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The Docket: N.M. Court Holds Underwriter Not Liable for Title Agent's Alleged Negligence

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Michael R. O'Donnell and Michael P. Crowley, both of the law firm Riker, Danzig, Scherer, Hyland & Perretti LLP, provided today's review of a decision by the U.S. Bankruptcy Court for the District of New Mexico that found that a title insurance company was not liable for the alleged negligent acts of the title agent in failing to discharge a mortgage. O'Donnell can be reached at modonnell@riker.com and Crowley can be reached at mcrowley@riker.com.

Citation: *Lamey v. Las Cruces Abstract and Title Co., et al., 2020 WL 1884189 (Bankr. D.N.M. Apr. 15, 2020).*

Facts: In the case, a Bankruptcy Trustee brought an action against a title agent and a title insurance company based

on the agent's failure to discharge a mortgage in the amount of $1 million. Although the plaintiffs did not allege that the underwriter itself was negligent, they claimed that the company should be held liable under an agency theory of liability for the agent's actions as title agent and escrow agent. The title insurance company moved for summary judgment on these claims.

Holding: In a thorough, well-researched decision, the court granted the summary judgment motion to the title insurance company. First, the court predicted how New Mexico state courts would rule on whether the insured could sue the title insurance company in tort for the agent's alleged negligence and found they would not allow such a cause of action. In doing so, the court found that:

[T]itle insurance is heavily regulated in New Mexico. The laws and regulations extend to the form of contract that may be used and the premiums insurers are allowed to charge. The regulatory regime appears designed to protect both insurers and insureds. Allowing insureds to bring tort claims against insurers in addition to contract claims would disrupt the regulatory and pricing scheme enacted by the legislature.

Second, the court found that the title agent was not the title insurance company's agent for escrow services. Plaintiffs claimed that they relied on the title policy, title commitment, and invoice as proof that the agent was acting on behalf of the title insurance company. The court found that the policy and invoice were created after the closing, and that the commitment alone was insufficient. "The title commitment, title policy, and invoice are reeds entirely too slender to support Plaintiffs' argument. Were the Court to hold otherwise, every title insurer doing business in New Mexico would be vicariously liable for the negligence of their local title companies when they (as so often happens) don their other hat and provide escrow services for a fee."

Importance to the Industry: This decision is significant in that it first reinforces the majority view that title insurance is a creature of contract and, as a general rule, negligence actions against underwriters are not cognizable absent clear and an unmistakable assumption of duty by the underwriter in excess of the title policy. Second, and perhaps of more interest, it reinforces the principle that when an agent serves as escrow agent, liability for a breach of the escrow agreement does not automatically transfer to the underwriter by the mere fact that the underwriter provided the title insurance. The decision is very helpful in establishing that agency agreements that limit the agent's authority to issuing policies on behalf on the underwriter are enforceable and rebutting efforts to extend liability past the scope of the agent's authority. In that context, there have been some recent decisions seizing on the fact that an agent had authority to issue the policy to impose liability on the underwriter for breach of the escrow agreement. See, e.g.,*Faith Assembly v. Titledge of New York Abstract, LLC, 106 A.D.3d 47, 60 (N.Y. 2d. Dept. 2013)* ("The language of the underwriting agreement set forth above does not utterly refute the plaintiff's allegations that Titledge was authorized to act as Stewart's agent in entering into the escrow agreement and holding the escrow funds, and in fact did so."). Thus, the decision is good news for the industry.

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