurance in Pennsylvania filed a class action alleging that title insurers and the Title Insurance Rating Bureau of Pennsylvania (TIRBOP) conspired to fix title insurance rates.¹²⁸ As in *McCray*, title insurers in Pennsylvania must file their rates with the insurance department, either individually or through a rating organization that collectively files

123. 636 F. Supp. 2d 322 (D. Del. 2009).

124. *Id.* at 324.

125. *Id.* at 327.

126. *Id.* at 330; DEL. CODE ANN. tit. 18 §§ 2506(a), 2503(a), 2504(b).

127. *McCray*, 636 F. Supp. 2d at 331; *see also* Taffet v. Southern Co., 967 F.2d 1483 (11th Cir. 1992) (dismissing civil RICO action involving rates filed with state utility regulators).

128. *In Re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663 (E.D. Pa. 2009).

rates on their behalf.¹²⁹ Defendants contended that the court should dismiss plaintiffs' complaint with prejudice for failure to state a legally cognizable claim because the filed rate doctrine bars antitrust actions that challenge any rate properly filed with and approved by a regulatory agency.¹³⁰

The court set out to resolve four issues: (1) whether the insurance department provided meaningful review of TIRBOP's submitted rates; (2) whether defendants submitted properly filed rates; (3) whether defendants' alleged conduct constituted nonrate anticompetitive behavior, and (4) whether defendants' alleged conduct implicated the policy concerns underlying the filed rate doctrine.

Citing *McCray*, the court concluded that as long as the regulatory scheme requires the filing of rates with a government agency that has legal authority to review those rates, the filed rate doctrine applies regardless of the actual degree of agency review.¹³¹ Because the statutory scheme provides the insurance department with authority to review submitted rates and the Third Circuit has not established a meaningful review requirement applicable to the degree of agency review, the court ruled that the filed rate doctrine applies.¹³² The absence of meaningful insurance department review of filed title insurance rates, as alleged by plaintiffs, does not render the filed rate doctrine inapplicable.¹³³ The court found that plaintiffs failed to plead that any noncompliance on the part of defendants with their rate submissions to the department rendered their rates improperly filed. The Third Circuit's nonrate anticompetitive activity exception did not rescue plaintiffs' complaint from the filed rate doctrine's preclusive effect.¹³⁴ Although plaintiffs argued that defendants' alleged kickbacks and unlawful inducements constituted nonrate anticompetitive activity, their complaint alleged that the defendants' conduct was part of an overall conspiracy to charge supracompetitive rates, which directly challenged the reasonableness of the rate. Finally, concerning plaintiffs' public policy concerns, because adjudication of plaintiffs' complaint would interfere with the department's determination of reasonable title insurance rates, the nonjusticiability principle justified the doctrine's application.¹³⁵ In granting defendants' motion to dismiss the parent defendants, the court concluded that plaintiffs' allegations against the parent corporations failed to set forth allegations that met the *Twombly*¹³⁶

129. *Id.* at 667.

130. *Id.* at 671.

131. *Id.* at 674-65; see *McCray*, 2009 WL 2170694, at *13 (expressing belief that Third Circuit would not limit application of filed rate doctrine to only those regulatory regimes that expressly approve rates).

132. *Pa. Title Ins. Litig.*, 648 F. Supp. 2d at 674-75.

133. *Id.* at 677.

134. *Id.* at 681.

135. *Id.* at 682-83.

136. *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

standard of specific allegations of coordinated activities. The court held that the filed rate doctrine precluded plaintiffs from seeking antitrust damages arising out of defendants' collective setting of title insurance rates.

B. State Regulations

Like many title insurers, First American offered several premium rates for lender's title insurance in Maine, including a standard rate as well as a discounted rate for refinancing customers.¹³⁷ When the Campbells refinanced their mortgage, First American issued a new lender's policy calculated at its standard rate. The Campbells sued, alleging that the insurer concealed that they were qualified for a discounted refinance rate, supplied false information, and routinely overcharged eligible consumers. First American asserted that plaintiffs' claims should be dismissed for failure to state a claim on each count and for failure to exhaust administrative remedies. The court concluded that the state statute setting forth the requirement for a claimant to exhaust its administrative remedies is permissive and does not require exhaustion, and consequently, the statute did not warrant dismissal of the Campbells' claims.¹³⁸ The court further denied the insurer's motion to dismiss the Campbells' claims for breach of contract, finding a contract was implied in fact between the parties¹³⁹ and unjust enrichment. The insurer knew or had reason to know the premium payment was calculated at an excessive rate,¹⁴⁰ and unfair trade practices, because the insurer knew or should have known that the Campbells were eligible for the refinance rate.¹⁴¹ The court did not find compelling First American's argument that because the Maine Insurance Code subjects title insurance rates to comprehensive oversight due to the nature of its highly regulatory transactions, its practices are exempt from the state unfair trade practices act. The court affirmed that more than comprehensive regulation is required to fall within the statute's exemption. The statute exempts only those transactions "otherwise permitted, not otherwise regulated."¹⁴²

137. *Campbell v. First Am. Title Ins. Co.*, 644 F. Supp.2d 126 (D. Me. 2009).

138. *But see* *Arthur v. Tigor Title*, 569 F.3d 154 (4th Cir. 2009) (plaintiffs' state law claims warranted dismissal for failure to exhaust administrative remedies).

139. *Id.* at 136–37.

140. *Id.* at 137.

141. *Id.* at 135.

142. *Id.* at 133 (citing *Good v. Altria Group, Inc.*, 501 F.3d 29, 58 (1st Cir. 2007)); *Provencher v. T&M Mortgage Solutions, Inc.*, 2008 WL 2447472, at *7 (D. Me. June 18, 2008) ("The defendants do not identify any of their actions, which the plaintiff has alleged violated the UTPA, as being specifically permitted by any statute or regulation. This omission is determinative."). "*Good* and *Provencher* limit the scope of [5 M.R.S.A.] section 208(1) to its plain language: in order to qualify for the exemption, the allegedly illegal conduct must be subject to agency regulation and be 'authorized, permitted or required' by law. Here, Maine law explicitly prohibits the challenged conduct. *See* 24-A ME. REV. STAT. ANN. § 2316. Thus, the exemption does not apply." *Campbell*, 644 F. Supp. 2d at 133.

The Minnesota Supreme Court held that a title insurer must pay a premium tax on the entire premium amount, even though the agent collects the insurance premium from the customer and retains 70 percent to 80 percent of the total premium, and the insurer never directly receives the portion of the premium retained by the agent.¹⁴³ The tax is on the “gross premium” amount.¹⁴⁴ The Maine Supreme Judicial Court also endorsed this interpretation of its premium tax statute.¹⁴⁵

V. MISCELLANEOUS

A. *Bankruptcy*

LandAmerica Financial Group Inc. (LFG) and its exchange subsidiary, LandAmerica 1031 Exchange Services, Inc. (LES), filed bankruptcy action in November 2008.¹⁴⁶ At that time, LFG owned the third largest title insurer in the United States, and LES was a qualified intermediary that administered tax free exchanges. It went insolvent as the result of holding auction rate securities that it could not liquidate. Thus, when its customers needed the exchange funds transferred to complete transactions, LES was unable to forward the funds.

In a case concerning the status of customers’ funds held by LES,¹⁴⁷ Millard Refrigerated Services, Inc. had elected to place its funds in a segregated subaccount of LES. Millard argued LES held the funds in trust. Consequently, they were not part of the bankruptcy estate. The bankruptcy court held no trust was created.¹⁴⁸ These accounts were in the name of LES and under the exchange agreement LES had sole control of the subaccount. Therefore, the funds were property of LES’ bankruptcy estate.

The court also considered the proceeds from the parties’ exchanges that were deposited to the commingled operation account of the debtor. This account was in LES’s name and under its control. There was no attempt to create a trust or escrow relationship. In the exchange agreements, the three parties disclaimed any equitable interest in the funds. The court found this

143. *Stewart Title Guar. Co. v. Comm’r*, 757 N.W. 2d 874 (Minn. 2008).

144. *Accord First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627 (Tex. 2008), *cert. denied* 129 S. Ct. 2157 (2009).

145. *Stewart Title Guar. Co. v. State Tax Assessor*, 963 A.2d 169, 182 (Me. 2009) (“the taxable premium includes the total consideration paid by the insured for the title insurance, including the cost of the title search and examination completed by the insurer or its agent; and that because the tax is a tax on premiums and not receipts, the tax applies regardless of whether all or a portion of the premium is paid to an agent for the insurer in the first instance, or directly to the insurer.”).

146. *Asset Preservation, Inc., Ramifications of the Recent LandAmerica 1031 Exchange Decision* (on file with author).

147. *In Re LandAm. Fin. Group, Inc.*, 412 B.R. 800 (Bankr. E.D. Va. 2009)

148. *Id.* at 813.

created a debtor-creditor relationship and thus these funds were also part of the bankruptcy estate.¹⁴⁹

The problem that both claimants faced was simple. To qualify as a tax free exchange, the proceeds had to be beyond their control while the exchange was in progress. Because LES controlled them, they became part of LES' bankruptcy estate.

B. *Federal Tax Lien*

A Nevada case provided guidance on the effect of failing to use the taxpayer's correct name in a federal tax lien notice. The taxpayer's original name was Crystal Cascades, LLC,¹⁵⁰ but a year after it began operation, changed its name to Crystal Cascades Civil, LLC. The company used the new name on its income tax returns.

The IRS filed two federal tax liens in the name of Crystal Cascades, LLC, and property owned by the taxpayer went into foreclosure.¹⁵¹ A third-party lienholder who filed after the tax liens claimed priority because the IRS had not used the debtor's correct name. The court held for the third-party lienholder. The tax lien did not constitute constructive notice because a key word of the debtor's name was omitted.¹⁵² The court also reviewed in detail expert testimony both sides offered on title searches. It held that the standard was the type of search a reasonable person would conduct rather than one by a professional title officer.¹⁵³

C. *InterCounty Title*

InterCounty Title was a large agent with its own underwriter in the Chicago area. The principal owners of InterCounty also owned Independent Trust Co. (ITC). Between 1990 and 2000, the principals moved over \$68 million from ITC's accounts to the escrow accounts of InterCounty. The reviewer for ITC sued Fidelity National Title Insurance Co. of New York (Fidelity), as reinsurer of InterCounty's underwriter.¹⁵⁴ The review claimed Fidelity had engaged in securing assets via fraudulent transfers from one of the InterCounty principals and had fraudulently secured an appointment by the State of Illinois as trustee for InterCounty's remaining escrow funds. The court entered summary judgment for Fidelity on the

149. *Id.* at 813-16.

150. *In Re* Crystal Cascades Civil, LLC, 398 B.R. 23 (Bankr. D. Nev. 2009).

151. *Id.* at 27.

152. *Id.* at 36.

153. *Id.* at 35. This is an unusually precise case on the level of accuracy required in federal tax liens. See and article by Hershbelger and Fox on this case in the March 2010 *Title Insurance Law Newsletter* (Woodridge Legal Publishers).

154. *Indep. Trust Corp. v. Fid. Nat'l Title Ins. Co. of N.Y.*, 577 F. Supp. 2d 1023 (N.D. Ill. 2008).

receiver's claims for common law fraud, Consumer Fraud Act violations, unjust enrichment, and fraudulent transfers because the receiver did not offer evidence to establish the claims. Moreover, the Consumer Fraud Act and unjust enrichment claims were barred by limitations.¹⁵⁵ The receiver was aware of the fraud transfers by May 2000, but did not bring this action until 2005.¹⁵⁶

155. *Id.* at 1041-42.

156. *Id.* at 1047.