

Mortgage Purchaser Can't Hold Title Insurer Liable for Fraudulent Conspiracy Between Originating Lender and Settlement Agent

By: James Bruce Davis

A United States District Judge in Virginia has ruled a title insurance company has no liability to a purchaser of worthless mortgage loans where one of the insurer's agents, acting as settlement agent, assisted the originating lender in defrauding the purchaser. The decision confirms several legal principles important to title insurers.

Vijay Taneja operated a mortgage banking company, Financial Mortgage, Inc. ("FMI"). FMI originated home mortgages and sold them to secondary market investors. One of those investors was Wells Fargo Funding, Inc. Taneja defrauded Wells Fargo and other investors by selling worthless mortgages. He accomplished the scheme, in part, by having legitimate FMI borrowers sign multiple sets of "original" loan documents, thereby creating multiple "first" mortgages on the same properties. Taneja would then sell these mortgages to different investors, each of whom believed it held the first mortgage on a particular home.

Taneja perpetrated a different kind of fraud with the assistance of a settlement agent, TitlePro. After receiving loan funds from FMI's warehouse lender, TitlePro prepared HUD-1 settlement statements representing that the funds would be used to pay off prior mortgages on the security property. Instead of paying off the prior mortgages, Title Pro paid the loan funds to Taneja, rendering the new mortgages worthless.

TitlePro was an agent for Old Republic, with authority to issue Old Republic's title insurance commitments and policies. However, the agency agreement provided that Title Pro's authority did not extend to any escrow business conducted by TitlePro. Wells Fargo nevertheless sued Old Republic, seeking to hold it liable for TitlePro's actions. On cross motions for summary judgment, the Court ruled that none of Wells Fargo's legal theories had merit, and entered final judgment for Old Republic.

Wells Fargo's first Argument was that Virginia's Consumer Real Estate Protection Act ("CRESPA") expands the scope of a title insurance agent's authority. The Court rejected this argument, holding that CRESPA merely authorizes title insurance agents and certain others to provide "escrow, closing, or settlement services" if they register with their respective licensing authorities and meet other regulatory requirements.

Wells Fargo next argued that TitlePro had actual authority to conduct closings for Old Republic. According to Wells Fargo, closing protection letters issued to FMI evidenced such authority, even if the agency agreement did not. The Court rejected this argument, reasoning that closing protection letters are issued precisely because a settlement agent is not the underwriter's agent for the purpose of conducting closings.

Wells Fargo's fallback argument was that TitlePro had apparent authority to conduct closings for Old Republic. However, the Court ruled that apparent authority was lacking because Wells Fargo could cite no act or statement of Old Republic that would have led Wells Fargo reasonably

to believe that Old Republic had designed TitlePro its agent for the purpose of conducting closings.

Wells Fargo also pleaded counts alleging that TitlePro had conspired with FMI to commit fraud. The Court ruled these counts failed because they were based on the theory that TitlePro was Old Republic's settlement agent. The Court's rulings that TitlePro had no actual or apparent authority to conduct closings for Old Republic disposed of this theory.

Wells Fargo's negligence claim failed for lack of a legal duty on the part of Old Republic. Virginia follows the rule that "where there is no breach of a legal duty to take care for the person or property of another, there can be no actionable negligence." Old Republic's loss did not involve harm to person or property, but rather a disappointed economic expectation. This kind of loss is not protected in Virginia by a common law duty that would support a claim for negligence.

Wells Fargo also asserted breach of contract claims based on title insurance commitments and closing protection letters issued to FMI. Wells Fargo had acquired FMI's rights under the commitments and closing protection letters by assignment. However, as FMI's assignee, Wells Fargo took the claims subject to all defenses that Old Republic could have raised against FMI. FMI's fraudulent actions would have barred FMI from recovery under the commitments or closing protection letters. Therefore, Wells Fargo's claims on the commitments and closing protection letters were likewise barred. The Court observed in its discussion of the facts that the conditions of the title insurance commitments were unsatisfied because they required payoffs of prior mortgage loans, and TitlePro had diverted the payoff funds to Taneja.

Finally, the Court rejected Wells Fargo's claims under Virginia's Wet Settlement Act. The Wet Settlement Act imposes duties upon settlement agents to record deeds and to disburse funds. However, TitlePro's actions as settlement agent were not chargeable to Old Republic because TitlePro was not Old Republic's agent for the purpose of conducting closings. Therefore, Old Republic was not liable for any violation of the Wet Settlement Act that TitlePro committed.

The decision is reported at *Wells Fargo Bank, N.A. v. Old Republic National Title Insurance Company*, 209 U.S. Dist. LEXIS 118655 (E.D. Va. December 17, 2009).

COMMENTS: The *Wells Fargo* decision stands for the following propositions:

1. A closing protection letter does not constitute evidence that a title insurance agent is the insurer's agent for the purpose of conducting closings. The closing protection letter cuts the other way. If the underwriter were responsible for a settlement agent's conduct under principles of agency law, there would be no need for closing protection letters. A U.S. District Court in Maryland reached the same conclusion. *Proctor v. Metro. Money Store Corp.*, 579 F. Supp. 2d 724 (D. Md. 2008).
2. A title insurer has no liability under a title insurance commitment if the commitment's requirements go unfulfilled because of a settlement agent's misappropriation of escrow funds.

3. An assignee of a mortgage loan can have no greater rights than the original lender would have had under a title insurance commitment or closing protection letter.
4. In jurisdictions where the common law tort duty is limited to exercising reasonable care to protect another's person or property, a plaintiff cannot recover for a purely economic loss caused by a title insurer's failure to exercise reasonable care in appointing an agent.