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Title Insurance Policy Did Not Cover Claimed Losses Allegedly Caused By Landmark Designation, New York Federal Court Decides

A federal district court in New York has rejected a lawsuit filed by insureds under a title insurance policy demanding indemnification for the ostensible diminution in their insured property's value stemming from an unexpected landmark designation.

The Case

Fawn Second Avenue LLC, 1881 Second Avenue LLC, and SFP 1881 Holdings LLC (collectively, the "Plaintiffs") purchased property located at 82 Second Avenue in New York City (the "Property") on November 17, 2015. At that time, First American Title Insurance Company issued a title insurance policy (the "Policy") to the Plaintiffs.

Approximately two years later, the Plaintiffs endeavored to make improvements to the Property, including by installing a roof railing, replacing windows, painting the storefront, and adding signage. The Plaintiffs asserted, however, that, unbeknownst to them, on October 9, 2012, the Property had been designated by the New York City Landmarks Preservation Commission (the "LPC") as part of the East Village/Lower East Side Historic District. On or about October 3, 2017, the Plaintiffs received three separate warning letters from the LPC demanding that their work to improve the Property "stop immediately" because the Property was located "on a landmarked site or within a landmarked historic district."

On October 12, 2017, the Plaintiffs sent a letter to their title insurer with a notice of claim under the Policy seeking insurance coverage for the diminished value of the Property incident to its landmark status. The title

insurer disclaimed coverage, and the plaintiffs brought suit. They argued that the undisclosed landmark designation created a defect in the Property's title that the title insurer had to indemnify against.

The title insurer moved to dismiss. It argued that the revelation of the Property's landmark status was not a covered risk under the Policy and that, even if it were, the risk was excluded from coverage by several of the Policy's exclusions.

The District Court's Decision

The court granted the title insurer's motion to dismiss, finding that the Policy did not provide coverage for the losses that the plaintiffs sought to recover.

In its decision, the court first considered the Plaintiffs' bid for coverage under Covered Risk 2, which provided coverage for specified title defects or encumbrances.

The court was not persuaded by the Plaintiffs' contention that their claim fit squarely within Covered Risk 2 because the landmark designation affected their title to the Property. The court agreed with the title insurer that a landmark designation from the LPC did not create a defect, lien, or encumbrance on the Property's title to qualify for Covered Risk 2. Rather, the court said, a landmark designation was an exercise of governmental power that served merely to regulate the Property's use or development, which was "wholly distinct from the types of impairments on Plaintiffs' ownership or interest in the Property addressed by Covered Risk 2." Simply put, the court said that, "local regulations that restrict the use or development of real property do not give rise to a defect in or encumbrance on title." According to the court, the LPC's landmark designation restricted the manner in which the Property could be used, but it in no way impacted the Plaintiffs' right to "unencumbered ownership and possession" of the Property. Accordingly, the court held, Covered Risk 2 did not extend to the Property's landmark status.

Next, the court considered whether the Plaintiffs were entitled to coverage under Covered Risk 5, which insured against risks associated with the violation or enforcement of certain laws or governmental regulations recorded in the Public Records. More precisely, Covered Risk 5 indemnified the Plaintiffs for loss or damage incurred by reason of:

> [t]he violation or enforcement of any law, ordinance, permit, or governmental regulation . . . restricting, regulating, prohibiting or relating to . . . (a) the occupancy, use, or enjoyment of the Land [or] (b) the character, dimensions, or location of any improvement erected on the Land . . . if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
>
> The Plaintiffs asserted that this provision entitled them to coverage if "*any* governmental authority restricts [their] ability to use or enjoy the Property" or to improve it for a particular purpose. (Emphasis added.).

For its part, the title insurer focused on the requirement that any violation or intent to enforce must be recorded in the Public Records – a defined term in the Policy limited to those "[r]ecords established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge" – to trigger a coverage obligation under Covered Risk 5. The title insurer argued that the Property's landmark designation did not appear in the relevant Public Records concerning the Property's chain of title, meaning that Covered Risk 5 could not entitle the Plaintiffs to indemnification for losses based on the LPC's unrecorded exercise of governmental power.

The court agreed with the title insurer, declaring that the title insurer offered "the only plausible reading of Covered Risk 5," whereas the Plaintiffs' proffered interpretation was "untethered from the Policy's language" and imposed obligations on the title insurer "for which the parties did not contract."

In the court's opinion, in the context of the Property and the landmark designation at issue in this case, "Public Records" meant the real property records maintained by the Office of the City Register, as reflected on the Automated City Register Information System ("ACRIS").

Therefore, the court held, by its plain terms, Covered Risk 5 was triggered only insofar as a notice of a legal violation or intent to enforce a law was recorded in the real property records maintained by the Office of the City Register. The court added that although it was undisputed that the Property received landmark status as early as October 9, 2012, the ACRIS records revealed that the landmark designation was not recorded until August 19,

2020. Therefore, the court held, because the landmark designation was not recorded in the relevant public records as of the date of the Policy, it could "not stand as the basis for coverage under Covered Risk 5."

Because the Property's unrecorded landmark designation did not fall into either of these two Covered Risks, and because it was not encompassed within any of the Policy's other Covered Risks, the court concluded that the Plaintiffs were not entitled to indemnification for their losses, and it dismissed their claims for breach of contract and declaratory judgment.

The case is *Fawn Second Avenue LLC v. First American Title Ins. Co.*, No. 21 Civ. 3715 (KPF) (S.D.N.Y. July 11, 2022).

Title Insurer Defeats Defendants' Motions to Dismiss Title Insurer's Indemnification Action

A New York trial court has refused to dismiss a title insurance company's lawsuit seeking common law indemnification, rejecting all of the grounds asserted by the defendants in their motions seeking dismissal.

The Case

The case, brought by Fidelity National Title Insurance Company (the "plaintiff") against four defendants – Heritage Titles, Joseph Muro, and Melissa Muro (collectively, "Heritage), and Ernani DaSilva ("DaSilva") – arose out of a series of mortgages that encumbered property in Massapequa, New York (the "Property").

As the court explained, in 2003, the then-owner of the Property, Linda Alioglu-DaSilva ("Linda"), executed a mortgage with Fremont Investment & Loan (the "Fremont Mortgage") for $165,000. The Fremont Mortgage was recorded with the Nassau County Clerk on June 23, 2003.

In 2004, Linda executed a mortgage with Ameriquest Mortgage Company (the "Ameriquest Mortgage") for $244,000. The Ameriquest Mortgage was recorded with the Nassau County Clerk on November 3, 2004.

A Satisfaction of Mortgage for the Fremont Mortgage was recorded with the Nassau County Clerk's Office on December 28, 2004. However, the satisfaction's endorsement cover page erroneously referenced the recording information for the Ameriquest Mortgage rather than the recording information for the Fremont Mortgage.

Linda died in 2005, at which time ownership of the Property passed to her husband, DaSilva. In 2010, DaSilva executed a Home Equity Conversion Mortgage (the "Reverse Mortgage") with Bank of America. As part of its issuance of the Reverse Mortgage, Bank of America purchased a Lender Policy of Insurance (the "Policy") from the plaintiff.

A title search on the Property was performed in connection with the issuance of the Reverse Mortgage. The defendants later asserted that Bank of America contracted with Rochester Equity Partners, Inc. d/b/a WebTitle Agency, Cascade Settlement Agency and Customized Lenders Services ("WebTitle") to obtain the title search. Heritage maintained that it was subcontracted by WebTitle, after which time it performed a title search in relation to the Property.

Heritage did not identify the Ameriquest Mortgage as encumbering the Property in the title search. As a result, the Ameriquest Mortgage was not excepted from coverage under the Policy.

In 2014, the Ameriquest Mortgage was assigned to Wilmington Savings Fund Society, FSB ("Wilmington Savings"). In 2016, Wilmington Savings filed a foreclosure action on the Ameriquest Mortgage (the "Ameriquest Foreclosure") in a New York trial court.

Bank of America was named as a defendant in the Ameriquest Foreclosure along with DaSilva and the administrator of Linda's estate. Bank of America's servicer submitted a claim to the plaintiff under the Policy. That led the plaintiff to retain counsel to defend the action in the Ameriquest Foreclosure on behalf of Bank of America's servicer. Summary judgment was entered in Wilmington Savings' favor on January 26, 2018. The court in the Ameriquest Foreclosure established the Ameriquest Mortgage as having a first lien position against the Property, with priority over the Reverse Mortgage.

The plaintiff subsequently fulfilled its obligations under the Policy and resolved the claim by paying Bank of America's servicer approximately $294,000 to satisfy the Ameriquest Mortgage. Wilmington Savings then sold the Property. The plaintiff thereafter filed its lawsuit for common law indemnification against Heritage and DaSilva, seeking $354,574.27 in damages, constituting the amount it paid on the Policy plus legal fees, costs, and expenses incurred in the Ameriquest Foreclosure. The plaintiff alleged that it was entitled to common law indemnification against Heritage and DaSilva because it was entirely without fault with respect to the damages it

incurred by having to pay the claim on the Ameriquest Foreclosure and because their actions were responsible for the loss.

The defendants moved to dismiss. Among other things, they argued that the plaintiff's lawsuit was filed after the statute of limitations had expired and that the plaintiff failed to state a cause of action for common law indemnification (also known as equitable indemnification).

The Court's Decision

The court denied the defendants' motions to dismiss.

In its decision, the court rejected the defendants' contention that the six-year statute of limitations on the plaintiff's indemnification claims accrued in 2010, at the time of the title search, and expired in 2016, before the plaintiff filed its lawsuit on August 17, 2020.

The court explained that the statute of limitations on a claim for indemnity or contribution accrued "only when the person seeking indemnity or contribution has paid the underlying claim." Thus, the court continued, the statute of limitations for indemnity claims arising from the plaintiff's liability under the Policy accrued when the plaintiff paid the claim for the Ameriquest Foreclosure on October 22, 2018. The plaintiff's indemnification action, therefore, was timely filed, the court ruled.

The court also rejected the defendants' argument that the plaintiff's lawsuit had to be dismissed because it failed to state a cause of action for common law indemnification. The court pointed out that the plaintiff's complaint alleged that the plaintiff sustained its loss by fulfilling its obligations under the Policy to resolve the claim in the Ameriquest Foreclosure. The plaintiff asserted that it did not commit any act of wrongdoing that caused it to sustain its loss but that its loss arose due to its liability under the Policy because Heritage failed to identify the Ameriquest Mortgage while conducting the 2010 title search and because DaSilva defaulted on the Ameriquest Mortgage, resulting in the foreclosure proceedings. Therefore, the court ruled, the facts alleged by the plaintiff were sufficient to state a claim for common law indemnification as against both Heritage and Da Silva.

The case is *Fidelity National Title Ins. Co. v. DaSilva*, 2022 N.Y. Slip Op. 32111(U) (Sup. Ct. N.Y. Co. July 6, 2022).

New York Appellate Court Affirms Trial Court Decision Finding That Insured's Alleged Losses Were Not Covered by Title Insurance Policy

An appellate court in New York has affirmed a trial court's decision granting summary judgment in favor of a title insurer in an action brought by the insured seeking damages for breach of contract and seeking a judgment declaring that losses the insured allegedly incurred were covered by the policy.

The Case

The case arose after the plaintiff, 50 Clarkson Partners LLC ("50 Clarkson"), agreed to purchase certain real property in Brooklyn encumbered by a restrictive covenant that included a building height restriction. 50 Clarkson's obligation to close was subject to a condition precedent that the seller enter into an agreement with the adjacent property owners to modify the restrictive covenant so as to enable the plaintiff to perform certain construction.

The seller subsequently executed an agreement to modify the restrictive covenant, and 50 Clarkson proceeded with the closing. Following the closing, 50 Clarkson filed a claim with Old Republic National Title Insurance Company, pursuant to its title insurance policy, asserting that the modified restrictive covenant did not enable 50 Clarkson to proceed with its construction plans for the property.

The title insurer disclaimed coverage on grounds including that the claim fell within Exclusion 3(a) of the policy, which excluded "[d]efects, liens, encumbrances, adverse claims, or other matters . . . created, suffered, assumed, or agreed to by [50 Clarkson]."

In August 2018, 50 Clarkson filed a lawsuit against the title insurer, seeking to recover damages for breach of contract and for a judgment declaring that losses allegedly incurred by 50 Clarkson were covered under the insurance policy. 50 Clarkson alleged, among other things, that the modified restrictive covenant was not included in the exemptions from coverage under the policy.

The title insurer moved to dismiss the complaint. The trial court granted its motion, and 50 Clarkson appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court found that the title insurer's evidentiary submissions demonstrated that 50 Clarkson's claim "fell within exclusion 3(a) of the policy." Thus, the appellate court found, the title insurer "demonstrated that material facts alleged in [50 Clarkson's] complaint were not facts at all, and that no significant dispute exists regarding them."

The appellate court concluded by remitting the case to the trial court for entry of a judgment declaring that the losses allegedly incurred by 50 Clarkson were "not covered under the subject title insurance policy."

The case is *50 Clarkson Partners, LLC v. Old Republic National Title Ins. Co.*, 206 A.D.3d 956 (2d Dep't 2022).

Standard Exclusion 3(a) Barred Coverage of Insured's Claim Under Title Insurance Policy

A Florida court, relying on a title insurance policy's Standard Exclusion 3(a), has decided that a title insurer was not obligated to defend its insured against claims that the insured failed to meet an obligation to which it was contractually bound.

The Case

The case arose in 2009 when Camilo K. Salas, III, as Trustee (the "Trustee") of the Salas Children Trust (the "Trust"), purchased Courtyard Lot 7, Block NN, Alys Beach Phase 2-B, in the Town of Alys Beach, Florida (the "Lot"), from Ebsco Gulf Coast Development, Inc. ("Ebsco"), for $1,350,000. The Trust, through the Trustee, and Ebsco entered into a purchase and sale agreement (the "Purchase Agreement"), dated July 31, 2009, for the Lot.

Commonwealth Land Title Insurance Co. ("Commonwealth") issued a Florida Owner's Title Policy to the Trust dated October 2, 2009 (the "Policy") covering the Trust's title to the Lot. The Policy excepted from coverage loss or damage arising from various documents identified in Schedule B of the Policy. One of those documents listed in Schedule B was the recorded Declaration of Covenants, Conditions and Restrictions for the Neighborhood of Alys Beach (the "Declaration of Covenants").

The Declaration of Covenants contained a provision requiring purchasers to build on the Lot within two years of purchase the Lot. If the purchaser failed to comply with that requirement, then Section 4.3 of the Declaration of Covenants gave Ebsco "the right, but not the obligation, to repurchase the Lot for the amount set

out in the Declaration." The warranty deed also included a "NOTICE OF REPURCHASE OPTION" that referenced that provision of the Declaration of Covenants.

The Purchase Agreement contained the same two year requirement and repurchase option in favor of Ebsco. Additionally, under the Purchase Agreement, the Trust was "obligated to pay [Ebsco], as liquidated damages, a monthly amount equal to ten percent (10%) of the Total Purchase Price divided by twelve (12) for each month (or portion thereof if applicable) for which commence of the construction or completion of construction is delayed." According to the Trust, this came to $11,250.00 per month. The Purchase Agreement was not identified as an exception in Schedule B of the Policy.

The Trust did not build on the Lot within two years of closing. In 2015, Ebsco filed suit against the Trust for breach of the Purchase Agreement, Declaration and Covenants, and warranty deed, seeking to repurchase the Lot and recover liquidated damages.

Subsequently, the Trust sought defense and indemnification from Commonwealth for the Ebsco litigation. Commonwealth denied coverage and the Trust settled the Ebsco litigation on August 31, 2018. The settlement included Ebsco repurchasing the Lot for a significantly reduced price. Additionally, the Trust incurred $846,430.12 in costs to defend the Ebsco Litigation.

After the conclusion of the Trust's litigation with the developer, the Trust sued Commonwealth and asserted claims including failure to provide a defense, failure to indemnify, and bad faith failure denial of coverage. The Trust sought $1,780,517.62 as attorneys' fees, costs, and damages it incurred as a result of settling the litigation.

Commonwealth moved to dismiss.

The Court's Decision

The court, applying Florida law, granted Commonwealth's motion.

In its decision, the court focused on the Policy's Standard Exclusion 3(a), which excludes from coverage, "Defects, liens, encumbrances, adverse claims or other matters created, suffered, assumed or agreed to by the insured claimant."

Finding "nothing ambiguous about the exclusion or any reason why the exclusion cannot be interpreted based on its plain meaning," the court explained that the exclusion applies to two primary factual situations. The first situation, the court said, occurs when language in the insured's purchase or mortgage contract suggests that the insured took title "subject to" a specific lien, encumbrance, or other title defect; that situation did not apply to this case.

The second situation, the court said, occurs when the insured failed to perform some act it assumed or agreed to in a legal contract. This situation, the court continued, applied in this case.

The court then observed that there was "no dispute" that:

- The Trust failed to build a home on the Lot within two years; and
- The Trust agreed to build a home on the Lot within two years or face certain penalties when it entered into the Purchase Agreement with Ebsco.

The court then stated that this was a "textbook case for the application of Exclusion 3(a)." According to the court, finding coverage here would put Commonwealth "in the unenviable position of insuring against events over which the insured had responsibility and control."

The court added that having Commonwealth insure the Trust against consequences of its own acts and based on liability agreed to by the Trust was not "the type of risk that title insurance is built to bear."

The court concluded that the Policy did not insure the Trust against the consequences of its own acts, did not provide coverage for loss occasioned by the Trust's alleged breach of the terms of the Purchase Agreement, and Commonwealth was not obligated to defend or indemnify the Trust for the Ebsco Litigation, which was based solely on that breach.

The case is *Salas v. Commonwealth Land Title Ins. Co.*, No. 3:21-cv-890-MCR-HTC (N.D. Fla. April 5, 2022).

Nevada Federal Court Continues Stay of HOA Coverage Dispute Pending Nevada Supreme Court Ruling

A federal district court in Nevada has granted a motion by Commonwealth Land Title Insurance Company to extend the stay of a coverage action filed by Deutsche Bank National Trust Company Americas pending a decision by the Supreme Court of Nevada that is expected to interpret the standard form language in the 1992

American Land Title Association ("ALTA") loan policy of title insurance (the "ALTA Policy") and the California Land Title Association ("CLTA") 100/ALTA 9 endorsement (the "CLTA Endorsement").

The Case

The case brought by Deutsche Bank against Commonwealth arose out of the numerous and long-standing homeowners' association ("HOA") foreclosure actions prevalent in Nevada. At issue in these cases is whether a title insurance claim involving an HOA assessment lien, and subsequent foreclosure sale, is covered by the corresponding title insurance policy. The parties dispute how to interpret the standard form language in the ALTA Policy and the CLTA Endorsement.

In 2019, the court granted a stay in the Deutsche Bank case (and in many other title insurance cases) pending a decision by the U.S. Court of Appeals for the Ninth Circuit in *Wells Fargo Bank, N.A. v. Fidelity National Title Ins. Co.*, Ninth Cir. Case No. 19-17332, Dist. Ct. Case No. 3:19-cv-00241-MMD-WGC) (the "*Wells Fargo II* Appeal"), which many anticipated would interpret the policy language at issue in the ALTA Policy and the CLTA Endorsement.

The *Wells Fargo II* Appeal, however, concluded without the Ninth Circuit reaching the policy interpretation issue.

In the case brought by Deutsche Bank against Commonwealth, Commonwealth contended that *PennyMac Corp. v. Westcor Land Title Ins. Co.*, Nev. Sup. Ct. Case No. 83737 (Eighth Judicial District Case No. A-18-781257-C) (the "*PennyMac* Appeal"), pending in the Nevada Supreme Court, would shed light on the policy language because it also concerns the ALTA Policy and the CLTA Endorsement. Commonwealth asked the court to extend the stay.

The Court's Decision

The court granted Commonwealth's motion.

In its decision, the court explained that a district court's power to stay a proceeding was "incidental to the power inherent in every court" to manage its docket and promote the efficient use of judicial resources. The court added, however, that, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both," and that a party seeking such a stay

must "make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else."

The court said that, to determine whether a stay was warranted, it had to weigh the possible damage that might result from a stay; the hardships or inequities a party might suffer if required to go forward; and the "orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law" that could be expected to result from a stay.

In this case, the court found, the benefits of continuing the stay outweighed any possible hardships of lifting it. The court said that, after reviewing the issues at stake in the *Wells Fargo II* Appeal, the *PennyMac* Appeal, and the Deutsche Bank case, it appeared that the *PennyMac* Appeal "may provide the exact interpretation" of the ALTA Policy and the CLTA Endorsement that the parties originally sought from the *Wells Fargo II* Appeal.

The court pointed out that Deutsche Bank and Commonwealth had previously agreed and stipulated that waiting for these interpretations from the *Wells Fargo II* Appeal would not prejudice either of them and that a stay of the Deutsche Bank lawsuit would "best serve the interests of judicial economy (given the possibility the Ninth Circuit Court of Appeals' decision on the *Wells Fargo II* Appeal might affect the disposition of this case)."

The court concluded by stating that it found "no reason why waiting for the same interpretations from the *PennyMac* Appeal would now cause prejudice or fail to serve the interests of judicial economy," especially when considering that Deutsch Bank had "not identified any hardship, other than the passage of time," that it would suffer by continuing the stay. Therefore, the court concluded, the "orderly course of justice" was best served by continuing the stay while the Nevada Supreme Court considers the *PennyMac* Appeal.

The case is *Deutsche Bank National Trust Co. Americas v. Commonwealth Land Title Ins. Co.*, No.: 2:19-cv-00761-GMN-DJA (D. Nev. Sept. 13, 2022).

New Mexico Appellate Court Upholds Dismissal of Breach of Contract Claim Against Title Insurer

A New Mexico appellate court has upheld a trial court's decision granting summary judgment in favor of a title insurer on a plaintiff's breach of contract claim where the trial court concluded that coverage under the title

insurance policy, which had been issued to a separate entity, ended before the plaintiff made his title insurance claim.

The Case

The case arose after Pensco Pension Services, Inc. ("Pensco"), as custodian for the benefit of Paul M. Kinzelman's individual retirement account ("IRA"), purchased an unimproved tract of land in Valencia County, New Mexico, by warranty deed in July 2001. Stewart Title Guarantee Company ("Stewart Title") issued an owner's policy of title insurance to "Pensco Pension Services, Inc." for the property (the "Policy"), effective on the date of the property purchase.

In 2005, Pensco conveyed the property by quitclaim deed to Zia Trust, Inc. as Custodian for Paul Kinzelman IRA # 964770 (the "Zia Trust").

In 2016, Zia Trust conveyed the property by quitclaim deed to Paul Kinzelman Living Trust.

In 2018, Kinzelman submitted a claim to Stewart Title based on a purported title defect predating Pensco's 2001 purchase of the property.

Stewart Title denied the claim, and Kinzelman sued Stewart Title for breach of contract in a New Mexico trial court.

Stewart Title moved for summary judgment. Stewart Title argued that Kinzelman was not an insured under the Policy and consequently could not pursue a claim under the Policy, and, regardless, the conveyances of Lot 54 by quitclaim deed terminated coverage under the Policy.

Kinzelman countered that he could submit a claim by way of an assignment or by virtue of his status as a third-party beneficiary or real party in interest, and that termination of coverage was irrelevant.

At the same time, Kinzelman filed an amended complaint in which he both reasserted his breach of contract claim and asserted a new claim for fraud.

In reply, Stewart Title maintained that summary judgment was appropriate because coverage under the Policy had terminated.

The trial court granted Stewart Title's motion, reasoning that "coverage under the title insurance policy issued to Pensco Pension Services, Inc. terminated when the property was conveyed in November 2005." In so doing, the court dismissed Kinzelman's amended complaint.

Kinzelman appealed.

The Appellate Court's Decision

The appellate court agreed with the trial court that coverage terminated before Kinzelman made his claim and ruled that the grant of summary judgment for breach of contract was warranted on this basis, but it did not agree that this was a proper basis for summary judgment on Kinzelman's fraud claim.

In its decision, the appellate court explained that although the parties disputed, as a threshold matter, whether Kinzelman could pursue a claim under the Policy as a third-party beneficiary, as a real party in interest, or as Pensco's assignee, it did not have to resolve that dispute because even if it assumed that Kinzelman stood in the shoes of Pensco for purposes of the Policy, it agreed with the trial court that "coverage under the title insurance policy issued to Pensco Pension Services, Inc. terminated when the property was conveyed in November 2005."

The appellate court explained that the Policy provided that Pensco, as the named insured, would maintain coverage under the Policy "only so long as the insured retains an estate or interest in the land, . . . or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest." The appellate court pointed out that in 2005, Pensco conveyed the property to Zia Trust by quitclaim deed. After it did so, Pensco retained no estate or interest in the property. Thus, the appellate court ruled, according to the Policy's terms, Pensco's coverage terminated in 2005 when it conveyed the property to Zia Trust by quitclaim deed.

The appellate court added that because coverage terminated "well before Kinzelman made his title insurance claim under the Policy," no claim for breach of contract could arise, and summary judgment was warranted on Kinzelman's breach of contract claim.

The appellate court was not persuaded by Kinzelman's contention that the property was transferred to Zia Trust "by operation of law" and, therefore, that Zia Trust was insured under the Policy. (The appellate court said

that, presumably, Kinzelman's argument was intended to refer to the Policy definition of "insured," which provided that an insured was "the insured named in Schedule A, and . . . those who succeed to the interest of the named insured *by operation of law* as distinguished from purchase including, but not limited to, heirs, distributes, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors." (Emphasis added.))

Among other things, the appellate court reasoned that the issue provided no basis for reversal "given the lack of accompanying record and legal support." Therefore, it refused Kinzelman's argument that the property was transferred to Zia Trust by operation of law.

The appellate court also rejected Kinzelman's contention that the policy was ambiguous as to when Stewart Title's liability under the Policy terminated.

The appellate court, however, decided that the trial court should not have dismissed Kinzelman's fraud claim. It explained that although termination of coverage was justified by the absence of a contractual relationship between Stewart Title and Kinzelman, a contractual relationship was "not necessarily an element of fraud." Moreover, the appellate court continued, it did not appear that Kinzelman's particular fraud claim depended on a contractual relationship between the parties.

More fundamentally, the appellate court conclude, given that Kinzelman's amended complaint adding the fraud claim was filed after Stewart Title's motion for summary judgment, the motion necessarily did not address the fraud claim and it was error for the trial court to grant summary judgment as to this claim.

The case is *Kinzelman v. Stewart Title Guarantee Co.*, No. A-1-CA-38518 (N.M. Ct. App. June 21, 2022).

Florida Appellate Court Affirms Decision Striking Down Purchase Option Provision in Condominium Declaration

An appellate court in Florida has affirmed a trial court's decision finding a purchase option provision in a condominium declaration to be unenforceable.

The Case

814 Property Holdings, LLC, and New Birth Baptist Church Cathedral of Faith International, Inc., each owned a unit in a two-unit condominium building located in Miami-Dade County. 814 Property owned unit

number one, and New Birth owned unit number two. From its unit, New Birth operated a gospel radio station that broadcast via a large radio antenna located on the condominium property.

The declaration of condominium that created the two-unit condominium included specific provisions accounting for the radio antenna. The declaration categorized the antenna as "a Limited Common Element appurtenant to Unit. No. 2 [New Birth's condominium unit]," and included a clause giving 814 Property a first option to purchase New Birth's condominium unit:

> [A] right of first offer exists in favor of the Owner of Unit No. 1 ("Owner 1") to purchase Unit No. 2 upon and subject to the terms and conditions hereinafter set forth. The owner of Unit No. 2 ("Owner 2"), for good and valuable consideration paid by and received from Owner 1, has granted and does hereby give and grant unto Owner 1 the right and option to purchase ("Purchase Option") Unit No. 2 for the sum of $200,000.00 ("Option Price") upon and subject to the terms and conditions herein contained. The owner of Unit No. 2 ("Owner 2") agrees to use its best and good faith efforts to obtain approval for the transfer of the Radio Antenna by the Federal Communications Commission ("FCC").

In August 2017, 814 Property exercised its right under the option clause to purchase Unit No. 2. 814 Property directed that New Birth "immediately use its best and good faith efforts to obtain approval for the transfer of the Radio Antenna by the [FCC]" to an appointee assigned by 814 Property. After New Birth refused to either recognize the purchase or transfer ownership of the radio antenna, 814 Property sued.

Specifically, 814 sought both a declaratory judgment that the declaration of condominium obligated New Birth to use good faith efforts to obtain approval from the FCC for the transfer of the radio antenna to 814 Property (Count I), and damages and specific performance for the alleged breach of the declaration of condominium due to New Birth's failure to comply with the option clause (Count II).

New Birth counterclaimed, asking that the court declare the option clause unenforceable and void as a restraint on alienation.

Both parties moved for summary judgment. After a hearing, the trial court granted summary judgment in favor of New Birth, interpreting the declaration to have clearly and unambiguously intended for the word "transfer" to refer to transferring the antenna to another location, rather than to 814 Property, upon the exercise

of the purchase option, as well as finding the option clause itself void and unenforceable as an unreasonable restraint on alienation.

814 Property appealed.

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court explained that a condominium declaration is a contract possessing "attributes of a covenant running with the land" and "spelling out mutual rights and obligations of the parties thereto." The appellate court then found that the trial court properly entered summary judgment in favor of New Birth on the basis that the option clause in the declaration was an unreasonable restraint on alienation.

According to the appellate court, the declaration of condominium imposed both a fixed price and an indefinite duration on the purchase option. The option clause allowed "a right of first offer . . . in favor of [814 Property] to purchase Unit No. 2" for a fixed price of $200,000.00. This provision included no time limit for the option, providing only that "[t]he Purchase Option shall be exercisable" within 10 days of New Birth providing notice of its effort to obtain transfer of the radio antenna from the FCC. The appellate court found that nothing required New Birth to seek such approval within a limited time, and if New Birth obtained FCC approval, the option would not terminate; rather, 814 Property would retain a right of first refusal on any outside offers, and this right would lapse only if not timely exercised.

The appellate court concluded that because these terms would constrain the development and marketability of the unit around New Birth's endeavors to transfer the radio antenna, the trial court properly concluded that the option clause was unenforceable and granted summary judgment on that basis.

The case is *814 Property Holdings, LLC v. New Birth Baptist Church Cathedral of Faith Int'l, Inc.*, No. 3D20-0233 (Fla. Ct. App. July 13, 2022).

Wisconsin Appellate Court Affirms Decision Denying Title Insurance Coverage of Neighbors' Easement Dispute

A Wisconsin appellate court has affirmed a trial court's decision granting summary judgment in favor of a title insurer in a case in which insureds sought coverage for a dispute over an easement.

The Case

Neighbors Steve and Norb Columb and Gregory and Katherine Cox owned property in Marinette County, Wisconsin. Both parcels were located north of County Highway X, which runs east-west. The Coxes' property abutted County Highway X to the north. The Columbs' property was north of the Coxes' property, with two side-by-side parcels separating the Columbs' and the Coxes' properties.

Willard DeGroff formerly owned the Columbs' property, the Coxes' property, and the two properties between them. In the mid-1990s, in four transactions, DeGroff deeded (the "DeGroff Deeds") the northern portion of his property to the Columbs, the southern portion of his property to the Putirskises, and the two properties in between to other owners.

DeGroff Deed 1, for the Columbs' property, established an easement (the "Original Easement"). The Original Easement started at County Highway X and ran northeast through the Putirskises' property and onto the Columbs' property, thereby providing the Columbs with access to the highway. DeGroff Deeds 2 and 3 conveyed an interest in the Original Easement. DeGroff Deed 4, for the Putirskises' property, reserved the Original Easement for the use of several parcels, including the parcel owned by the Columbs.

In 2016, the Putirskises recorded a modification of the Original Easement (the "Modification"). The Modification purported to reroute the easement's location to the east, away from the house and other buildings on the property (the "Modified Easement"). The Columbs, however, did not sign the Modification and apparently never agreed to move the easement from its original location.

In January 2017, the Putirskises sold their property to the Coxes. An addendum to the deed stated that the property was "subject to that ingress/egress easement set forth in [DeGroff Deed 1], as modified in [the Modification]."

In 2019, the Columbs sued the Coxes for wrongful interference with the easement, alleging that the Coxes consistently parked vehicles in or otherwise blocked the Original Easement. The Columbs alleged that the Coxes' actions began around the time of the Coxes' purchase, were ongoing, and persisted even after the Columbs, their counsel, and the Marinette County Sheriff's Department told the Coxes to stop interfering with the Columbs' use

of the easement. The Columbs sought compensatory damages and an order enjoining the Coxes from interfering with their easement rights.

The Coxes answered and requested an injunction prohibiting the Columbs from further trespass and a judicial determination of the location, scope, and other provisions of any easement in which the Columbs retained easement rights.

The Coxes tendered their defense of the Columbs' claims to their title insurer, WFG National Title Insurance Company ("WFG"), which had issued a standard 2006 American Land Title Association ("ALTA") owner's policy to the Coxes. WFG denied the claim. The Coxes then filed a third-party complaint against WFG for breach of contract.

WFG moved for summary judgment, arguing that there was no coverage under the policy. The court granted WFG's motion, dismissed the Coxes' claim against WFG, and dismissed WFG as a party.

The Coxes appealed. First, they argued that WFG could not rely on Policy exceptions that might otherwise preclude coverage because WFG issued the Policy three years late. Second, they argued that the Policy required WFG to defend and indemnify them in this lawsuit and that exceptions to coverage for certain easements (the "Easement Exceptions") did not preclude coverage.

The Easement Exceptions

The Easement Exceptions in the Policy provided that:

> This policy does not insure against loss or damage, and [WFG] will not pay costs, attorneys' fees or expenses that arise by reason of: . . .
>
> 8. Rights and/or claims of others in and to that ingress/egress easement as set forth in [DeGroff Deeds 1-4] *and as modified* in [the Modification]. (Easements benefit several parcels located adjoining or near to the insured premises.)
>
> 9. Terms and provisions as to use and maintenance of that ingress/egress easement as set forth in [DeGroff Deeds 1-4] *and as modified* in [the Modification]. (Easements benefit several parcels located adjoining or near to the insured premises.) (Emphasis added.)

The Appellate Court's Decision

The appellate court affirmed.

In its decision, the appellate court first pointed out that WFG issued the Coxes' title insurance commitment (the "Commitment") on January 10, 2017, 13 days before the Coxes recorded their deed. WFG, however, did not issue the Policy until April 2020, several months after the Coxes filed their third-party complaint against WFG. It then ruled that the late issuance of the Policy had no effect on WFG's coverage obligations because the Commitment and the Policy contained "identically worded Easement Exceptions." Accordingly, the appellate court rejected the Coxes' argument that, because they did not timely receive the Policy, they were unaware that their contract excepted coverage for disputes relating to the easement.

Next, the appellate court considered whether the Easement Exceptions in the Policy precluded coverage for the Columb/Cox lawsuit. It rejected the Coxes' central argument that the exceptions only referred to a single easement – the Modified Easement – and, therefore, that coverage was not excepted for any losses or disputes relating to the Original Easement.

The appellate court said that this argument attached an "improper significance" to the Easement Exceptions' use of the phrase "and as modified." According to the appellate court, the reference to "that ingress/egress easement as set forth in [DeGroff Deeds 1-4] and as modified in [the Modification]" was not a representation that the Original Easement was (or was not) validly modified or that coverage would be excepted only for an easement in some specific modified location. Rather, the appellate court continued, in issuing the Policy, WFG determined the records that were associated with "that ingress/egress easement" (namely, the four DeGroff Deeds and the Modification), and it listed those instruments where pertinent, including in the Easement Exceptions. In this way, the appellate court ruled, WFG notified the Coxes of which title defect or encumbrance was being excepted.

The appellate court then ruled that, by their plain terms, the Easement Exceptions precluded coverage for an identified easement – "that ingress/egress easement" – and provided the Coxes with the additional information they needed to determine the title defect or encumbrance these exceptions were meant to reference. In short, the appellate court concluded, the phrase "and as modified" did not substantively limit the

scope of the Easement Exceptions in the manner the Coxes suggested. Rather, the Policy excepted coverage for "that ingress/egress easement" regardless of which path ultimately was determined to be enforceable.

The case is *Columb v. Cox*, No. 2020AP1593 (Wisc. Ct. App. June 7, 2022).