CASE LAW

A quarterly compilation of recent rulings impacting the title industry

TOP CASES

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DENIED: New ruling throws wrench in Coldwell Banker Burnet case

Fiduciary duty

On Dec. 14, Judge **Francis J. Connolly**, of the Hennepin County District Court in the Fourth Judicial District of Minnesota, issued a 42-page opinion ruling to deny class certification in the controversial fiduciary duty suit pending against Burnet Realty, d/b/a Coldwell Banker Burnet.

The suit, filed by plaintiffs **Kenneth** and **Dylet Grady** in February 2007, set off a round of shockwaves throughout the industry as it contained the claim that the real estate agents violated their fiduciary duties to customers by steering them to their affiliated title company, Burnet Title, allegedly knowing that its prices were higher than those charged by comparable title companies.

Although the complaint alleged that the proper RESPA affiliatedbusiness disclosures were provided, the plaintiffs argued that this disclosure wasn't enough, and that the information was "deceptive, ambiguous and incomplete."

More chapters to be written Regarding the new ruling, plaintiffs' counsel **Hart Robinovitch** of Zimmerman Reed PLLP, said, "Obviously the plaintiffs are disappointed in the outcome of the hearing. We believe there are significant legal errors made by the judge in terms of his analysis of the governing law for breach of fiduciary duty claims, and certainly for a Consumer Fraud Act claim.

"The judge's interpretation and reliance on the case law he cited is dead wrong." He added, "The Minnesota Supreme Court has made clear in rejecting the standard that Connolly applied that there is not an individual reliance component to the Consumer Fraud Act, and that was the basis to which he denied class certification."

Robinovitch indicated that Connolly had just retired and that this ruling was his last action on the bench, adding, "This case has a lot more chapters to be written, and we're confident that the new judge will correct the legal errors that this judge made."

Battling claims In the original complaint, the plaintiffs claimed that Burnet "creates internal barriers which make it more difficult for a sales associate to recommend and use a title company other than Burnet Title," that Burnet "impedes" the efforts of third-party title companies to market to its customers but assists Burnet Title in its marketing efforts, and that "Burnet offers financial and/or other incentives to its sales associates and/or managers in order to entice them to recommend and direct client's closing and title insurance business to Burnet Title."

The suit sought class action status on behalf of Minnesota citizens who, in the six years prior to the complaint, purchased real estate in a select group of counties under the jurisdiction of the court and used the services of Coldwell Banker Burnet and Burnet Title.

Coldwell Banker Burnet fired back a reply, maintaining that it "does not improperly steer' clients to Burnet Title," and noted, "To the extent that Burnet Title has advantages in getting business, they have a proven track record as a trustworthy and reliable company, and the quality of its products and services." Further, Burnet said, "Although the complaint implies or suggests that the obligations Burnet has under state law are higher than the obligations imposed by [RESPA], the opposite is true."

Under state law, "a fiduciary may be compensated for the referral of business with the principal's knowledge and consent. RESPA prohibits the payment of referral fees regardless of the principal's knowledge and consent," Burnet claimed.

"Under state law, a real estate broker or agent has a duty to disclose to buyers those material facts that could adversely and significantly affect the buyers' use and enjoyment of the property, or any intended use of the property of which the broker or agent is aware. Under RESPA, a real estate broker or agent has a duty to disclose facts about affiliated business relationships to buyers, regardless of whether those facts would affect the buyers' use or enjoyment of the property." Burnet added, "There is absolutely no basis in state law to claim that a fiduciary has a duty to its principal to priceshop before making a referral." Insurmountable' difficulties

In seeking denial of class certification, Burnet claimed that the class would be impossible to identify as, during the proposed class period, more than 8,700 agents worked for Burnet, completing nearly 170,000 transactions.

Depending on the type of transaction, Burnet said, "clients could have entered into one of five different types of contracts, each of which created a different type of relationship with Burnet, with different rights and duties." But "most significantly," Burnet noted, "each Burnet client had a different type of interaction with his or her agent regarding Burnet Title. Some clients may have been referred to' Burnet Title by their agent, while others may have used Burnet Title for other reasons.

Plaintiffs do not respond to this basic argument in their

brief. Indeed, they merely gloss over the problems and state, although management problems inhere in any class action, the district court is vested with broad powers to alleviate any procedural problems which may arise."
In Connolly's order denying class certification, he responded to this claim by saying, "While the court appreciates the superhuman qualities that plaintiffs attribute to it, the court is more mindful of its limited powers to overcome insurmountable procedural and practical difficulties.

Moreover, the court agrees with defendants that it would be nearly impossible to identify who fits the plaintiffs' proposed class definition without conducting a file-by-file review of 160,000 to 170,000 closing files."

Further, Connolly said the problem was compounded by the fact that the proposed class would have to exclude members of a prior

settlement class in the case of *Theresa Boschee v. Burnet Title*, which included borrowers whose transactions included certain settlement fees that were allegedly marked up by Burnet Title. "Because plaintiffs have not shown that the proposed class can be identified without laborious, time-consuming, file-by-file inquiries, class treatment is not appropriate," Connolly said.

Typicality questions Further, the court questioned the typicality of the plaintiffs' claims, stating that the Burnet agent who represented the Gradys, Mary Ellen McGlone, "was not pressured or offered incentives to refer the plaintiffs to Burnet Title."

Also, McGlone and Dylet Grady had both testified that McGlone "had recommended Burnet Title on the basis of Mrs. Grady's desire to close in a convenient place." Thus, the court said, "Plaintiffs cannot claim that McGlone had a duty to disclose the allegedly omitted information, as their own express wishes made the communication of that information irrelevant."

Connolly also noted that the plaintiffs had gone through three closings on their property, used three different title agencies and "acknowledged that Burnet Title was the cheapest title agency that they used, not the most expensive.

Their own experience refutes the complaint's allegations that Burnet Title's fees are among the highest, if not the highest, in Minnesota.'" For the foregoing reasons, the court also questioned whether the plaintiffs would be adequate representatives of the class. Individualized issues The court also addressed the predominance standard regarding questions of fact or law common to the proposed class members, finding that on this point the plaintiffs' motion was "fatally flawed." The case "would be built on a series of individualized determinations of claims, and on individualized examination of evidence relating to those claims, breaches of duty and finally the amount of damages or fee forfeiture," the court said. "In every case there would have to be an individualized and specific inquiry which would defeat the entire purpose of certifying this matter as a class action."

For example, Connolly said the court would have to consider:

1. Whether Burnet had a duty to provide details about competitive title agencies or about financial benefits to its employees. This would include an inquiries into what each client already knew, what each client's reasons were for selecting Burnet Title, what each client communicated to the agent and what the agents had communicated to the clients.

2. Whether Burnet breached a duty to provide details.

3. Whether Burnet acted in its clients' best interests by referring them to Burnet Title.

4. Proof supporting the plaintiffs' claims under the Minnesota Consumer Fraud Act.

5. Proof that the class members suffered any injury at all.

6. Proof of the amount of damages.

7. Whether the class members should be entitled to fee forfeiture. For each of these items, the court said that the inquiry would be based on individualized evidence and not circumstances common to the entire class, thereby ruling to deny class certification on the predominance element.

Based on the foregoing, the court ruled that it could not find that a class action was the superior method for adjudicating the controversy, and denied the plaintiffs' motion. But as Robinovitch indicated previously, the case is not over yet, and the plaintiffs expect that the winds of fortune might soon change in their favor.

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Reissue rate cases heat up in Fla., Pa. and Ohio

Reissue rates

Several class action lawsuits alleging that title underwriters charged full price for title policies to clients eligible for state-law-mandated reissue rates have heated up in recent weeks, with two cases earning class certification from their respective courts, and one Florida settlement going awry.

The reissue rate lawsuits, which began emerging in 2003, continue to represent just one more troublesome backlash from the housing and refi boom. Rising defalcations, claims and lawsuits continue to set off aftershocks in an industry already reeling from the subprime earthquake.

Settlement goes awry

On Jan. 16, the Florida Third District Court of Appeals reversed a trial court's order certifying a settlement class and approving the settlement agreement in a reissue rate case, determining that some of the plaintiffs were "actively misled" and that the consolidated cases were inadequately represented by the named plaintiff.

In the case of *Carmen Grosso and James Chereskin v. Fidelity National Title Insurance Co*. and **Janet Figueroa**, the plaintiffs successfully appealed the trial court's order, saying that that the trial court's consolidation of three separate lawsuits resulted in the class being "inadequately represented."

The appeal rose out of three competing class action lawsuits, *Figueroa v. Fidelity National*, filed on Aug. 24, 2004, in Miami-Dade County; *Grosso v. Fidelity National Title Insurance Company of New York*, filed in Broward County on Aug. 24, 2004; and *Chereskin v. Fidelity National Title Insurance Company of New York*, filed Sept. 21, 2004, in Nassau County.

According to the court opinion, when Figueroa filed her class action lawsuit, Fidelity National and Fidelity N.Y. were separate entities. During the pendency of the litigation, Fidelity National and Fidelity N.Y. merged, with Fidelity National assuming the obligations of Fidelity N.Y.

The court said that on Jan. 20, 2005, Figueroa filed her third amended complaint, expanding her lawsuit to include the Fidelity N.Y. plaintiffs, negotiating with Fidelity National to settle claims against both entities, entering into a settlement agreement with Fidelity, and receiving class certification and preliminary approval of the agreement from the Miami-Dade Circuit Court.

Both *Grosso* and *Chereskin* moved to intervene and to replace class counsel in the Figueroa action, but the Miami-Dade trial court denied their motions.

On appeal, the court determined that Fidelity had "actively misled" the other plaintiffs, but Fidelity fired back a motion for rehearing en banc on Feb. 4, saying the court had misapprehended the facts in the case and created a conflict with prior decisions.

Fidelity fires back

Counsel for Fidelity filed two motions on Feb. 4, the first calling for an order certifying the decision released by the court on Jan. 16 in *Grosso, et al. v. Fidelity, et al*. conflicted with a First District Court of Appeal decision in Fidelity National Title Insurance Company of *New York v. Chereskin*. The second motion called for a rehearing en banc of the Jan. 16 opinion.

Fidelity claims that under the priority doctrine, *Figueroa*, as the first-filed action, has priority over the *Grosso* or *Chereskin* actions, a fact which the court overlooked and which was decided in the First District Court of Appeal decision.

Although the Jan. 16 opinion stated that Fidelity continued to defend the separate actions under two different entities, Fidelity insisted that this was in name only, and that in fact on the day of the merger in 2004, Fidelity N.Y. ceased to exist in fact.

"Simply because Fidelity did not move to dismiss the Grosso and Chereskin class actions on the basis that those plaintiffs had named the wrong corporate entity does not resurrect Fidelity of New York from its corporate demise or unwind the merger such that two separate entities exist," Fidelity averred in its motion.

Plaintiffs were never misled'

Fidelity has also called for the court to correct its conclusion that Fidelity "actively misled" the other plaintiffs.

"That this court would attribute a wrongful purpose based on this record is surprising and based solely on a misapprehension of the record due to Grosso's slanted and unfair depiction of the proceedings in Grosso," the motion alleges. "The record reveals that Grosso's counsel admittedly knew about the Figueroa action at all times and even communicated with counsel for Figueroa."

Fidelity also alleged that the court's application of judicial

estoppel was unsupported by the record.

“In a perverse way, this court’s application of judicial estoppel would result in the unintended consequence of forcing Grosso and Chereskin to sue a non-existent entity, and forcing Fidelity to act as if the merger never existed,” the motion claimed. “If so, Fidelity would not be responsible for the debts and liabilities of Fidelity of New York. Surely this cannot be the intended result.”

Alberton wins class certification

A Pennsylvania federal court granted class-action certification on Jan. 31 in a reissue rate case filed against Commonwealth Land Title Insurance Co., joining a growing list of courts around the country that have certified similar class actions.

According to the defendant, in the case of *A.D. Alberton v. Commonwealth*, the plaintiff purports to represent a class of plaintiffs that under the tenets of Title Insurance Rating Bureau of Pennsylvania Manual (TIRBOP Manual) may have to bring quite different evidence to bear on their claims.

At issue, according to Commonwealth, is that the requirements in TIRBOP differ for refis under three years versus refis sought within the 3-10-year limits, challenging typicality in the class certification.

While the court entertained Commonwealth’s defense on this issue, it determined that creating a subclass would answer the defendant’s concerns.

Alberton argued that an insurance purchaser was entitled to a reduced rate “whenever the title search [which Defendant was required by law to conduct] reveal[ed] events recorded in the chain of title that would lead any reasonable title agent to conclude that a prior title policy was issued in connection with such event.”

Commonwealth strenuously contested this position, arguing that the language of the manual requires the insurance purchaser to provide evidence of the prior insurance policy rather than relying on Commonwealth to uncover the policy in its title search.

Commonwealth claims that, contrary to plaintiff’s allegations, it is possible to obtain a mortgage or refinancing without title insurance in a variety of circumstances.

Therefore, it is impossible to conclude that every member of the proposed class who purchased title insurance from Commonwealth within three or 10 years of obtaining a mortgage or refinancing was eligible for a reduced premium from Commonwealth.

Insisting that a past mortgage or refinancing does not mean a previous purchase of title insurance, Commonwealth argued it had no obligation to provide a discounted rate when the title search revealed such an event.

Commonwealth also challenged typicality, arising from the differences between Sections 5.6 and 5.3 of TIRBOP.

Section 5.6 provides that, when a policy is purchased within three years, the charge will be the refi rate. Section 5.3 provides that a discounted rate applies to those who purchase title insurance outside the three-year period but within 10 years “when evidence of the prior policy is produced.”

The court agreed that the difference in language may point to the fact that Commonwealth could have breached one without breaching the other, but chose to address the defense concerns by certifying two subclasses based on the two different provisions of the manual.

Ohio statute language fuzzy

Class certification was also granted on Jan. 31 in the case of *Randleman, et al. v. Fidelity National Title Insurance Co.*, in the U.S. District Court for the Northern District of Ohio.

Fidelity argued that the borrowers had knowledge or should have had knowledge of the discounted rates because of the plethora of disclosures that are provided in the settlement process.

The Randlemans argued that the language of the rate manual is ambiguous, allowing Fidelity to apply their filed rates in a non-uniform and discriminatory fashion.

As in Alberton, the Randlemans maintained that because they had purchased a title insurance policy within the look-back period, and this prior transaction was reflected in the chain of title for their property, Fidelity knew or should have known about the prior transaction as a result of the title exam, and that was sufficient to allow Fidelity to identify the prior policy.

But Fidelity, like Commonwealth, countered that the Randlemans rely on a presumption that the prior lender will have obtained a lender’s policy in every prior mortgage transaction.

The judge agreed with the plaintiffs that the language was ambiguous and noted that he would rule on the meaning of the language, but that that issue did not preclude class certification, as his final ruling would apply to the entire class.

Data Tree wins temporary reprieve in battle over records access

FOIA

A New York court of appeals reversed a decision by a trial court in a case that arose when Data Tree LLC was denied records by a county clerk's office.

The case was remitted to the county supreme court for further proceedings. The appellate court determined questions remained unanswered concerning whether compliance with Data Tree's request would require the Suffolk County Clerk to disclose information excluded under the privacy exemption of the Freedom of Information Law (FOIL), and whether the clerk has the ability to comply with the request in the format sought.

Data Tree is the nation's largest database of recorded land documents and property information available online, according the company.

Founded in 1987, Data Tree helps its customers have quick access to land records, such as deeds, mortgages, judgments, liens and maps.

Access denied

In January 2004, Data Tree wrote to the records access officer of the Suffolk County Clerk's Office requesting copies of public land records from 1983 to the present.

Data Tree requested the records as TIFF images or as images in the electronic format regularly maintained by the county, on CD-ROM or other electronic medium used by the county.

"If electronic images are not maintained, then in microfilm format," the request stated. The clerk failed to respond to the request within the five-day period required by law, thereby constructively denying the request. The Suffolk County attorney also denied Data Tree's request identifying the following reasons:

1. The FOIL request would require re-writing and reformatting of the data, which the office isn't required to do.

2. Disclosure would constitute an unwarranted invasion of personal privacy due to the volume of the records requested and the commercial nature of Data Tree's business.

3. The records are available for copying and/or downloading from the computer terminals at the clerk's office.

Data Tree then brought this proceeding against the county clerk in the county's supreme court. The trial court held that "the clerk's office has rightly denied petitioner's request."

The court, just as the county attorney did, noted in its decision that the requested records are available either by computer or in paper form at the office or on the clerk's Web site.

The court adopted the argument of the clerk that the bulk of the remaining documents could not be transferred into the requested form or any other electronic medium without creating a new record.

Data Tree appealed.

The appeals court affirmed, holding first that the clerk's office established an exemption to FOIL, namely, that disclosure of the documents sought would entail an unwarranted invasion of personal privacy.

The court then shifted the burden to Data Tree to establish that the exemption did not apply. The court held that Data Tree failed to meet the burden.

"In denying Data Tree's FOIL request, the clerk relied in part on the privacy exemption, which authorized each agency to deny access to records or portions of such records that, if disclosed, would constitute an unwarranted invasion of personal privacy,' " the appellate court said.

Data Tree appealed again, contending that the appeals court used an improper burden-shifting analysis to determine whether the privacy exemption applied in the case. The appeals court agreed with Data Tree that there remained questions of fact.

"FOIL is based on a presumption of access to the records, and an agency carries the burden of demonstrating that the exemption applies to the FOIL request," the court said.

Although the lower court failed to articulate the specific basis for its holding, it remarked that Data Tree is a commercial enterprise and was seeking the documents for "data mining" purposes. But the appeals court said that no

exemption applies because of the commercial nature of Data Tree.

“Data Tree is not seeking a list of names and addresses to solicit any business,” the court said. “Rather, Data Tree is seeking public land records for commercial reproduction online.”

The Suffolk County clerk’s Web site sheds some light on how the clerk’s office feels about companies that make public records available at a higher cost than consumers can get the same records from public offices.

In early 2007, County Clerk **Judith Pascale** notified the New York Attorney General that the National Deed Service Inc. was contacting consumers requesting payment of $59.50 to receive a copy of their deed.

She origionally on her Web site she has not received an opinion from the office.

“Regardless of whether or not these practices are legal and/or ethical, the bottom line is that there is no reason for anyone in Suffolk County to pay $59.50, or nearly 1,200 percent more, for a certified copy of a deed that is readily available from the Suffolk County Clerk’s Office for $5,” Pascale wrote.

Back to the trial court

The court concluded that a question of fact exists in the case as to whether the privacy exemption applies to the records because some of the documents requested may contain private information, such as Social Security numbers and dates of birth.

The case was remitted to the county supreme court to determine whether any of the records contained information exempt from disclosure based on the privacy exemption and whether the information can be redacted.

Based on Data Tree’s submissions, questions of fact were also found as to whether disclosure may be accomplished by merely retrieving information already maintained electronically by the clerk’s office, or whether complying with Data Tree’s request would require creating a new record.

“Accordingly, the order of the appellate division should be reversed, without costs, and the matter remitted to supreme court for further proceedings,” the court said.

Suffolk County’s refusal to hand over records isn’t the first time Data Tree has felt resistance from counties as the company moves forward into the electronic age.

Carol Foglesong, president of the Property Records Industry Association (PRIA) said the organization plans to propose a study in the near future that will help lead to proposed legislation of the conditions and prices of such records requests.

PRIA is aware that mass data requests have become a hot topic in the title insuance industry and are getting mixed reactions from counties across the nation.

The hope of the study is that various industries - title insurance, mortgage, underwriters and recorders - volunteer to be a part of the study so a committee can derive a list of best practices, Foglesong said.

Foglesong also is the assistant comptroller of Orange County, Fla., which charges $3,000 for one calander year’s worth of land records, according to its policy.

There are usually millions of pages in one year’s of documents, she said.

That’s why the medium is agreed upon by the records requestor and the comptroller’s office. Ulterior motives? Other sectors of the settlement services are facing challenges at the local level as well.

According to COMPS President and CEO Keith Larsen more towns are invoking privacy to deny data requests, but their real motivation is not protecting citizens.

Larsen said in some cases, towns want to withhold the information because they fear it will lead to headaches for assessors. Armed with publicly available information, a growing number of citizens are challenging their home’s assessment in order to lower their property tax rates.

“In Nassau County, this information is readily available,” Larsen said. “As a result, people who challenge taxes get this information electronically and build valuation models to determine pockets of over-assessment. They go out and file thousands and thousands of tax challenges each year.” Those challenges are expensive for counties.”

“Suffolk is looking at it and saying, We’re going to get killed if we make this information available.’ They guard the information as closely as they can,” Larsen said.

The ramifications of such a crackdown on data access for the real estate industry could be huge. There is a fair amount of data that could be lost to appraisers, title companies, and the mortgage industry that relies on it.

Rhode Island court declares a $12M title insurance policy null and void

Failure to dosclose

Commonwealth Land Title Insurance Co. v. IDC Properties Inc. (U.S. District Court, Rhode Island, Case No. C.A. 01-400T)

A U.S. District Court in Rhode Island recently ruled in favor of Commonwealth Land Title Insurance Co. after it found that a title insurance policy would not have been issued if IDC Properties, the client, would have disclosed it was threatened with litigation.

Commonwealth Land Title Insurance Co. brought an action seeking a declaration that IDC's policy affords no coverage for loss of development rights because IDC failed to disclose information that would have stopped the policy from being issued in the first place.

The facts:

In January 1988, IDC's predecessor owned 23 acres of land which it planned to develop as condominiums. In March 1988, the first master declaration was recorded by the company, giving the company the right to convert the reserved area into a master unit before 1995.

According to Rhode Island law, an amendment changing any master unit must be approved by "all owners and sub-association board members" of the unit.

Other kinds of amendments can be made with at least 67 percent approval of all master unit owners and sub-association members' approval.

By the end of 1994, the area had not been converted and nothing had been built on it.

Between April 27, 1994, and Dec. 29, 1994, IDC had purported to adopt three amendments to the master declaration that extended IDC's right to develop until Dec. 31, 1999.

Before the third amendment was adopted, **Thomas Roos**, IDC's president, was advised by IDC's predecessor's counsel that the proposed extension for development could be questioned because all individual condominium owners had not consented, but Roos decided to assume an "aggressive posture," according to the court.

After the third amendment was adopted by more than 67 percent of master unit owners, IDC obtained a $10 million title insurance policy from Chicago Title that covered IDC's title and development rights in the west and south units as well as individual condominium units owned by IDC.

Sometime in 1997, associations representing the condominium owners challenged IDC's right to develop the undeveloped parcels. Meanwhile, Chicago Title refused to insure the north units development, citing "threats of litigation," the court said.

At no time did IDC disclose to Commonwealth that individual condominium owners had threatened a suit challenging its development rights nor did IDC provide Commonwealth with a copy of Chicago Title's rejection memo, the court said.

In January, Commonwealth issued a $5 million policy insuring IDC's title to and development rights in the North Unit, and shortly after, IDC began constructing a function center known as the Regetta Club on the north unit.

On Feb, 7, 1999, at IDC's request, the policy limit was increased to $12 million. In May, the associations representing the condominium owners sued IDC in the Rhode Island IDC's request, the policy limit was increased to $12 million

In May, the associations representing the condominium owners sued IDC in the Rhode Island Superior Court, seeking a declaration that IDC's development rights had expired on Dec. 31, 1994, and that IDC no longer owned the north unit.

Judgment was in favor of the associations. IDC appealed, while that appeal was pending, Commonwealth brought this action.

What the court decided:

The court returned judgment in favor of Commonwealth on its complaint for declaratory relief, declaring that the policy Commonwealth issued to IDC was null and void and that Commonwealth was not liable to IDC for any loss, damage, costs, attorney fees or expenses sustained or incurred by IDC as a result of Commonwealth's denial of coverage.

"In short, this Court finds that IDC failed to disclose information that was material to Commonwealth's decision and that, if such information had been disclosed, Commonwealth would not have issued the Policy," the court said.

Title company loses appeal; Massachusetts court says unrecorded mortgage invalid

Unrecorded mortgage

First American Title Insurance Co. and David Carney v. Michael and Elaine Pifalo (U.S. Bankruptcy Appellate Panel of the First Circuit)

A title company appealed a bankruptcy court order granting Chapter 13 debtors, **Michael** and **Elaine Pifalo**, move for leave to refinance, objecting on grounds that grant of Pifalos' motion would improperly modify its rights under mortgage on debtors' principal residence.

The facts:

In January 2001, the Pifalos borrowed $209,000 from Option One. First American was Option One's title insurer, and **David Carney** Esq., the title agent for First American, was the company's closing attorney.

On Oct. 5, 2004, the Pifalos filed a Chapter 13 case, and on the same date, Option One's mortgage remained unrecorded. On March 9, 2005, Option One filed a secured proof of claim in the amount of $215,595, to which the Pifalos objected, on the grounds that as of the date of the petition, the mortgage was unrecorded.

Option One did not respond to the objection, and on Feb. 3, 2005, the bankruptcy judge sustained the Pifalos objection, ruling that Option One was an unsecured creditor.

Three months later, Option One filed a motion for reconsideration, asking the court to "approve the post-bankruptcy perfection of its security interest nunc pro tunc."
The bankruptcy judge denied the request, and ordered Option One to record a discharge of the mortgage by Sept. 8, 2005.

First American later paid off the mortgage and submitted to Option One's position. The Pifalos filed the instant motion for leave to refinance their loan.

The bankruptcy judge approved the refinancing, stating, "The mortgage lien under which First American Title asserts its secured claim and makes the objection herein was determined as void by prior order of the court and is the subject of a discharge by Option One."
First American appealed.

What the court decided:

The panel concluded that the bankruptcy court did not abuse its discretion or commit any legal error by allowing the Pifalos to refinance.

The bankruptcy judge ruled that the recording of the mortgage was void. Option One's opposition of the refinance had already been decided and the issue could not be addressed by the panel.

The court also stated that neither the original lender or assignee had appealed the earlier order of bankruptcy court declaring that the mortgage was void as having been recorded in violation of automatic stay, nor had they appealed bankruptcy court's denial of motion for reconsideration.

"Not only was there no appeal, On Sept. 8, 2005, on the company's behalf, Carney filed a notice with the court that he had recorded the mortgage discharge, as ordered," the panel said.

The appeal was dismissed.

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feature report

Florida Court sides with title company on Fair Labor Standards Act complaint

Labor laws

Nelda Gregory v. First Title of America, U.S. District Court M.D. Florida Orlando Division (Case No. 6:06-cv-1746-Orl-18UAM)

The U.S. District Court in Florida determined it lacked jurisdiction to grant summary judgment in a breach of contract action, but granted summary judgment on a Fair Labor Standards Act charge in a complaint filed by an employee of a title company who sued for unpaid overtime wages.

The facts:

Bruce Napolitano is the owner of First Title of America. Plaintiff **Nelda Gregory** was an employee at First Title from July 2004 through January 2005.

Gregory's job was to provide services for referring and closing title insurance customers.

Gregory was initially paid $1,000 per week. After she provided six referrals per week over a 60-day period, she was supposed to have been paid by receiving a 50 percent commission on all her clients who closed with First Title.

She claims that she often worked more than 50 hours per week, but says she was never compensated for her overtime. She also claims that First Title breached the employment agreement by failing to pay all agreed upon compensation.

First Title asserted that Gregory met the requirements for the outside salesman exemption of the Fair Labor Standards Act.

What the court decided:

In making its judgment, the court used a portion of the Fair Labor Standards Act that says, "Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"Gregory could not sell title insurance herself because she was not licensed to do so," the court said. "However, her primary duty was to obtain orders for title services, and her compensation was tied to how many orders for service she obtained. Most of Gregory's work typically took place outside the employer's place of business, and as such, meets the requirements of the outside salesman exemption."

The court granted First Title's motion for summary judgment. The court also dismissed Gregory's claim of breach of contract, saying that the complaint alleged violations of state contract law and was in front of the U.S. District Court in Florida court under constitutional law.

The second count was dismissed without prejudice.

Chicago Title wins reversal of class certification

Unjust enrichment

Chicago Title Insurance Co. v. Juanita A. Gresh (Court of Appeals of Indiana, No. 45A03-0705-CV-219)

An Indiana appellate court reversed class action certification in a lawsuit alleging among other things unjust enrichment for overcharge of settlement services, saying that a trial court abused its discretion in finding that common issues would predominate over issues affecting individual class members.

The facts:

On Sept. 30, 2002, Chicago Title agent **Tina Brakley** conducted a residential mortgage refinance closing for **Juanita A. Gresh** and **William Gresh**. Brakley prepared and presented to Mr. and Mrs. Gresh a HUD-1 Settlement Statement, which listed recording fees of $40 for the mortgage and $15 for each of the two mortgage releases.

The Greshes paid the fees to Chicago Title as part of the settlement. When Chicago Title subsequently recorded the mortgage, the actual charge was $37. The lender banks recorded the releases instead of returning them to Chicago Title for recording.

On April 29, 2003, the Greshes filed a complaint against Chicago Title, alleging unjust enrichment, statutory conversion and violations of the Deceptive Consumer Sales Act. William Gresh was removed as a party plaintiff on Dec. 14, 2005, following his death. On Dec. 16, 2005, pursuant to Indiana Trial Rule 23, Juanita Gresh filed a motion for class certification asking to serve as representative of an “Unjust Enrichment Class,” a “Conversion Class” and a “Deceptive Practice Class.”

On June 21, 2006, the trial court held a hearing on Gresh’s motion. On Jan. 18, 2007, the trial court granted the motion and designated Gresh as class representative of the three certified classes.

On Feb. 16, 2007, Chicago Title filed a motion to certify the class certification order for interlocutory appeal, contending that the trial court abused its discretion in determining that common issues predominate over issues pertaining to individual members of the proposed classes.

What the court decided:

The Court of Appeals of Indiana reversed the trial court’s award of class certification. Citing *Doll v. Chicago Title Ins. Co.*, 246F.R.D.683, 2007 WL 4284271 (D.Kan. Dec. 6, 2007), the appellate court noted that the Doll court addressed the question of predominance of common versus individual issues pertaining to the HUD-1 form supplied to customers at closing.

The court concluded that the class members’ contract claims were dependent upon unique facts, and common questions d[id] not predominate, as required.’ Here, Gresh’s unjust enrichment claim will require proof that Gresh and all other class members paid Chicago Title an excessive amount of money due to an erroneous belief induced by a mistake of fact that the amount paid was necessary to discharge a duty.’ *Ticor Title Ins. Co. of Cal. v. Graham*, 576 N.E.2d 1332, 1336-37 (Ind.Ct.App.1991).”

The court said that contrary to Gresh’s argument, establishing the relevant inducements and duties would require more than a blanket or cursory comparison between the amounts Chicago Title collected, paid out, and kept in each transaction. The court noted that the fee schedules differ by county and even within a given county, are dependent upon the size, type and format of the instrument being recorded.

“Releases often are not even created until after the closing, so it is difficult to see how a closing agent could use any figure besides an estimate in those cases,” the court said. “Also, more than 100 different closing agents represented Chicago Title in the 10-year period at issue. As just one example, Blakley testified in her deposition that she had personally worked as the settlement/closing agent on 40 to 60 cases per month during her preceding three years as a full-time closer, for an approximate total of 1,800 cases.”

Moreover, the court said, two Chicago Title managers provided sworn statements declaring that their closing agents do not use scripts or canned presentations when conducting closings.

On the breach of fiduciary duty claim, the court agreed with Chicago Title that a jury might find differently on the claim of breach of fiduciary duty depending on whether a particular class member was told or otherwise knew that the HUD-1 amount for recording fees was merely an estimate.The court followed the same reasoning for the conversion and deceptive consumer practices, opining that proof of customer reliance and Chicago Title’s intent to deprive and/or deceive would involve inquiry into each closing agent’s representations to each class member and the expectations created thereby.

California court absolves title company of negligence claim

Negligence

American Land Investments v. County of Los Angeles, First American Title Company, and et al., (Court of Appeal, Second District, Division 4, California, No. B193598)

A California court of appeals affirmed a trial court's determination that a title company could not be held liable for negligence where a preliminary and cursory report was relied on to purchase land that was later discovered to be encumbered by a tax lien.

The facts:

On Feb. 10, 2005, ALI contacted First American Title Company (FATCO) regarding two parcels of real property it was interested in purchasing at a tax sale on Feb. 14. FATCO "explained to ALI that securing a formal report would take some time, but that it was willing to provide preliminary information by telephone based upon accessible records available for property profiles."

ALI specifically inquired about the existence of 1915 Bond Act assessments, on Feb. 14, 2005. This time FATCO faxed documents showing "there were ... two special assessments of record pertaining to the 1915 Bond Act," totaling $218,000. ALI allegedly relied on this information in bidding that same day on the two parcels, offering $1.51 million for one and $1.42 million for the other. ALI's bids were accepted and, as required by statute, it paid the county two 10 percent deposits.

After paying the deposits, ALI learned that prior to the sale, **Betsy St. John**, Palmdale's Director of Finance had prepared and delivered to **Vivian Handley**, Supervisor of the Tax Sale Unit for the County a letter dated Jan. 12, 2005, stating that there were delinquent assessments under the 1915 Bond Act on the parcels that would not be eliminated by the county's tax sale. Enclosures "intended to be delivered with the letter" showed that the parcels were burdened by assessment liens totaling approximately $8 million.

After learning about the letter and the additional assessment liens, ALI requested rescission of the sale and a refund of its deposit, but was refused. Based on these factual allegations, ALI brought suit against Palmdale, St. John, the county, Handley and FATCO, asserting a claim of negligence against FATCO and two causes of action for deceit against the governmental entities and their employees and seeking refund of the amounts deposited toward purchase of two parcels at a tax sale conducted by the county, along with other damages.

FATCO and the governmental entities and their employees demurred to the complaint. Palmdale and St. John contended that governmental immunity and constructive notice provided a complete defense. The county and Handley raised similar contentions in their separate demurrer. FATCO contended that it could not be liable for negligence because "a title insurer owes no duty to disclose recorded liens or other clouds on title" and is potentially liable only to those who purchase a title policy.

FATCO contended that the complaint established that ALI's request was informal, and that the information provided was cursory and based on accessible records available for property profiles. In its opposition to the demurrers of the county and Handley, ALI conceded that the county could not be sued directly for a misrepresentation made by its employee and offered to dismiss the deceit claims against the county. In its opposition to FATCO's demurrer, ALI contended liability for negligent performance of a title search was proper based on *Jarchow v. Transamerica Title Ins. Co*. (1975) 48 Cal.App.3d 917.

The trial court sustained the three demurrers without leave to amend. Regarding FATCO, the court concluded that the governing statutes precluded liability where a title insurer negligently performs a title search and fails to discover or reflect in the preliminary report an impediment to title.

As ALI had not purchased title insurance from FATCO, it had no basis for asserting a claim against FATCO. After the court entered a judgment of dismissal based on its orders sustaining the demurrers without leave to amend, ALI appealed, contending FATCO's demurrer should not have been sustained because FATCO owed a duty of care under the facts alleged in the complaint.

On appeal, FATCO conceded that a title insurer may be liable for representations it makes when acting as an abstractor of title. It contends, however, that as ALI purchased neither title insurance nor an abstract of title, FATCO cannot be liable for encumbrances not found in the informal and cursory search conducted. In its reply brief, ALI contended for the first time that FATCO was arguably acting as an abstractor of title under the facts pled.

What the court decided:

The appellate court determined that the trial court correctly sustained all of the defendant's demurrers. Regarding FATCO, the court noted that "the statutory definition of abstract of title found in Insurance Code section 12940.10,

forecloses imposition of abstractor liability on the informal, limited information ALI sought and obtained here."

The court said that section 12340.11 specifically provides that preliminary reports, also known as commitments or binders are not abstracts of title and that, "the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title" are not applicable to the issuance of any such report.

Instead, preliminary reports are "offers to issue a title policy subject to the stated exceptions set forth in the reports and such other matter as may be incorporated by reference therein." Prior to the enactment of section 12340 et seq., courts had held that a title insurer who prepared a preliminary report owed the same duty as an abstractor of title to "report all matters ... which are readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made and list all matters of public record regarding the subject property in its preliminary report. In enacting Insurance Code sections 12340.10 and 12340.11, the Legislature recognized that no reliance should ever be placed on a preliminary report or policy of title insurance to show the condition of title."

If FATCO agreed to provide an abstract of title here, it could be liable for a negligent search of the title records that failed to discover recorded encumbrances such as the

Michigan court of appeals dismisses tort case against title agent

Escrow agreement

A Michigan court of appeals determined that since a title agent acted only as the closing agent and not the guarantor of title, the company owed no duty to the property owner after she claimed the agent was liable for not providing an escrow agreement to delineate the rights and duties of the parties.

The facts:

Alfred Hawkins purported to sell two adjacent city lots to Latoya Burton. Sure Title served as the closing agent, although Burton did not purchase title insurance from Sure Title or enter into any contractual relationships with Sure Title.

After believing that she had purchased the lots in their entirety, Burton discovered that another property owner, Daryl Sanders, claimed he owned the east 14 feet of one lot. She pursued tort and contract claims against Sure Title.

The trial court granted summary judgment in favor of Sure Title.

Burton appealed, contending that Sure Title should be held liable for not providing an escrow agreement to clearly delineate the rights and duties of the parties.

What the court decided:

The Court of Appeals of Michigan upheld the trial court ruling, noting that Sure Title owed plaintiff no duty in tort.

"It is axiomatic that there can be no tort liability unless defendant owed a duty to plaintiff," the court said. "The plaintiff cannot identify any duty owed to her by Sure Title because there was no special relationship between the parties that could have given rise to such a tort-based duty."

"Similarly, Sure Title owed plaintiff no duty in contract. Plaintiff was not a party or privy to any contract with defendant Sure Title," the court added.

The trial court properly granted summary disposition with respect to plaintiffs' tort and contract claims against defendant.

With regard to providing an escrow agreement to delineate the rights and duties of the parties, the appellate court noted that the plaintiff never pleaded such a claim.

Accordingly, the court properly declined to entertain plaintiff 's belated assertion in this regard.

"Plaintiff asserts that her title was superior to that of Sanders because it was first recorded and because she was a subsequent purchaser in good faith within the meaning of Michigan's recording statute, MCL 565.29. However, plaintiff disregards that fact that Hawkins never held title to the east 14 feet of lot five in the first instance. Therefore, Hawkins' conveyance of the east 14 feet of lot five to plaintiff was null and without effect. If a man grants more than he owns, the grant will be good for what he owned and void for the rest,' " the court said.

Court says plaintiff shares responsibility for unpaid taxes

Negligence

A Michigan appellate court upheld a trial court's granting of summary judgment to a title company that had been sued for negligence and breach of fiduciary duty, where back taxes remained undiscovered, and unpaid, through the closing process of a mortgage loan.

"Imposing a duty of care on a closing agent for a lender toward a property owner would be tantamount to providing the property owner with free title insurance, which the property owner could have purchased, but did not."

The facts:

Philip F. Greco Title Company undertook to act as closing agent, including paying all back taxes from escrowed funds, and issuing a policy of title insurance to the bank, for the purpose of ensuring the priority position of the bank's security interest in property purchased by the Dietrich Family Irrevocable Trust.

The trustee, **Edgar Julian Dietrich**, alleged that Greco negligently performed its duty to discover and pay the back taxes owed on lot 25, as part of its duties as closing agent. Dietrich brought suit against the title company, alleging negligence and breach of fiduciary duty.

The title company argued that the duty to discover and pay back taxes arose from its contract with the bank, and that they did not owe a duty of care to the trust separate and distinct from their contractual obligations to the bank.

The trial court granted summary judgment to Greco and Dietrich appealed.

What the court decided:

The Court of Appeals of Michigan affirmed the trial court's decision to grant summary judgment to Greco, explaining that whether a duty exists depends on

(1) the relationship of the parties,
(2) the foreseeability of the harm,
(3) the degree of certainty of injury,
(4) the closeness of the connection between the conduct and the injury,
(5) the moral blame attached to the conduct,
(6) the policy of preventing future harm, and
(7) the burdens and consequences of imposing a duty and the resulting liability for breach.

"Foreseeability of harm, by itself, is not sufficient to justify imposing a duty," the court said. "Rather, the issue of duty is one of fairness, involving a weighing of the relationship of the parties, the nature of the risk, and the public's interest in the proposed solution." The court determined in the present case, the only relationship between the parties was that defendant had acted as closing agent on previous transactions involving the trust and that it was actually the bank was defendant's client.

"Although the harm (of losing property to foreclosure) was foreseeable, the injury was not certain to occur; rather, it depended on how long the taxes had been due and on whether plaintiff eventually paid them," the court said. "Further, the connection between defendant's alleged negligence and plaintiff's loss is tenuous. Ultimately, it is the property owner's responsibility to pay property taxes, and plaintiff knew that taxes were past due. Further, defendant's conduct was not morally blameworthy."

"The policy of preventing future harm is not particularly strong in this situation, given that the payment of taxes is the property owner's responsibility. Lastly, imposing a duty of care on a closing agent for a lender toward a property owner would be tantamount to providing the property owner with free title insurance, which the property owner could have purchased, but did not."

The court also upheld the dismissal of the breach of fiduciary duty claim, saying there was no evidence that Dietrich confided in Greco Title, or that he sought or received counsel and advice.

"Plaintiff can show no more than an ordinary, albeit long-term, business relationship, not a fiduciary, confidential, trust-based relationship," the court said. "Accordingly, the breach of fiduciary claim was properly dismissed."