



The Docket: Nebraska Court Holds No Obligation to Indemnify for Foreclosure of Excepted Mortgage

Publication:

The Docket

All publications of the American Land Title Association are copyrighted and are reprinted herein by specific permission from:

American Land Title Association (ALTA)

1800 M Street Suite 300 South Washington, DC 20036 Phone: 202-296-3671 E-Mail: service@alta.org Web: <http://www.alta.org>

The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee, which reviews significant court rulings and other legal developments, and explains the relevance to the title insurance industry.

December 26, 2019

The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee which reviews significant court rulings and other legal developments and explains the relevance to the title insurance industry.

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 a Nebraska appellate court that held an insured owner was not entitled to coverage when a lender foreclosed on its property based on a prior mortgage that the insured had assumed and that was excepted in the policy. O'Donnell can be reached at modonnell@riker.com and Crowley can be reached at mcrowley@riker.com.

Citation: *Fo Ge Investments LLC v. First Am. Title*, 27 Neb. App. 67 (2019)

Facts: The insured agreed to purchase a property in 2006. As part of the agreement, the insured agreed to purchase subject to the seller's existing mortgage on the property and to take over the seller's monthly payments. The mortgage was from 2002 and secured a loan to the seller in the amount of \$272,000. In December 2006—six weeks before the closing—the seller obtained a second loan from the same lender, and this debt was secured by the assignment of a life insurance policy. First American Title Insurance Company issued a policy and specifically excepted the 2002 mortgage. The policy did not mention the 2006 second loan because that loan was not secured by a mortgage on the property. The lender later brought a foreclosure action against the property based on a default under the 2002 mortgage. The insured filed a claim under the policy and First American denied it. The insured then brought this action. According to the insured's complaint, the 2002 mortgage contained a cross-default position that allowed the lender to foreclose when the seller defaulted on its 2006 loan, which the insured did not assume. The insured sought coverage under the argument that the 2002 note and mortgage were excepted from the policy, but the 2006 note was not.

Holding: The trial court granted the title insurance company's motion for summary judgment, which the Court of Appeals affirmed in a published opinion. The Court of Appeals found that “[e]ven if a default on the 2006 note was the basis for foreclosure, it was still the 2002 mortgage that was being foreclosed. The mortgage was a known lien at the time the title insurance policy was issued and a specific exception was made.” The insured also argued that the exception in the policy was limited to a default under the 2002 note because the exception stated that the mortgage was “securing the principal amount of \$272,000.00.” The court found that this description of the mortgage did not limit the exception to the 2002 note: “The language that identified \$272,000 as being the principal amount secured merely gives a more specific description of the mortgage. It does not limit in any way what is being excluded.”

Importance to the title industry: Banks routinely include in their loan documents cross-default provisions providing that a default on any obligation that a borrower has with the bank will serve as a default on any other obligation that the borrower has with the bank. This decision establishes that if a mortgage is expressly excepted from coverage under a title policy, there is no coverage even if the default on the excepted mortgage was caused by a cross-default on another, non-excepted loan. This is particularly important as defaults on unsecured loans can trigger defaults on mortgage loans and the title underwriters would not know of the unsecured loan provisions without due diligence beyond the title records.

Attorneys:

Michael R. O'Donnell · Michael Crowley

Practice:

Title Insurance

Headquarters Plaza, One Speedwell Avenue, Morristown, New Jersey 07962-1981 • t: 973.538.0800 f: 973.538.1984

50 West State Street, Suite 1010, Trenton, New Jersey 08608-1220 • t: 609.396.2121 f: 609.396.4578

500 Fifth Avenue, New York, New York 10110 • t: 212.302.6574 f: 212.302.6628

399 Knollwood Road, Suite 201, White Plains, NY 10603 • t: 914.539.3360 f: 914.539.3361

1200 Summer Street, Suite 201C, Stamford, CT 06905 • t: 203.326.6740 f: 914.539.3361

www.riker.com