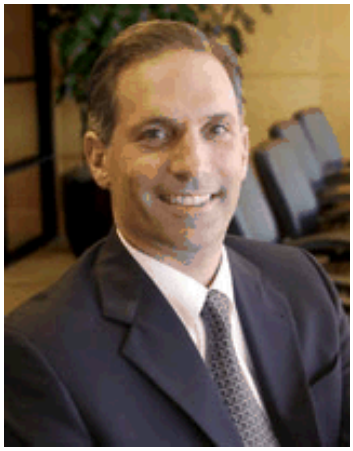
WENDEL ROSEN
BLACK & DEAN LLP

CASE PROVIDES CLARIFICATION FOR TITLE INDUSTRY



Mark Epstein is a partner at Wendel, Rosen, Black & Dean LLP where he specializes in real estate, title insurance and mortgage lending litigation.

Email: mepstein@wendel.com
Phone: 510.834.6600

New Case Holds That Title Company Has No Liability When It Gratuitously Provides Erroneous Title Information

For almost thirty years, it has been established under California law that neither a policy of title insurance nor a preliminary (title) report constitute representations as to the condition of title to real property, upon which an action for negligence may lie. (*See, e.g., Fidelity Nat. Title Ins. Co. v. Miller* (1989) 215 Cal.App.3d 1163, 1175.).

Title insurance, by definition, is a contract through which the insurer agrees to indemnify the insured property owner or lender against losses caused by certain defects in the insured's interest in the property that are specified in the policy and exist at the time the policy is issued. (Cal. Ins. Code §§ 104, 12340.1; *Vournas v. Fidelity National Title Ins. Co.* (1999) 73 Cal.App.4th 668; *Rosen v. Nations Title Ins. Co.* (1997) 56 Cal.App.4th 1489, 1499; *Lawrence v. Chicago Title Ins. Co.* (1987) 192 Cal.App.3d 70, 74; *Elysian Investment Group, LLC v. Stewart Title Guaranty Co.*, 105 Cal.App.4th 315, 320.) A preliminary report of title is merely a statement of the terms and conditions upon which the issuer is willing to issue a policy of title insurance, if such offer is accepted. (Ins. Code §12340.11; *Siegel v. Fidelity Nat. Title Ins. Co.*, (1996) 46 Cal.App.4th 1181, 1190-91.)

A title insurer's potential scope of liability is limited to the insured(s) under a policy, and not to anyone who merely purchases a preliminary report, or to any third parties. (*Vournas v. Fidelity National Title Ins. Co., supra*, 73 Cal.App.4th at 675; *Golden Sec. Thrift & Loan Ass'n v. First American Title Ins. Co.* (1997) 53 Cal.App.4th 250, 258; *Siegel v. Fidelity National Title Ins. Co., supra*, 46 Cal.App.4th at 1192.) Only when a party purchases an abstract of title, which is more expensive than a title insurance policy, can that party pursue an action for negligence based on errors and omissions in the abstract regarding the status of title to the property in question. (*Southland Title Corp. v. Superior Court*, (1991) 231 Cal.App.3d 530, 536.)

Notwithstanding the principles of title insurance law described above, there is a longstanding body of case law that holds that a duty of ordinary care may arise out of a voluntarily assumed relationship when such a duty does not otherwise exist. (*Walnut Creek Aggregates Co. v. Testing Engineers, Inc.* (1967) 248 Cal.App.2d 690, 695.) Generally speaking, in a case involving purely economic loss, where there is no privity of contract between parties, the courts have held that a duty to exercise ordinary care not to harm another may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty. (*Desert Healthcare Dist. V. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 792; *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650.) The determination of whether the defendant in a specific case will be held liable to a third party who is not in privity of contract involves the balancing

of various factors, among which are: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58-59.)

Until recently, there were no published cases in California that addressed the issue of whether a title company can face negligence or other tort liability when it acts as a volunteer by gratuitously providing title information to a party who relies on the information in deciding whether or not to purchase a property. Though the plaintiff (surprisingly) did not specifically argue that a duty of care should be imposed under the doctrine of voluntarily assumed relationships, in *Soifer v. Chicago Title Company*, (Aug. 10, 2010) Cal.App. LEXIS 1385, the Court of Appeal for the Second District appears to have precluded the possibility that liability can be imposed on the title companies under such circumstances.

In *Soifer*, the plaintiff made some rather imaginative arguments in an effort to circumvent the authorities outlined above, and pursue a series of tort claims against Chicago Title Company based on alleged erroneous information that was provided to him despite the fact that he never purchased a title insurance policy, an abstract, or even a preliminary report. The court applied its analysis in the *Southland* case to reaffirm that a plaintiff cannot recover for errors in a title company's statements regarding the condition of title to real property in the absence of a title insurance policy or an abstract of title.

Mr. Soifer was an investor in distressed real estate, who purchased properties out of foreclosure. In order to decide whether or not to bid on a particular property, Mr. Soifer needed to know if the loan being foreclosed upon was secured in first position or was subject to one or more senior liens. Mr. Soifer alleged that he entered into an oral agreement with an agent of Chicago Title Company whereby the agent would provide very limited information about the existence (or lack thereof) of any senior liens on a particular property, upon which Mr. Soifer would rely in deciding whether or not to bid on the property at a foreclosure sale. The information Mr. Soifer wanted from Chicago Title Company was very limited, specific and time sensitive: he wanted a simple "yes" or "no" answer to his questions about whether a particular loan in foreclosure was secured in first position, usually within twenty-four hours before the trustee's sale.

Mr. Soifer went on to allege that as consideration for Chicago Title Company's alleged oral agreement to provide him with such limited and expedited title information, he agreed to place future business with Chicago Title Company (i.e., purchase title policies) in the event he was the successful bidder on any properties at the trustee's sales. In truth, however, Mr. Soifer neither paid nor agreed to pay Chicago Title Company for any services.

On March 6, 2008, Mr. Soifer requested information regarding the priority of a Deed of Trust on property in Encino, California that secured a loan that was in foreclosure. Mr. Soifer's acquaintance at Chicago Title Company allegedly informed him that the foreclosing loan in the amount of $990,000 was secured in first position when in fact, the loan was junior to a $1.6 million first Deed of Trust in favor of Citimortgage, Inc. Mr. Soifer alleged that he relied on Chicago Title Company's one-word "yes" e-mail response to his inquiry about whether the loan was in first position when he made a successful bid of $1,000,000.01 for the property on March 11, 2008. Mr. Soifer alleged that he had to pay off the senior loan (after negotiating a reduction in the balance owing) and was only able to sell the property for $1,200,000, which resulted in a $1 million loss that he sought to recover from Chicago Title Company in a civil action for negligence, negligent misrepresentation, breach of oral contract, and a so-called cause of action for "abstractor negligence."

After sustaining Chicago Title Company's demurrer to the initial complaint with leave to amend, the trial court sustained its demurrer to the first amended complaint without leave to amend. Relying on *Southland, supra,* and *Siegel, supra,* as well as Insurance Code sections 12340.10 and 12340.11, the trial court ruled that since Mr. Soifer neither sought nor obtained a policy of title insurance or an abstract of title, Chicago Title Company had no liability to him ***on any theory***.

Mr. Soifer argued on appeal that pursuant to an oral contract, Chicago Title Company provided him "with the services of an 'abstractor'" and that Chicago Title Company had been negligent in performing those services to his detriment. Mr. Soifer asserted that he had alleged viable causes of action for negligence, breach of contract and negligent misrepresentation against Chicago Title Company, and that the trial court

should have granted him leave to allege a fraudulent concealment cause of action against Chicago Title Company as well. The Court of Appeal, however, rejected Mr. Soifer's arguments.

The court noted that Insurance Code Section 12340.10 defines an abstract of title as a "***written*** *representation*, provided pursuant to a contract, whether written or oral, intended to be relied upon *by the person who has contracted for the receipt of such representation, listing all recorded conveyances, instruments or documents* which, under the laws of this state, impart constructive notice with respect to the chain of title to the real property described therein….(emphasis added)." The court re-affirmed that only a person who purchases a written report that meets the definition of an abstract under Insurance Code Section 12340.10 can pursue a claim for negligence against a title company. (citing *Southland, supra,* 231 Cal.App.3d at p. 536.)

In this case, Mr. Soifer was seeking to circumvent the limitations imposed by cases such as *Southland* by asserting that Chicago Title Company's agreement to provide him limited "yes" or "no" responses as opposed to a listing of **all** recorded conveyances, instruments or documents on the claim of title amounted to a contract for an "abstract of title." However, Mr. Soifer's contention ran up against the plain statutory definition of an abstract, and Mr. Soifer, by his own allegations, neither sought nor agreed to pay for such an abstract. Mr. Soifer merely sought a quick look at the public record at no cost to him except for the vague "promise" to provide some undefined future business to Chicago Title Company.

The Court of Appeal agreed with the trial court's conclusion that Mr. Soifer, in effect, sought to make Chicago Title Company a "super guarantor" of his trustee's sale transaction. By virtue of an artful pleading, Mr. Soifer re-characterized a very informal arrangement as a formal legal commitment, and thereby sought to place himself in a better position than a party who purchases a title insurance policy. The Court of Appeal concluded that a quickly-prepared one-word e-mail, for which the title company did not charge a premium, and which in no way meets the statutory definition of an abstract of title simply cannot support a cause of action for negligence. (*citing Siegel, supra,* 46 Cal.App.4th at p. 1190 ["[A] title insurer who has not undertaken to perform as an abstractor owes no duty to disclose recorded liens or other clouds on title"].)

The court did not address the issue of whether a duty of care might have been imposed on Chicago Title Company as a volunteer under the five-factor test articulated in *Quelimane Co. v. Stewart Title Guaranty Co., supra,* 19 Cal.4th at 58-59. Evidently, Mr. Soifer did not raise this issue in his brief. While the California Supreme Court may one day decide that a title company can face negligence liability to a third party to whom it gratuitously provides erroneous title information under the doctrine of voluntary undertakings, the Court of Appeal made two statements that appear to rule out the imposition of any such liability at this time. *Citing Southland, supra,* 231 Cal.App.3d at 536, the court stated, "A party that seeks to hold an insurer liable for negligently providing title information upon which the party relied *must obtain an abstract of title* (emphasis added)." The court also concluded, "In short, there are two ways in which an interested party can obtain title information upon which reliance may be placed: an abstract of title or a policy of title insurance." (Ibid.)