

# Ensure That You've Insured The Right Property: Deference Must Be Given To The Insureds' Reasonable Expectations

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A recent case held that the insureds were covered for the loss of a second parcel that was not included in the grant deed's and title policy's legal (metes and bounds) description of the property because the preliminary report referenced the second parcel by its assessor's parcel number.

The principle that an insureds' reasonable expectations are ultimately what govern the scope of coverage that is afforded by an insurance policy has perhaps never been better illustrated than by the recent decision handed down by the First District Court of Appeal in *Lee v. Fidelity National Title Insurance Co.*, (1st Distr., Sept. 16, 2010) 188 Cal. App. 4th 583.

As with any other type of insurance, the language of a title insurance policy is to be construed in accordance with its plain, ordinary and popular meaning. However, in determining what benefits or duties the insurer owes its insured(s) pursuant to the policy, the court may not look to the words of the policy alone, but must also take into account what the insureds' reasonable expectations are as to the scope of coverage the policy affords. (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 881; *Jarchow v. Transamerica Title Ins. Co.* (1975) 48 Cal.App.3d 917, 941; *Lagomarsino v. San Jose Abstract & Title Ins. Co.* (1960) 178 Cal.App.2d 455, 464-465.)

The issue in *Lee v. Fidelity* was whether a title insurance policy issued by defendant Fidelity National Title Insurance Company ("Fidelity") insured that the plaintiff policyholders owned a second parcel of real property that was not included within the esoteric legal (i.e., "metes and bounds") description in the policy, because in the preliminary report (upon which the policy was based) the property to be insured was identified by the assessor's parcel numbers for two contiguous parcels. Sixteen years after they purchased the property and paid taxes on both parcels, the county assessor's office advised the plaintiffs that there had been a mistake in the assessor's records, and that the plaintiffs actually did not own the second parcel. The court cited the fifty-year-old case of *Lagomarsino v. San Jose Abstract & Title Ins. Co.*, *supra*, 178 Cal.App.2d 455, in holding that the policy provided coverage for the plaintiffs' loss of the second parcel because the policy's legal description of the property was ambiguous under the circumstances, and the insureds had reasonably been lead to believe that they owned both parcels and were insured as owning both parcels.

California Insurance Code Section 12340.11 defines a preliminary report as 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. It is an offer identifying precisely the risk that the insurer will agree to assume, which the insured accepts by purchasing the title insurance policy. (*Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1190-1193.) It has long been held in California that the insured has the right to expect that the contract thus formed will be consistent with the terms of the offer, and the insured's purchase of the policy creates a binding contract based on the terms set forth in the preliminary report and any materials that are incorporated therein by reference. (*Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, 790.)

In this case, Fidelity issued a preliminary report to the plaintiffs in 1990 that referred repeatedly to the assessor numbers for the two contiguous parcels. The legal "metes and bounds" description of the property used in the preliminary report, which matched the description of the property in the grant deed through which the plaintiffs acquired title, was incorporated into the title insurance policy. However, the references to the two assessor's parcel numbers in the preliminary report's description of the property were not incorporated into the terms of the policy. Nevertheless, Fidelity attached a map to the policy that

had arrows pointing to the same two parcels, which the court determined could reasonably have lead the plaintiffs to believe they were insured under the policy as owning both parcels.

When they were advised that they did not own the second parcel, the plaintiffs submitted a claim to Fidelity in 2006. Fidelity denied the claim on the grounds that the metes and bounds description in the policy did not include the second parcel and on other grounds that are beyond the scope of this article. The plaintiffs then filed suit against Fidelity for breach of contract, bad faith and declaratory relief. The trial court granted Fidelity's motion for summary judgment, ruling that the policy did not provide coverage, because among other things, the legal description of the insured property did not include the second parcel. The Court of Appeal reversed the trial court's decision.

The Court of Appeal followed a decision that was handed down fifty years earlier in *Lagomarsino v. San Jose etc. Title Ins. Co.*, *supra*, 178 Cal.App.2d at 465. In that case, the title insurer also denied coverage based on the legal description of the property covered by the policy. The court concluded that the legal description of the property was ambiguous to a lay person, and that the risk of a "proper description" should be assumed by the insurer in order to give the insured the protection which he reasonably had a right to expect. (*Ibid*). The court reached the same decision, for the same reasons, in *Lee v. Fidelity*.

The term "metes and bounds" refers to a system of describing land that uses distance (metes) and angles or compass directions (bounds) to describe a property's boundary lines based on local landmarks (e.g., trees and fences) and topography. The *Lee v. Fidelity* court concluded that the plaintiffs had a reasonable expectation of coverage, based on the references to the two parcel numbers in the preliminary report and the depiction of the two parcels with arrows pointing to them in the map that was incorporated into the policy. The court also reasoned that the plaintiffs' expectation of coverage would not have been dispelled by a reading of the policy's metes and bounds description of the property because a metes and bounds description requires professional training to decipher under California law, and it was therefore ambiguous to a layperson when juxtaposed against the preliminary report's references to the two parcels by their assessor's parcel numbers.

The court emphasized in its opinion, however, that a legal description of real property in metes and bounds is not ambiguous *per se* just because it is beyond the skill of an ordinary lay person to interpret. The court elaborated that it found the legal description ambiguous in this case because of the circumstances under which the policy was issued, which involved the preliminary report that could be reasonably construed as an offer to insure property located outside the land encompassed by the legal description. The court was also influenced by the fact that from the time the plaintiffs acquired their property until 2006, they paid property taxes on both parcels, and by the fact that the plaintiffs were assessed fees on both parcels by the local Reclamation District for the maintenance of levees along an adjacent waterway slough.

So, what should title insurers and their agents take away from the *Lee v. Fidelity* decision? The court's opinion does not mean that a title insurer will be held liable to provide coverage for a loss otherwise not covered by the policy, in every instance where an inconsistency exists between the preliminary report and the policy: In each case, the issue remains whether under the totality of the circumstances, the insureds have a reasonable expectation of coverage.

However, *Lee v. Fidelity* underscores the importance of issuing a *new* corrected preliminary report, *before* a policy is issued to the prospective insureds, when a mistake is discovered in the initial report. In the *Lee* case, the property description in the policy was not a *verbatim* match of the description in the preliminary report. Evidently, someone at Fidelity realized that the property description in the preliminary report should not have contained a reference to the second assessor's parcel number; they made the mistake of trying to "correct" the error by deleting this reference from the property description in the policy. In so doing, Fidelity ultimately was held to be bound by the description used in the preliminary report, and thus was liable to the insureds when it was discovered that they did not own the second parcel.