Court Rules CPL Doesn't Insure Title

Guest Column

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Wells Fargo Bank, N.A. v. MLD Mortgage, Inc., 2012 U.S. Dist. LEXIS 175463 (D. Minn. Dec. 11, 2012).

Courts sometimes can't tell the difference between a title insurance policy and a closing protection letter ("CPL"), but the U.S. District Court in Minnesota figured it out. The policy insures the status of the title irrespective of any fault on the part of the title insurer or settlement agent. A CPL, in contrast, covers only title risks that arise from a settlement agent's misconduct.

Wells Fargo Bank sued MLD Mortgage, Inc. under a loan purchase agreement for failure to repurchase a defective mortgage, the defect being that the mortgaged property lacked legal access. MLD filed a third party complaint against First American Title Insurance Company and its subsidiary, United General Title Insurance Company. First American had issued a CPL, obligating First American to reimburse MLD for losses caused by the settlement agent's failure to follow the lender's closing instructions or by the settlement agent's fraud or dishonesty. United General had issued a standard loan title insurance policy.

United General moved to dismiss MLD's claim on the ground that it could not be brought as a third party complaint. First American moved for dismissal on the ground that the MLD's claim under the CPL failed to state a claim for which relief may be granted.

Rule 14 of the Federal Rules of Civil Procedure provides that a defendant may file a complaint against a nonparty "who is or may be liable to [the defendant] for all or part of the claim against it." United General argued that the Rule did not apply because the policy and CPL didn't make United General responsible for MLD's contractual obligation to Wells Fargo in connection with a loan sale. The court disagreed, ruling that Rule 14 should be applied liberally whenever a defendant's claim against a third party "is in some way dependent upon the outcome of the main claim." The court explained:

> If the title is found defective and MLD has to buy back the mortgage loan, then MLD will again be the policy holder. At the end of this case, either MLD or Wells Fargo will hold the title insurance policy and if the title is defective, then either MLD or Wells Fargo will have a claim against United General. Impleading United General fits the purpose of Rule 14… , by promoting efficiency and avoiding circuity. The issue of defective title will be ruled on once, not twice, and claims for loss can be handled together rather than in a multiplicity of suits.

However the court granted First American's motion to dismiss. MLD had construed the CPL as obligating First American to search for title defects and disclose any defects to MLD. However, the court ruled that the CPL only covered "failure of the issuing agent to follow MLD's written closing instructions or fraud of the issuing agent in handling MLD's funds or documents." Since MLD had not alleged that the settlement agent was guilty of any misconduct, the court ruled that the third party complaint failed to state a claim against First American for which relief may be granted.

Comment: The *MLD Mortgage* decision differs from *Sears Mortgage Corp. v. Rose*, 134 N.J. 326, 634 A.2d 74 (1993), where the court conflated CPL coverage with policy coverage.

Insurers Not Liable on Fake Title Commitments

DLJ Mortgage Capital, Inc. v. Kontogiannis, ___ N.Y.S.2d ___, 2013 WL 149771 (N.Y.A.D. 1 Dept.), 2013 N.Y. Slip Op. 00159 (permanent citation not yet available).

Two title insurers have been found not liable to a lender under fake title commitments issued by real title agents on completely fake loans.

DLJ Mortgage Capital has sued Thomas and Georgia Kontogiannis, John T. Michael and a host of title companies, mortgage brokers and others for allegedly selling 95 completely fake loans to DLJ, on which the lender advanced $50 million. It sued under RICO, seeking treble damages from all of the defendants. In fact, DLJ wanted to skip foreclosures altogether and just proceed on its RICO claim. In a decision reported in the September, 2010 issue, the court said it must try to foreclose first. *DLJ Mortgage Capital, Inc. v. Kontogiannis*, 726 F.Supp.2d 225 (E.D.N.Y. 2010).

In August of 2011, the trial judge denied motions by Chicago Title and United General Title to dismiss the complaint against them. The appellate division reversed. The appeals court noted that the title agents were co-conspirators in the mortgage fraud scheme. However, DLJ had not alleged that the insurers "were aware that their agents had issued fraudulent certificates of title and commitments for title on the title insurers' behalf for mortgages that plaintiff eventually purchased." The insurers also had not cloaked the title agents with apparent authority to issue the fake title commitments. To the contrary, DLJ bought the loans after they were supposedly made, and never dealt with the title insurers directly.

The court also found that DLJ could not show justifiable reliance on the alleged misrepresentations of the agents. The loan files did not contain title insurance policies. Thus, the title agents did not represent that insurance had been procured. The court dismissed the insurers, who were strangers to the made-up transactions.