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The Docket: Nevada Supreme Court Holds CPL Does Not Protect Loan Assignee

Publication:

The Docket

December 6, 2018

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 Nevada Supreme Court that held the assignee of a deed of trust was not entitled to bring a claim against the title insurance company arising out of the closing protection letter. O'Donnell can be reached at modonnell@riker.com and Crowley can be reached at mcrowley@riker.com.

Citation: PennyMac Holdings, LLC v. Fid. Nat'l Ins. Co., 423 P.3d 608 (Nev. 2018).

Facts: In the case, Fidelity Nevada Title Insurance Company, on behalf of Fidelity National Title Insurance Company, issued a title insurance policy and closing protection letter to a lender as part of a 2007 refinance. One week prior to the lender's deed of trust being recorded, however, the homeowners association (HOA) for the subject property recorded a lien for unpaid fees. In 2013, PennyMac Holdings LLC was assigned the deed of trust. That same year, the HOA served PennyMac with a notice of foreclosure. When PennyMac did not respond, the HOA foreclosed on and sold the property LN Management, which brought a quiet title action to establish that the sale extinguished PennyMac's deed of trust. PennyMac filed a claim with Fidelity, which responded that it was only obligated to pay the amount of the HOA lien: $951.77. PennyMac then brought this action asserting claims under both the policy and the CPL. Fidelity moved to dismiss and the district court granted the motion. This appeal followed.

Holding: On appeal, the court affirmed in part and reversed in part. First, it reversed the district court's holding that the policy claims should be dismissed because PennyMac did not provide timely notice. Although the court confirmed that PennyMac was required to provide timely notice of any adverse claims, it also found that PennyMac had pleaded that it did not have actual notice of the HOA claim in 2013. While Fidelity was able to show that PennyMac received notice of the HOA's action, the court held that, on a motion to dismiss standard, that was not enough due to PennyMac's denial in its pleading of actual knowledge. The court also found that because Condition 3 of the policy provides that late notice will only preclude coverage where the delay in notice causes material prejudice to the insurer, that presented an issue of fact requiring factual findings on prejudice and the lower court made none. Thus, reversal was mandated. More importantly from a caselaw perspective, the court also found that the lower court properly dismissed the CPL claims. PennyMac had argued that it was entitled to enforce the CPL as an assignee of the loan because the CPL was issued to the original lender and its successors and assigns. However, the CPL specifies that "[i]f you are a lender protected under the foregoing paragraph . . . (ii) your assignee who provides funds, instructions or documents to the issuing agent or approved attorney for such closings shall be protected as if this letter were addressed to your assignee." Based on this definition, the court held that "the CPL only protects an assignee who participated in the closing of the loan transaction by providing funds, instruction, or documents," which does not include PennyMac who was assigned the loan six years later. Thus, the court held that the CPL claims against Fidelity were properly dismissed.

Relevance to the title industry: The decision is first worthy of consideration for its address of the late notice provision in the policy and that an insured's actual notice of an adverse claim and prejudice caused by delay in giving notice of a claim are issues of fact that require findings for a proper ruling to be made. The real significance of the opinion, however, is the holding that PennyMac, as the original lender's assignee, cannot bring claims under the CPL because it was not involved in the original transaction. This holding is contrary to that of other courts in recent years that have found otherwise, although those decisions are not clear as to whether the CPLs at issue contained

the language about an "assignee who provides funds, instructions or documents." See, e.g., Genworth Fin. Servs., Inc. v. Lawyers Title Ins. Corp., 2008 WL 11404240, at *7 (N.D. Ga. Feb. 11, 2008) ("The Court agrees with plaintiff that no good reason exists for treating the closing protection letter differently from the loan and associated mortgage instruments, the assignability of which form the bedrock of the secondary mortgage market"); U.S. Bank Nat. Ass'n v. First Am. Title Ins. Co., 2011 WL 2119335, at *3 (M.D. Fla. May 27, 2011) ("First American agreed to reimburse Lender Direct (or its assign) for its agent's failure to comply with Lender Direct's written closing instructions to the extent that the instructions relate to the status of the title and the priority of the lien of the insured mortgage"). Accordingly, this decision serves as a reminder that there are limits to CPL claims and who can bring them, particularly when a party is trying to bring CPL claims six years after the closing.

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