RECENT DEVELOPMENTS IN TITLE INSURANCE LAW

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I. Introduction

This article reviews significant title insurance decisions from October 1, 2009, to September 30, 2010, in which over 100 cases were reviewed. The cases cover what is insured, the duty to defend, the duty to search title, and everything in between.

II. Insured versus Insurer

A. *Terms of the Policy*

1. Who Is the Insured?

In Connecticut, a title policy procured by fraud prevented the subsequent purchaser of the mortgage loan from making a claim under the policy. In *Flagstar Bank, FSB v. Ticor Title Insurance Co.*,[1] Flagstar Bank purchased a mortgage loan believing it to be insured by the defendant, Ticor Title Insurance Co. (Ticor).[2] The loan subsequently went into default and Flagstar filed a claim on the Ticor policy. When Ticor rejected the claim, Flagstar filed suit against Ticor for breach of contract and negligence in training its agents. Ticor moved for summary judgment on Flagstar's claims, asserting that the title policy was the product of fraud.[3] The court determined that the agent's signature was forged on the closing documents. Under Connecticut law, fraud "vitiates all contracts."[4] The court explained that "even if the Title Policy otherwise appeared enforceable, the fraudulent signature would vitiate any contract thus formed."[5] Ticor also won summary judgment on the negligence claim after asserting a successful statute of limitations defense.[6]

In California, a title insurer was not held liable for negligently misstating the status of a title when one of its employees provided title information informally and orally to plaintiff. In *Soifer v. Chicago Title Co.*,[7] an investor in distressed real estate had an arrangement with an employee at Chicago Title in which he would request title information on foreclosed properties in exchange for placing business with Chicago Title upon the resale of the foreclosed property. Plaintiff required information concerning whether a foreclosing lender held the senior lien on a property, and typically needed this information within twenty-four hours. The employee would usually respond with a "yes" or "no" to the question of whether the foreclosing

1. 660 F. Supp. 2d 346 (D. Conn. 2009).
2. *Id.* at 348.
3. *Id.* at 350.
4. *Id.*
5. *Id.*
6. *Id.* at 354.
7. 187 Cal. App. 4th 365 (2010).

lender was in the senior lien position. Plaintiff used this information to determine whether to make a bid at a particular foreclosure sale. The issue giving rise to this lawsuit involved information provided by the employee to plaintiff informing him that the foreclosing loan was in a senior position, when, in fact, it was junior to a first deed of trust. Based on this information, plaintiff submitted a bid at the foreclosure sale and sustained a substantial loss in the resale of the property. Plaintiff's lawsuit alleged that he received services of an abstractor via an oral contract and that the services had been negligently performed, resulting in damage to plaintiff. Chicago Title argued that it can only be liable for negligently misstating the status of a title if it issues an abstract of title and that the informal communications between the plaintiff and its employee were not proper abstracts. The trial court reasoned that since plaintiff had neither sought nor obtained a policy of title insurance or an abstract of title, Chicago Title had no liability to plaintiff on any theory.[8] On appeal, the court found that plaintiff by his own pleading neither sought nor agreed to pay for an abstract, but instead sought only one-word answers to his very time-sensitive inquiries about specific foreclosing loans that he had already identified.[9] The court held that a plaintiff cannot recover for errors in a title company's statements regarding the condition of title to a property in the absence of a policy of title insurance or the purchase of an abstract of title.[10]

2. What Is Insured?

In *Fells v. Stewart Title Guaranty Co.*,[11] the sellers sold the buyer one of their rental properties. The property as described in the public records actually comprised two properties owned by the sellers. Consequently, the warranty deed that the sellers delivered to the buyer conveyed both properties.[12] When the parties discovered what happened, the buyer was advised by an agent of Stewart Title Guaranty Co. (Stewart Title) to file a claim. Instead of filing a claim with the insurer, the buyer sued the sellers claiming slander of title and entitlement to rents the sellers collected on

8. "Prior to the enactment of Insurance Code sections 12340.10 and 12340.11, caselaw had held that a preliminary title report is the equivalent of an abstract of title, and that a title insurer could be liable in negligence for its failure to list all recorded encumbrances in a preliminary title report." *Id.* at 371 (order modifying opinion) (quoting Southland Title Corp. v. Superior Court, 231 Cal. App. 3d 530, 535 (Ct. App. 1991)).

9. "[A] title insurer who has not undertaken to perform as an abstractor owes no duty to disclose recorded liens or other clouds on title." *Id.* at 373 (quoting Siegel v. Fid. Nat'l Title Ins. Co., 46 Cal. App. 4th 1181, 1190 (Ct. App. 1996)).

10. *Id.* at 374.

11. 2010 WL 2197693, at *1 (E.D. Ark. Apr. 23, 2010), *aff'd*, No. 10-2462 (8th Cir. Nov. 8, 2010) (per curiam) (unpublished).

12. *Id.* at *1.

the second house.[13] The buyer claimed that the seller disparaged her title by attempting to record a revised deed and by causing the tenant on the other property to refuse to pay rent to her.

The trial court granted a directed verdict against the buyer on her slander of title claim. The court entered a judgment denying the sellers' claim for reformation of the deed after the jury found that the sellers did not prove mutual mistake in the legal description by clear and convincing evidence. The buyer then sued Stewart Title in the district court for its failure to defend against the seller's reformation counterclaim, failure to prosecute the action for slander of title, and lost rents and bad faith. The trial court adopted the magistrate judge's recommendation to grant Stewart Title's motion for summary judgment. The magistrate judge held that (1) the duty to defend was not triggered because the insured buyer did not give written notice to the insurer, i.e., phone calls to the agent were not sufficient; (2) slander of title is a tort claim seeking damages, not a claim to establish title to the property, and therefore was outside of the policy coverage and, in any event, the sellers' actions were a post-policy date matter;[14] (3) the rents collected by the sellers were also a post-policy date matter; and (4) Stewart Title's conduct was not in bad faith, defined by Arkansas law as "dishonest, malicious, or oppressive" conduct.[15]

3. Insurer's Duty to Defend

The duty to defend terminates with the mortgagee policy when the insured is paid and subsequently signs a release. In *Morrison v. Wells Fargo Bank*,[16] James Eugene Morrison (Eugene Morrison) and his wife entered into a mortgage with Provident Bank, which erroneously purported to lien the property of the plaintiff, James Elder Morrison. The mortgage was subsequently transferred to Wells Fargo Bank, N.A. After the Morrisons defaulted on their loan, Wells Fargo initiated foreclosure proceedings against them and the plaintiff's property.[17] In turn, the plaintiff commenced an action to compel Wells Fargo to release its mortgage. Stewart Title accepted Wells Fargo's second claim and retained counsel to negotiate the payment of the mortgage by the Morrisons.[18] Wells Fargo subsequently released its

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13. *Id.* at *1–2.
14. *Id.* at *4–6.
15. *Id.* at *8 (citation omitted). The Arkansas Supreme Court has defined "bad faith" as "dishonest, malicious, or oppressive conduct carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge." Unum Life Ins. Co. of Am. v. Edwards, 210 S.W.3d 84, 87 (Ark. 2005) (citation omitted).
16. 711 F. Supp. 2d 369 (M.D. Pa. 2010).
17. *Id.* at 374.
18. *Id.* at 375.

lien on the property.[19] Wells Fargo filed a third-party action against Stewart Title after it denied Wells Fargo's claim for continued counsel on plaintiff's action. Although Stewart Title initially appointed counsel to defend Wells Fargo in the action against it by plaintiff, it discontinued its defense on the ground that since the mortgage loan had been paid in full, Stewart Title's liability under the policy was terminated.[20] The court agreed with Stewart Title and found that it was entitled to summary judgment because once the mortgage was paid its obligation under the policy ended.[21]

Two other courts reached opposite conclusions on the question of a title insurer's duty to defend. An Ohio court held that a title insurer had no duty to defend the insured where an unrecorded instrument was excluded from coverage under the title policy. Hauck Holdings Columbia SC, LLC (Hauck) obtained a title insurance policy from First American Title Insurance Company (First American) in connection with its purchase of the Northtowne Commons Shopping Plaza.[22] This purchase made Hauck a party to an Operation and Easement Agreement (Agreement) and subsequent amendments entered into among Hauck's predecessors-in-interest, one of which was Target Corp. (Target). When Target refused Hauck's request under the Agreement for it to pay for some of the maintenance of the shopping center's common areas, Hauck made a claim under its title insurance policy. First American denied the claim on the ground that because a supplement to the Agreement concerning Target's obligations was unrecorded, it was excluded under the title policy. After settling its dispute with Target, Hauck proceeded with its declaratory judgment action against First American. First American argued that either Hauck's loss is excluded under the title policy if he had actual knowledge of the unrecorded supplemental agreement, which was unknown to First American; or if it did not have actual knowledge of the supplemental agreement, it was not a title defect insured under the title policy.[23] The issue before the court was whether the supplemental agreement could be construed as a defect or encumbrance on the title.[24] The Agreement required that in order for a modification to be effective, it must be recorded. Because the supplemental agreement was not recorded, it never became effective, was not enforceable, and therefore could not constitute a defect or encumbrance on the title. Therefore, First American had no duty to defend Hauck.

19. *Id*. at 373.

20. *Id*.

21. *Id*. at 389.

22. Hauck Holdings Columbia SC, LLC v. Target Corp., 2010 WL 1258103, at *1 (S.D. Ohio Mar. 25, 2010).

23. *Id*. at *9; *see* Emrick v. Multicon Bldrs., Inc., 566 N.E.2d 1189, 1194 (Ohio 1991) (an unrecorded land use restriction is not enforceable against a bona fide purchaser for value unless the purchaser has actual knowledge of the restriction).

24. *Hauck Holdings*, 2010 WL 1258103, at *10.

However, a Texas court held that although the insurer can reserve its rights, it has a duty to defend the entire case. In *Lawyers Title Insurance Corp. v. Graham Mortgage Corp.*,[25] a developer purchased property from a seller under a purchase money note, for which the seller attached a lien on the property. The developer obtained several development loans from Graham Mortgage Corp. (Graham), and the seller signed an agreement to subordinate her lien to each of the new loans. Graham purchased title insurance for each new loan from Lawyers Title Insurance Corp. (Lawyers Title). When the developer defaulted, the seller filed a petition alleging that her lien should have priority over Graham's liens because the subordination agreements had been procured by fraud. In response to Graham's request that it defend the claim, Lawyers Title petitioned for a declaratory judgment to determine if it owed a legal duty to defend the suit under the title policy.[26] The court noted that after an insured establishes coverage under the terms of the title policy, the burden shifts to the insurer to prove that an exclusion applies that permits it to deny coverage, in this case, whether fraud falls within a policy exclusion.[27] Lawyers Title argued that fraudulent misrepresentations allegedly made by Graham were excluded from coverage because Graham "created, suffered, assumed or agreed to" the defect under exclusion 3(a). Because Lawyers Title did not clearly allege that Graham made or knew about certain misrepresentations, the court resolved any ambiguities in the petition in finding a duty to defend.[28] Finding that an insurer "has a duty to defend against even 'groundless' suits," the magistrate judge held that Lawyers Title had a duty to defend the entire case.[29]

In California, a title insurer may be held liable for negligence in connection with a preliminary report, if the insured has a reasonable expectation that the preliminary report reflects the scope of coverage being offered. In *Lee v. Fidelity National Title Insurance Co.*,[30] the insureds purchased property that was identified by two tax assessor parcel numbers. Fidelity National Title Insurance Co. (Fidelity) issued a preliminary report that referred repeatedly to both assessor parcels, and included a legal description of only one of the parcels. The legal description, which matched the one in the insured's grant deed, was incorporated into the title insurance policy and a map depicting the two parcels was attached to the policy. When the insureds later discovered they did not, in fact, own one of the parcels, they

25. 2010 U.S. Dist. LEXIS 64125, at *1 (E.D. Tex. Apr. 16, 2010).
26. *Id.* at *2.
27. *Id.* at *5.
28. *Id.* at *9–10.
29. *Id.* at *13.
30. 188 Cal. App. 4th 583 (2010).

made a claim under the title policy. After Fidelity denied coverage, the insureds filed suit for declaratory judgment, breach of insurance contract, bad faith breach of insurance contract, and negligence.[31] In granting summary judgment to Fidelity, the trial court held that the insureds could not recover for a breach of the title policy as to land that they never purchased, owned, or insured.[32]

In holding for the insured, the court of appeals reasoned that the preliminary report could have reasonably been construed as an offer to insure both parcels, even though one was outside the land described. The report included the other parcel in the property's address, listed exclusions from coverage that were specific to the other parcel, and attached a parcel map. Although California Insurance Code § 12340.11 has established that a title insurer cannot be held liable for negligence in connection with a preliminary report, and that the recipient of the report cannot rely on it to represent the status of title to the property to be insured, title insurance coverage is still to be construed consistent with the insured's reasonable expectations.[33] An insured may also rely on a preliminary report to reflect the scope of the coverage being offered. The insureds could have reasonably expected under the circumstances that they were buying a title insurance policy on the other parcel that would conform to the preliminary report.[34] The court determined that the insureds could not know from a reading of the metes and bounds description whether the other parcel was covered. Consequently, the legal description was ambiguous.[35]

B. *Exclusions and Exceptions*

1. Exclusions

In *Washington Mutual Bank v. Commonwealth Land Title Insurance Co.*,[36] Washington Mutual Bank (WAMU) loaned money to borrowers to refinance a preexisting mortgage on their home. Commonwealth Land Title Insurance Co. (Commonwealth Land Title) issued a lender's title policy to WAMU in connection with the loan, which required in relevant part

31. *Id.* at 593.
32. *Id.*
33. *Id.* at 595 (quoting White v. Western Title Ins. Co., 40 Cal. 3d 870, 881 (1985)) ("'In determining what benefits or duties an insurer owes his insured pursuant to a contract of title insurance, the court may not look to the words of the policy alone, but must also consider the reasonable expectations of the public and the insured as to the type of service which the insurance entity holds itself out as ready to offer. Stated in another fashion, the provisions of the policy, "'must be construed so as to give the insured the protection which he reasonably had a right to expect, . . .'"'") (citations and emphasis omitted).
34. *Id.* at 597.
35. *Id.* at 598.
36. 2010 WL 135685, at *1 (Tex. App. Jan. 14, 2010).

that WAMU notify Commonwealth Land Title promptly in writing of any adverse claim to the title of the insured mortgage.[37] Subsequently, the borrowers filed for bankruptcy. Since Commonwealth Land Title recorded the deed of trust less than ninety days prior to the bankruptcy, the bankruptcy trustee instituted an adversary proceeding against WAMU, alleging that the recordation was a preferential transfer in contravention of the Bankruptcy Code.[38] WAMU and the trustee ultimately entered an agreement whereby WAMU surrendered its rights in the property, transferred all rights and benefits under the deed of trust lien from WAMU back to the borrower's estate, and left WAMU with an unsecured claim against the estate. When WAMU filed a claim with Commonwealth Land Title, it denied the claim on the ground that WAMU failed to notify it of the adversary proceeding under paragraph 3 in time for it to defend the validity of the insured deed of trust lien.[39] The court of appeals opined that compliance with a notice-of-suit provision in an insurance policy "is a condition precedent to the insurer's liability on the policy."[40] The purpose of the notice-of-suit provision in an insurance policy is to enable an insurer to investigate the circumstances of the policy-invoking incident so that the insurer has adequate time to prepare to defend any claims. The court of appeals agreed with Commonwealth Land Title that it was prejudiced as a matter of law by WAMU's failure to notify it of the adversary proceeding because it was denied the opportunity to defend against the claims of the bankruptcy trustee. Consequently, WAMU was not entitled to coverage

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37. *Id.*

38. Section 547(b) of the Bankruptcy Code provides:

> Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made—
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if—
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C § 547(b) (2010).

39. *Washington Mut. Bank*, 2010 WL 135685, at *1.

40. *Id.* at *2 (quoting Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 173 (Tex. 1995)).

and the trial court did not err in granting summary judgment to Commonwealth Land Title on the basis of the affirmative defense.[41]

On the other hand, a Washington court held a late notice issue was not proper for summary judgment even though the lender did not notify the title insurer about an action that resulted in the priority of a lien over the lender's mortgage.[42] The lender purchased insurance from Chicago Title to insure two loans lender had made to a developer. The mechanics lienors filed their notices of lien on the development and ultimately filed suit to enforce their liens.[43] The lender did not inform Chicago Title of the notices of lien or the suit, but instead hired an attorney to defend it against the lawsuit. After satisfying the liens, the lender tendered the satisfied lien claims to Chicago Title for payment and requested defense and indemnity for a foreclosure action. The insurer accepted defense of the foreclosure action.[44] The court denied the lender's partial motion for summary judgment for repayment of the amount it paid to discharge the liens, in part because genuine issues of material fact existed as to when the lender should have tendered the claims to Chicago Title and whether or not the insurer suffered prejudice as a result of the lender's late tender.[45]

An insurer had no duty to indemnify the insured where the insured assumed the risk of purchasing a home with knowledge of superior liens on the property, and thus was excluded from coverage. Norman Culbertson owned a home that was subject to the judgment liens of his creditors.[46] James Marr, plaintiff, and Culbertson engaged in a sham transaction to shield the home from Culbertson's creditors. When Marr purchased the home from Culbertson, he took out title insurance from defendant Commonwealth Title Insurance Co. (Commonwealth Title). When Culbertson defaulted on his mortgage, Marr filed a foreclosure suit to extinguish the equitable title remaining in Culbertson's name. One of Culbertson's creditors counterclaimed that his judgment lien was filed before Marr took his mortgage interest and that it held priority. Commonwealth Title defended the creditor claim for some time, then withdrew.[47] Marr settled with the creditor and then brought suit against Commonwealth Title for indemnity of the settlement proceeds and attorney fees. The court granted summary judgment for Commonwealth Title because Marr's actions excluded him

41. *Id*. at *3.
42. Columbia Cmty. Credit Union v. Chicago Title Ins. Co., No. 09-5290 RJB, 2010 WL 546923, at *1 (W.D. Wash. Feb. 12, 2010).
43. *Id*. at *1.
44. *Id*. at *2.
45. *Id*. at *4.
46. Marr v. Commonwealth Title Ins. Co., No. 3:06-CV-20-S, 2009 WL 5125624, at *1 (W.D. Ky. Dec. 21, 2009).
47. *Id*. at *4.

from coverage.[48] Commonwealth Title issued a "Commitment for Title Insurance that recited the existence of various recorded liens on the property and indicated that they would need to be paid and released before Commonwealth Title would issue the policy."[49] This statement made Marr aware of the specific liens on the property. He purchased the property and took out a title policy anyway; thus, he "assumed the risk that those liens would be superior to his."[50] Under this reasoning, Commonwealth Title was under no duty to indemnify Marr.[51]

In a case out of the Fourth Circuit, Alexandra Murnan (Murnan) created a trust, under which she was the sole beneficiary and the sole holder of the right to revoke the trust.[52] Murnan purchased a property on behalf of the trust and purchased a title insurance policy from Stewart Title shortly before closing. At the time the policy was issued there were numerous federal tax judgments pending against Murnan in her individual capacity. Murnan's attempts to sell the property a year later failed when the purchasers were unable to obtain title insurance because the tax judgments against Murnan attached to the property as tax liens. Murnan's claim with Stewart Title was denied, the lender foreclosed on the property, and Murnan brought a breach of contract claim against Stewart Title.

The Fourth Circuit affirmed the summary judgment in favor of Stewart Title.[53] The title policy excluded from coverage liens suffered by the insured claimant including taxes subsequent to the year 2002. The trial court ruled that the tax liens were excluded from coverage under the policy because Murnan "suffered" the liens on the property by accepting title on behalf of the trust. The issue was not whether Murnan caused the liens to arise in the first place but whether she permitted the liens to attach to the property.[54] Murnan was aware of the federal tax judgments when she purchased the property, those judgments became liens on all property held by her or the trust, and she knew she held expansive rights to the trust property. For these reasons Murnan suffered the liens on the property and summary judgment in favor of Stewart Title was proper.[55]

A bankruptcy trustee's allegations of a fraudulent transfer by the insured fell within the exclusions of the insured's title policy. The insured obtained a mortgagee policy from Pacific Northwest Title Insurance Company for

48. *Id.* at *6.
49. *Id.*
50. *Id.*
51. *Id.*
52. Murnan Spring Hill Trust v. Stewart Title Guar. Co., No. 09-1490, 2010 WL 1227268, at *1 (4th Cir. Mar. 31, 2010).
53. *Id.*
54. *Id.* at *2.
55. *Id.*

a $12 million loan it made against a house, in *Concept Dorssers v. Pacific Northwest Title Insurance Co*.[56] Thereafter, the bankruptcy trustee for a prior owner sued several parties, including the insured. The trustee sought to avoid all transfers of the property including the insured's lien alleging the insured failed to pay value and acquired its purported interest in the property with the intent to hinder, delay, and defraud creditors.[57] The title insurer timely issued a denial of coverage letter, which was followed by the insured's lawsuit. The court held that the trustee's allegations of a fraudulent transfer squarely fell under Exclusion 6, and therefore there was no coverage. The court further held that because the insurer's denial of coverage and failure to provide a defense were based on a reasonable interpretation of the title policy, there was no bad faith.[58]

Can an insured argue that even though he had knowledge of a title defect, he is entitled to coverage because the insurer should have done its due diligence to discover the defect? In *Nourachi v. First American Title Insurance Co*.,[59] the insured obtained a tax deed to certain unimproved real property. After acquiring a quiet title judgment, the insured posted "no trespassing" signs on his property. When a forester with the U.S. Forest Service observed the signs on land that had long been part of the Ocala National Forest, the Forest Service demanded removal of the signs. The insured was notified that the United States owned the land, pursuant to a 1937 deed that appeared in the public records. The county made a mistake in adding the property to the county tax rolls and subjecting it to the tax sale. Several months later, First American Title Insurance Co. (First American) issued a title policy to the insured insuring the property. The insured deliberately failed to disclose the existence of the United States' claim to the property and First American negligently failed to discover it.[60] A couple of years later when the county refused to accept the insured's tax payment, he notified First American of the adverse claim of ownership. First American filed a declaratory judgment and rescission action against the insured. The trial court entered judgment in favor of First American, finding that the insured should not benefit by deliberately concealing a known defect in title and then argue that the title insurer should have been more astute in performing its title search duties.[61] On appeal, the insured

56. No. C09-1692RSL, 2010 WL 1141462, at *1 (W.D. Wash. Mar. 19, 2010).

57. *Id*. at *2.

58. *Id*. at *3. The State of "Washington imposes a duty on insurers to act in good faith. To establish the tort of bad faith, an insured must show a breach of contract that was, 'unreasonable, frivolous, or unfounded.'" *Id*. (quoting Kirk v. Mt. Airy Ins. Co., 134 Wash. 2d 558, 560, 951 P.2d 1124 (1998)).

59. 44 So. 3d 602 (Fla. Dist. Ct. App. 2010).

60. *Id*. at 603.

61. *Id*.

argued that he had no duty to disclose facts that First American could, by its own diligence, have discovered. The court rejected the argument and concluded that where an insured purchases property, and subsequently learns of facts establishing that he does not have good title to the property and then seeks title insurance without disclosing the defect, he is not entitled to recover under the policy.[62]

In *De Paz v. First American Title Insurance Co.*,[63] plaintiffs purchased Lot No. 12 from a developer, which consisted of two parcels. Plaintiffs' residence was constructed on one of the parcels (Parcel 1); however, twenty-five percent of the residence was upon the other parcel (Parcel 2). When Lot No. 12 was sold to the plaintiffs, the developer only conveyed title to Parcel 1. The tax assessor's records continued to reflect that the developer owned Parcel 2. As a result, for fourteen years, the real property taxes were assessed against the developer, who did not pay them. The tax collector foreclosed on Parcel 2 and sold the property at public auction to a third party. When plaintiffs attempted to sell Lot No. 12, their title insurer discovered the tax default on Parcel 2 and the prospective buyers canceled the sales contract.[64] The parties submitted this action to arbitration where First American and the third party were named as defendants. Subsequently, pursuant to terms of settlement, the owner of Parcel 2 rescinded the tax deed and title was transferred to plaintiffs. The arbitrator issued an award in favor of First American after concluding that its offer to insure over the title defect as to any proposed buyer was equivalent to removing the cause of the claim from the coverage provisions of the policy.[65] In plaintiffs' appeal, subsequent to the trial court's denial of their petition to vacate the arbitration award, they alleged that because the title was not marketable at the time of escrow, they suffered damages when they were unable to deliver marketable title to the purchasers. The court opined that the arbitration award was predicated upon the erroneous legal theory that the offer to insure over the title defect "effectively" removed it.[66] However,

62. *Id.* The dissent subscribes to a broader rule that would entitle the insured to coverage for the defect because First American should have discovered it in its title search. "[A]n insured under a policy of title insurance . . . is under no duty to disclose to the insurer a fact which is readily ascertainable by reference to the public records. Thus, even an intentional failure to disclose a matter of public record will not result in a loss of title insurance protection. L. Smirlock Realty Corp. v. Title Guar. Co., 418 N.E.2d 650, 654 ([N.Y.] 1981); *see also* Lawyers Title Ins. Corp. v. D.S.C. of Newark Enters., Inc., 544 So. 2d 1070, 1072 (Fla. Dist. Ct. App. 1989) (general rule is that title insurer cannot avoid liability for condition discernable from public record, even if insured knew of defect and failed to disclose it to insurer)." *Id.* at 613 (Torpy, J., dissenting).

63. No. B220937, 2010 Cal. App. Unpub. LEXIS 5863, at *1 (Ct. App. July 22, 2010).

64. *Id.* at *3.

65. *Id.* at *19.

66. *Id.* at *43.

the cause of the title defect was not actually removed and the property remained unmarketable for a year from the time an offer to insure over was made.[67] Plaintiffs' loss is measured by the amount of actual loss suffered by them as a result of the defective title. By the time the title defect was removed, one year later, plaintiffs had lost substantial equity in their home due to the collapsing real estate market. The court reversed the trial court's judgment affirming the arbitration award because the arbitrator erred in concluding First American's offer to insure over the title defect as to any proposed buyer "effectively" removed the title defect.[68]

2. Exceptions

Vacating an earlier opinion to the contrary, a federal district court judge in Tennessee held that a partial release of an easement not listed on Schedule B was not an encumbrance.[69] The original easement had been listed, but not the partial release. Since the partial release increased the owner's rights, it increased instead of decreased the property value.[70]

A real estate developer filed a declaration to establish a condominium association in *Piper v. Nitschke's Northern Resort Condominium Owner's Ass'n, LLC*.[71] The declaration[72] described the condo complex as consisting of fifteen existing units as well as five units to be constructed. Subsequent amendments to the declaration increased the size of units 19 and 20 and created unit 21—all from areas designated as a common element in the original declaration. Members of the association sued the developer for misappropriation of the common elements. When the developers tendered defense to Chicago Title, the insurer intervened in the action and moved for summary judgment, claiming that the claims were not covered because the developers' policies included specific exceptions to coverage for claims arising out of amendments to the declaration.[73] The Wisconsin Court of Appeals engaged in a grammatical dissection of the exceptions semicolon by semicolon and found that the litigation was covered. "[T]itle to [units 19 and 21] depends on the amendments because the amendments partially created unit 19 and completely created unit 21. Coverage for title insurance would not pay benefits under any reasonable expected set of circum-

67. *Id.* at *41, *44.

68. *Id.* at *42.

69. GC Fin., LLC v. Old Republic Nat'l Title Ins. Co., No. 3:06-0913, 2010 WL 1408823, at *4 (M.D. Tenn. Mar. 31, 2010).

70. *Id.* at *2, *5.

71. 777 N.W.2d 677 (Wis. Ct. App. 2009).

72. A declaration is the instrument by which a property becomes subject to the condominium chapter of the Wisconsin statutes.

73. *Piper*, 777 N.W.2d at 678.

stances, when the policy fully excludes from coverage the documents on which title depends."[74]

C. *Claims Procedure*

Are claim reserves and items in the insurer's claim file subject to discovery? After the title insurer's agent embezzled $338,000 in closing funds, the lender sued the title insurer alleging failure to honor a closing protection letter, indemnification, breach of implied covenant of good faith and fair dealing, and engaging in unfair or deceptive acts or practice in the conduct of trade or commerce in violation of the Connecticut Unfair Trade Practices Act (CUTPA).[75] The title company objected to the lender's discovery requests for its claims file and information on insurance reserves on grounds of attorney/client and work product privilege, and further argued that reserves are discoverable only when there are allegations of bad faith. With respect to the title company's privilege objection, the court held that because it had not met its burden of showing that the reserve information was created by an attorney or for purposes of litigation, it would have to produce the information if the lender alleged a sustainable bad faith claim.[76] However, the court found that the lender did not allege bad faith (contrary to its assertion otherwise under its breach of implied covenant of good faith and fair dealing and CUTPA claims), and consequently the reserve information was not subject to discovery. The court required the title company to disclose all or parts of its claims file along with a privilege log for review by the court in camera.[77]

Is a title insurer's obligations under the title policy satisfied if it conveys title to the property to the insured? In *JP Morgan Chase Bank, N.A. v. First American Title Insurance Co.*,[78] First American's agent fraudulently obtained a loan on behalf of a borrower involving an 11,000-square-foot home.[79] Based on the agent's falsely stated information that the borrower had income of $250,000 per month, the lender approved the borrower's loan application in the amount of $4.5 million.[80] First American issued a title insurance policy for this amount. As a result of other fraudulent acts

74. *Id.* at 680. This is a bizarre opinion. Maybe the court was saying if there is no valid unit 21, this is a title vesting issue. The issue is different on unit 19 because the parties agreed that it existed; only the change in its dimensions was being challenged.

75. U.S. Bank N.A. v. Lawyers Title Ins. Corp., No. CV095013702, 2010 WL 1629942, at *1 (Conn. Super. Ct. Mar. 22, 2010); *see* Conn. Gen. Stat. §§ 42-110a—42-110q (2005) (Connecticut Unfair Trade Practices Act).

76. *U.S. Bank*, 2010 WL 1629942, at *1.

77. *Id.* at *7.

78. No. 09-14891, 2010 WL 2720911, at *1 (E.D. Mich. July 8, 2010).

79. *Id.* at *1.

80. *Id.*

perpetrated by the agent, the lender did not obtain an effective mortgage lien on the property. When the borrower defaulted on his loan payments, First American acquired title and possession of the property. After the insured mortgage was assigned to J.P. Morgan Chase Bank (Chase), First American sought to convey the property to Chase in order to extinguish any possible claims that could be brought under the title policy. Chase refused to accept the property, maintaining that it was entitled to monetary damages. Chase argued that First American cannot satisfy its obligations by tendering the deed to the property, as title must be established in accordance with the definition of the term in the title policy, which is defined as vesting in the borrower, with Chase possessing a mortgage lien on the property.[81] In this case, because the purchase of the property by the borrower was a sham, title never properly vested and consequently Chase did not obtain its lien interest in the property. In such a situation, the court found that tendering full title to the property to Chase established title under the title policy. The court, noting that title insurance is not a guaranty of title, but rather a contract of indemnity, found that by tendering the title to the property to Chase, First American established the title, fully performing its obligations under the title policy.[82]

In *Chicago Title Insurance Co. v. Bristol Heights Association, LLC*,[83] the issue was whether a property seller's knowledge of a tax lien on the property should be imputed to the buyer who was a limited liability company of which the seller was a member. Bristol Heights Association, LLC (Bristol Heights) purchased property from the seller in return for $800,000 and a twenty-five percent membership interest in Bristol Heights, for which Chicago Title issued an owner's title policy. As a part of the transaction, the seller warranted that the property was free from all encumbrances. As a result of the seller's failure to pay previously owed taxes on the property, the town of Bristol placed a lien on the property.[84] After Bristol Heights' purchase of the property, the town made a demand for payment of the taxes, and Bristol Heights submitted a claim to Chicago Title. Although Bristol Heights was uncooperative with Chicago Title's investigation, it accused Chicago Title of unnecessary delay in resolving the claim. Shortly after submitting the claim, Bristol Heights paid the town $200,341 in settlement of the tax liability without notice to, or the consent of, Chicago Title.

81. *Id.* at *4.
82. *Id.* For a different view, see *Citicorp Savings of Illinois v. Stewart Title Guaranty Co.*, 840 F.2d 526, 530 (7th Cir. 1988).
83. No. X02CV074020477, 2009 WL 5698103, at *1 (Conn. Super. Ct. Dec. 30, 2009).
84. *Bristol Heights Ass'n, LLC*, 2009 WL 5698103, at *1.

Chicago Title filed an action for a declaratory judgment alleging that Bristol Heights was not entitled to coverage. The court determined that Chicago Title's claims that (1) Bristol Heights had actual or imputed knowledge of the tax liability; (2) Bristol Heights suffered no loss because its debt to the seller could be reduced by the amount paid to the town to satisfy the liens; and (3) it breached its duty of good faith and fair dealing by failing to cooperate in the investigation were questions for the jury.[85] The court denied summary judgment on Chicago Title's counts alleging: (1) Bristol Heights voluntarily assumed the loss when it paid the town without the consent of Chicago Title and (2) Bristol Heights failed to cooperate in the investigation of the claim.[86] A determination of whether a settlement by an insured of a pending claim is justified if the insurer has unreasonably delayed resolution of a claim will have to wait until the case goes to trial.

D. *Damages*

Damages for partial loss on owner policies are generally measured by the difference in market value of the property with and without the defect, or the cost of removing the defect.[87] A California case seems to follow the "cost of removal" measure. In *MBK Celamonte LLC v. Lawyers Title Insurance Corp.*,[88] a notice of communities facilities district (CFD) tax was recorded. It became due when a subdivision map was recorded or a building permit issued. A certain amount was due each year on each residential unit for up to twenty-five years or it could be paid as a one-time fee.

The insured bought the property in 2006 and planned to construct 119 townhomes. The owner policy did not list the CFD notice. No taxes were due at the time of the sale because no subdivision map had been recorded or building permits issued.

When the insured started to sell units, it learned of the special tax. After holding the insurer liable for the CFD tax, the court held it had to pay the lump-sum payoff times 119 for total damages of $869,000. The opinion does not consider allowing the insurer to make the annual payments and does not question that all 119 townhomes eventually will be built.[89]

In *Rose Development Corp. v. Einhorn*,[90] however, the measure of damages was the market value of the property, notwithstanding the purchase price was far lower than that value. In the case, the third-party defendant challenged the insured's right to recover $275,000 in damages, when the

85. *Id.* at *4, *8.
86. *Id.* at *5, *8.
87. Joyce Palomar, Title Insurance Law §§ 10.5–10.8 (2007).
88. No. G041605, 2010 WL 1697703, at *1 (Cal. Ct. App. Apr. 28, 2010).
89. *Id* at *8.
90. 886 N.Y.S.2d 59, 60 (App. Div. 2009) (granting recovery in excess of purchase price).

purchase price had only been $150,000. The court rejected the challenge and held: "where there has been a total loss of title, the measure of loss will generally be the market value of the property within the limit of the policy."[91]

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

Mr. and Mrs. Goodman sold their home in New Jersey and allowed their attorney to retain most of the proceeds, which were to be used when the Goodmans closed on the purchase of another home.[92] The attorney, Pizzi, stole the Goodmans' funds. A few months later when the Goodmans had entered into a contract to buy, Pizzi contacted an agent for Stewart Title. A commitment was issued that included the notice mandated by *Sears Mortgage Corp. v. Rose*[93] that the closing attorney (Pizzi) was not the insurer's agent. The notice was provided to Pizzi but was not sent directly to the Goodmans.

The resale closed and the check to the seller and lienholder bounced. The Goodmans borrowed money to cover the stolen funds and filed a claim with the New Jersey Lawyer's Fund for Client Protection (the Fund). In turn, the Fund paid the Goodmans and took an assignment of their rights. The Fund sued Stewart Title alleging the insurer was liable for Pizzi's actions because the disclosure was not sent directly to the Goodmans. The insurer maintained that the disclosure did not have to be sent directly to the parties, but, in any event, Pizzi stole the funds a few months before he contacted Stewart Title's agent. Thus, he was not Stewart Title's agent under any theory when the theft occurred.[94]

The New Jersey Supreme Court declined to decide how the *Sears* notice must be given. Nonetheless, it held that Pizzi was not Stewart Title's agent when the funds were misappropriated and the insurer was not liable to the Fund.[95]

Title agents who close transactions perform in two capacities more or less simultaneously. They are escrow for the parties and an agent for the title insurer. Two cases this year reaffirmed the principle that insurers are not necessarily liable for the agent's activities as an escrow agent. Indeed, in *Bluehaven Funding, LLC v. First American Title Insurance Co.*[96] it was an

91. *Id.* (quoting L. Smirlock Realty Corp. v. Tit. Guar. Co., 97 A.D.2d 208, 226 (N.Y. App. Div. 1983)).
92. New Jersey Lawyer's Fund for Client Prot. v. Stewart Title Guar. Corp., 1 A.3d 632, 635 (N.J. 2010).
93. 134 N.J. 326 (1993).
94. *N.J. Lawyer's Fund*, 1 A.3d at 635–36.
95. *Id.* at 639–40. For a similar case arising in North Carolina, see *Johnson v. Schultz*, 691 S.E.2d 701, 703 (N.C. 2010) (risk that closing attorney will steal funds falls on buyer).
96. 594 F.3d 1055 (8th Cir. 2010).

associate (Hartman) of the title agent (Capital Title) who used Capital Title's office space when he defrauded the plaintiff—investor.

Here the investor gave funds to Hartman to invest in properties. With one exception, no policies or commitments were issued on these transactions. The investor later discovered Hartman had diverted the funds for his own use.

Capital Title went into receivership and the investor sued the title insurer, First American Title Insurance Co., which had an express agency agreement with Capital Title. The investor claimed that Hartman and Capital Title were acting on the insurer's behalf. Moreover, the insurer had a duty to monitor and audit the agent's activities and it failed to do so.

The court reviewed the agreement between the agent and the insurer. It was explicit that the agent had no authority to act on the insurer's behalf in providing escrow services.[97] As for monitoring the agent, any right to review files granted to the insurer was for the insurer's protection, not for third parties like the plaintiff.[98] Consequently, the insurer prevailed.

Does the insurer have to audit or monitor its agents? *Bluehaven* seems to answer that no such duty exists and a Connecticut case specifically confirms that result.[99] Here a lender sued an attorney agent for failing to list a tax sale notice and a mortgage foreclosure notice in a commitment. The plaintiff also sued the Connecticut Attorneys Title Insurance Company (CATIC) for failing to properly supervise the attorney-agent in how to issue commitments.

The trial court held that CATIC had no duty to actively supervise its 3,000 agents. Such a burden would severely overextend the insurer's resources. Moreover, agents are required to carry malpractice insurance to protect third parties.[100] The opinion notes that research does not reveal any decisions from other jurisdictions imposing liability upon a title insurer for its failure to supervise its agents.[101] The title agent/escrow agent dichotomy was not mentioned in the opinion.

III. INSURER VERSUS AGENT

First American's issuing agent misappropriated funds intended to refinance the borrower's original mortgages.[102] As a result the refinancing lender's

97. *Id.* at 1060.
98. *Id.* at 1061.
99. DeGirolomo v. Papa, No. CV095030452, 2010 WL 654388, at *1 (Conn. Super. Ct. Jan. 15, 2010).
100. *Id.* at *2.
101. *Id.* at *5.
102. First Am. Title Co. v. First Alliance Title, Inc., 718 F. Supp. 2d 669, 672 (E.D. Va. 2010).

mortgages were not placed in first and second priority on the property but were relegated to positions behind the original mortgagee. The original mortgagee's subsequent foreclosure on the home rendered the refinancing lender's interest unsecured, compelling it to tender a claim on the title insurance policy. First American paid and subsequently filed suit against the issuing agent and its surety, alleging breach of contract and seeking $100,000, the full amount of the surety bond. First American entered into a settlement agreement with the issuing agent; however, the surety refused to pay the bond arguing that (1) the settlement agreement between First American and its issuing agent extinguished its liability; (2) First American is precluded from recovering damages suffered by it as a consequence of the misconduct of its own agent; and (3) First American took other actions that prejudiced the surety's rights and therefore preclude First American from recovering.[103] The court held that (1) the consent judgment entered against the issuing agent did not extinguish its liability and did not release the surety, so consequently the surety remained bound by its obligations under the bond;[104] (2) the losses to the refinancing lender and consequently First American were wholly caused by the issuing agent's mishandling of the settlement funds;[105] and (3) no prejudicial acts by First American relieved the issuing agent of its obligation to pay First American under the terms of the bond. The court held that the issuing agent was liable for the full amount of the surety bond in the amount of $100,000.[106]

IV. Duties of Title/Escrow Agent

A. *Duty to Search Title*

This year's cases focused on the agent's duties to search title, handle escrow funds, handle documents, and disclose information about the transaction.

In *U.S. Bank, N.A. v. Integrity Land Title Corp.*,[107] an agent failed to except to a judgment against the seller in the commitment. The transaction closed and a mortgage policy issued to the lender. The judgment holder filed an action to determine priority and won.

The case would have usually ended with a claim on the mortgage policy. However, the title insurer was in receivership.[108] The lender's assignees sued the title agent in contract and tort. The Indiana Supreme Court held

103. *Id.* at 674.
104. *Id.* at 676.
105. *Id.* at 678.
106. *Id.* at 684.
107. 929 N.E.2d 742 (Ind. 2010).
108. *Id.* at 744 n.2.

that there was no privity for a contract claim, and the agent is not a party to the title issuance policy.[109]

The court determined that absent a contract, plaintiff could sue the agent for negligent misrepresentation. It is an exception to Indiana's version of the economic loss rule.[110] The opinion reviewed decisions both pro and con on the issue from other states. The case was remanded so the lender's assignees could go to trial on the tort cause of action.[111]

Does Wisconsin statutory law permit an award of attorney fees and costs to an insured for costs incurred in litigating liability and coverage issues? Two years after purchasing a residential lot, the insured was notified that a natural gas easement was on her property.[112] Chicago Title filed an action against the insured seeking a declaration that the proper covered loss due to the gas pipeline was valued at $14,000. In her answer, the insured challenged Chicago Title's appraisal of the loss and requested the court declare that the loss was $33,210. After granting judgment in favor of the insured, the court awarded the insured attorney fees of $24,412.50 and costs of $8,382 based on the equities of the case under § 806.04(8) of the Wisconsin Statutes.[113] In a case of first impression, the court analyzed case law discussing the statute and whether the recovery of attorney fees expended by the insured in establishing coverage is recoverable where there has been no breach of the duty to defend by the insurer.[114] The court determined that attorney fees are not recoverable under the statute where there has been no breach of the duty to defend.[115] The court further held

109. *Id.* at 745.

110. Indianapolis Marion County Pub. Library v. Charlier Clark & Linard, 929 N.E.2d 722, 741 (Ind. 2010).

111. *Id.* at 734. For a recent similar case, see *Hamilton v. Trans Union Settlement Solutions, Inc.*, 295 S.W.3d 844, 848 (Ky. Ct. App. 2009).

112. Chicago Title Ins. Co. v. Voss, No. 2009AP1185, 2010 WL 3420234, at *1 (Wis. Ct. App. Sept. 1, 2010).

113. Section 806.04(8) of the Wisconsin Statutes provides:

> SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefore shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

Wis. Stat. § 806.04(8) (2010).

114. *See* Elliot v. Donahue, 485 N.W.2d 403, 407 (Wis. 1992) (recovery of attorney fees and costs permitted where incurred because title insurer failed to follow required procedures in requesting a bifurcated trial and moving to stay any proceedings on liability until the issue of coverage was resolved); *cf.* Reid v. Benz, 629 N.W.2d 262, 273–74 (Wis. 2001) (the insured was not entitled to attorney fees expended solely to establish a duty to indemnify where the insurer did not breach its duty to defend).

115. *Voss*, 2010 WL 3420234, at *2.

that an award of costs under the statute is within the discretion of the trial court. Consequently, the court held that the trial court erred in its award of attorney fees to the insured and upheld the trial court's discretionary award of equitable and just costs under the statute.[116]

B. *Handling Documents*

An agent's failure to timely record documents had severe consequences in two cases this year. In one, the result was the avoidance of a $20 million mortgage after the borrower filed bankruptcy almost six years later.[117] In a second one, punitive damages of $672,000 were assessed against the agent who apparently lost a deed and mortgage and took no action to cure the problem before the buyer died two years later.[118]

C. *Duty to Disclose*

The title agent handling the sale of an Iowa motel was advised by the seller's real estate agent not to collect the prior year's taxes at closing.[119] Buyer apparently did not understand how taxes were assessed and collected in Iowa and signed the closing statement. When the buyer became aware the prior year's taxes were unpaid, it sued the sellers, their real estate agent, and the title agent.

The buyer alleged the title agent had a duty to advise of its error concerning Iowa taxes. The court of appeals held there was ". . . no duty to disclose information received by [the title agent] unless the agent had actual knowledge of a fraud being committed on one party."[120] The failure to point out the buyer's error on Iowa law did not rise to that standard.

In another case on disclosure obligations, Brown obtained a business loan from Dorsch and Delatoba (D&D).[121] Shortly thereafter; D&D tendered documents for a $375,000 secured loan against Brown's house to CMG Escrow. Brown's signature was forged on these documents. The loan proceeds were disbursed per the escrow instructions to a third party.

After the loan closed, Brown learned of the recorded documents and sued CMG Escrow for slander of title.[122] The appellate court held the agent

116. *Id.*

117. *In re* Bill Heard Enters., Inc., 420 B.R. 553, 567 (Bankr. N.D. Ala. 2009).

118. Chase Manhattan Mortgage Co. v. Lane, No. 3:09-cv-47, 2010 WL 2738266, at *1 (W.D.N.C. July 9, 2010).

119. Wildcat Inns v. First Am. Title Ins. Co., No. 09-1195, 2010 WL 1875730, at *1 (Iowa Ct. App. May 12, 2010).

120. *Id.* at *7.

121. Brown v. CMG Escrow Co., No. B215706, 2010 WL 93228, at *1 (Cal. Ct. App. Jan. 12, 2010).

122. *Id.*

could not be liable for slander of title because no malice had been shown. Moreover, the agent had no duty to verify escrow documents had genuine signatures. The agent had complied with the escrow instructions.[123] Of course, the lender likely made a claim on its loan policy.[124]

V. GOVERNMENTAL REGULATIONS

A. *Federal*

There were many rate reissue cases this year, and of particular interest are a couple of cases from Texas regarding whether or not RESPA liability under § 8(b) can be part of a class action claim. In *Mims v. Stewart Title Guaranty Co.*,[125] the Fifth Circuit rejected a RESPA class theory based on a HUD reasonable relationship test, which had previously been rejected in the case *O'Sullivan v. Countrywide Home Loans, Inc.*[126] because this standard of liability required too much of an individualized inquiry into the fact situation of each particular plaintiff to be handled as a class. In *Hamilton v. First American Title Insurance Co.*,[127] however, another Texas federal judge found a way around this problem by distinguishing the plaintiff's theory of RESPA § 8(b) liability from *Mims* and *O'Sullivan*. The *Hamilton* court found that plaintiff's RESPA claims rested on a question of law, specifically whether or not "title agents were barred by Texas law from accepting any compensation for services actually performed in connection with the issuance of the plaintiffs' lender's policies other than a split of the premium mandated by Rate Rule R-8."[128]

An Illinois case this year involved a challenge to the status of attorney agents who allegedly did not perform core title services. If proven, such a model would violate RESPA § 8(e) and 24 C.F.R. § 3500.14(g)(3). In *Chultem v. Ticor Title Insurance Co.*,[129] Ticor allegedly operated a system whereby attorney agents that referred business to Ticor were paid for core title agent services that they did not perform. Instead, these services for which they were paid were performed by Ticor. The court found this to be an actionable violation of RESPA and certified the class action.[130]

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123. *Id.*

124. On the limited nature of this duty, see *Victory v. Sneed Financial Services, LLC*, No. 03:07CV17970, 2010 WL 45918, at *1 (N.D. Tex. Jan. 6, 2010) (escrow agent had no duty to verify data seller provided regarding equipment or seller's business dealings).

125. 590 F.3d 298 (5th Cir. 2006).

126. 315 F.3d 732 (5th Cir. 2003).

127. 266 F.R.D. 153 (N.D. Tex. 2010).

128. Tex. Dep't of Ins., Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas § III, Rate Rule R-8 (2006).

129. 927 N.E.2d 289 (Ill. App. Ct. 2010).

130. *Id.* at 297; *cf.* Howland v. First Am. Title Ins. Co., No. 07 C 2628, 2009 WL 2180832, at *1 (N.D. Ill. July 21, 2009) (finding in similar fact pattern that claim was not an appropriate matter for a class action).

In *Carter v. Wells Bowen Realty*,[131] the plaintiffs allege that Chicago Title collaborated with two real estate firms to create two sham title companies, and to split the profit from those companies with the real estate firms. The court found that HUD's ten-step test for determining if a company is a sham is void for vagueness. The court was then left to determine if the companies were affiliated business arrangements (ABA). The companies indisputably performed some services, making them an ABA. To be exempt from liability, an ABA must have "(1) disclosure of the ownership arrangement; (2) no requirement for the consumer to use a particular provider; and (3) the only thing of value received by the ABA parents was their ownership interest in the provider." The court found that the companies in this case met these standards, and so had no liability under RESPA.[132]

B. *State*

In *Texas Department of Insurance v. Reconveyance Services, Inc.*, the Texas Supreme Court, in a per curiam decision, reiterated the rules of sovereign immunity and dismissed the plaintiff title insurer's claim.[133] In the case, Reconveyance Services, Inc. (RSI) provided post-closing mortgage release monitoring and verification services. Its representative contacted the Texas Department of Insurance (TDI) about offering its services in Texas. A TDI staff member responded that the services were part of the service purchased with a title insurance premium and therefore could not be charged for with an additional fee.[134]

RSI filed a declaratory judgment action against TDI but not against any of its officers or employees. It sought an order allowing it to offer its services through Texas title agents and asserted that TDI's prohibition was ultra vires its authority. The Texas Supreme Court dismissed the suit on the basis of sovereign immunity, noting that while sovereign immunity did not bar suit for ultra vires actions, such suits can only survive the bar if they are brought against the individuals claimed to be acting ultra vires.[135] A suit against TDI alone, therefore, had no jurisdictional basis.

VI. MISCELLANEOUS

A. *Bankruptcy*

A California case reaffirmed the long-standing tenet that an unscheduled bankruptcy asset remains property of the estate indefinitely. In *In re Dun-*

131. 719 F. Supp. 2d 846 (N.D. Ohio 2010).
132. *Id.* at 855.
133. 306 S.W.3d 256 (Tex. 2010) (per curiam).
134. *Id.* at 258.
135. *Id.* at 259–60 (citing City of El Paso v. Heinrich, 284 S.W.3d 366, 372 (Tex. 2009)).

ning Brothers Co., Dunning Brothers Co. ("DBC") filed a voluntary petition in bankruptcy in 1936.[136] DBC entered "NONE" on Schedule B-1 "Real Estate" and "NONE" as "Interest in Land" on Schedule B-4, "Property in Reversion, Remainder or Expectancy, Including Property Held in Trust for the Debtor or Subject to Any Power or Right to Dispose of or to Charge."[137] Neither statement was accurate. It appears that the estate was fully administered and the case was closed in August 1937. Three unscheduled (and unknown) DBC parcels comprised the fee interest under a railroad right-of-way. Seventy-three years later, the railroad owner desired to acquire the fee title to the three parcels and sought to reopen the bankruptcy.[138] The court held that the question of whether the case should be reopened would be determined under the Bankruptcy Act of 1898, rather than the Bankruptcy Code.[139] The court determined that the unscheduled real property had not been administered and it was still property of the estate, which therefore was eligible to be reopened.[140]

B. *Recording Statutes*

A properly recorded notice of assessment in California gives a buyer constructive notice of a lien, even if the notice is not recorded in the grantor-grantee index.[141] In *612 South LLC v. Laconic Limited Partnership*, the property owner financed the payment of a tax assessment by having the water district issue and sell a bond, which allowed the owner to pay off the assessment amount over time. Several years after the owner defaulted, an investor purchased the property at a public auction of the tax-defaulted property.[142] After the investor failed to pay delinquent taxes, the bondholder sought a judgment ordering the foreclosure and sale of property subject to a water district bond. The trial court concluded that the investor had actual, constructive, or inquiry notice of the assessment and that the bondholder was entitled to a foreclosure sale of the property. On appeal, the court noted that before the investor purchased the property, it obtained a preliminary title report indicating that a special tax was assessed against the property and that it would be collected with the county taxes.[143] The trial court rejected the investor's contention

136. 410 B.R. 877 (Bankr. E.D. Cal. 2009).
137. *Id.* at 879.
138. *Id.* at 880.
139. The court gives a great review of the history of jurisdiction of federal courts over bankruptcy cases from the Bankruptcy Act of 1898 to the present Bankruptcy Code. Laches was occasionally recognized as a basis for not reopening a case under the Bankruptcy Act. *Id.* at 889.
140. *Id.* at 887–88. In determining to reopen the case, the court found that "[n]o useful purpose would be served by refusing to reopen" the case. *Id.* at 889.
141. 612 South LLC v. Laconic Ltd. P'ship, 184 Cal. App. 4th 1270 (2010).
142. *Id.* at 1275.
143. *Id.* at 1276.

that failure to index the notice of assessment under the name of the property owner in the county recorder's office rendered the tax lien invalid, and found that the investor was not a bona fide purchaser for value. The court affirmed, finding that the investor had constructive notice of the bond and assessment lien because a notice of assessment had been properly recorded at the county recorder's office, and there is no statutory requirement that the notice of assessment be indexed in the grantor-grantee index.[144]

C. *LandAmerica Bankruptcy*

In *In re § 1031 Exchange Litigation*,[145] LandAmerica 1031 Exchange Services, Inc. (LES) invested its clients' exchange funds[146] in auction rate securities. That market froze in February, 2008, and LES was unable to convert the securities to cash. Until filing bankruptcy in November 2008, LES used the funds from new customers to pay on the exchanges it invested for existing customers. A group of customers, who were affected by the market freeze in February 2008 sued Sun Trust because it had arranged for the purchase of the securities by LES, and LES had its remaining exchange funds in Sun Trust accounts (the "Customers"). The Customers claimed Sun Trust (1) aided and abetted LES's breach of fiduciary duty, (2) converted the funds, (3) aided and abetted LES's conversion, and (4) engaged in a civil conspiracy.[147] As all of the allegations occurred in Richmond, Virginia, the court applied Virginia law to the Customers' claims. The court dismissed "the aiding and abetting breach of liability claim for want of actual knowledge of the primary wrong; the conversion and aiding and abetting conversion claims because the Customers did not have an immediate right to possession of the Exchange Funds; and the civil conspiracy claim because the complaint fails to adequately allege an agreement to act."[148]

D. *Unauthorized Practice of Law*

In *Ohio State Bar Association v. Dalton*,[149] the state bar association filed a complaint against the title company and its agent alleging that the de-

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144. *Id.* at 1280.

145. 716 F. Supp. 2d 415 (D.S.C. 2010).

146. For a fee LES would serve as a qualified intermediary to customers who desire to effect a tax-deferred like-kind exchange under § 1031 of the Internal Revenue Code. 26 U.S.C. § 1031 (2006). Qualified intermediaries hold the proceeds of a real estate sale until the customer chooses to purchase another property. At closing, the qualified intermediary transfers the proceeds to the seller of the property. By using a qualified intermediary, a customer can avoid realizing a taxable gain on the sale of his property, as a customer avoids possession of his initial sale proceeds, effectively deferring any taxable gain until the property is sold. *See In re Section 1031 Exch. Litig.*, 716 F. Supp. 2d at 419.

147. *In re Section 1031 Exch. Litig.*, 716 F. Supp. 2d at 419–20.

148. *Id.* at 428.

149. 924 N.E.2d 821 (Ohio 2010).

fendants engaged in unauthorized practice of law by preparing general warranty deeds and forging an attorney's signature on one of them.[150] Before the Board on the Unauthorized Practice of Law issued its final report, the title company dissolved and the agent filed for bankruptcy. The court first determined that the automatic stay by the bankruptcy court does not stay commencement or continuation of an action or proceeding by a governmental entity to enforce its police or regulatory powers, and thus does not stay the proceedings arising from the unauthorized practice of law.[151] The court found that the defendants prepared and filed both deeds and that they forged an attorney's signature on one of them. Consequently, the defendants engaged in the unauthorized practice of law because the agent was not an attorney and the title company, as a corporation, cannot practice law.[152]

150. *Id*. at 822.
151. *Id*. at 823.
152. *Id*. at 824.