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# The TITLE INSURANCE LAW NEWSLETTER

AMERICAN LAND TITLE ASSOCIATION

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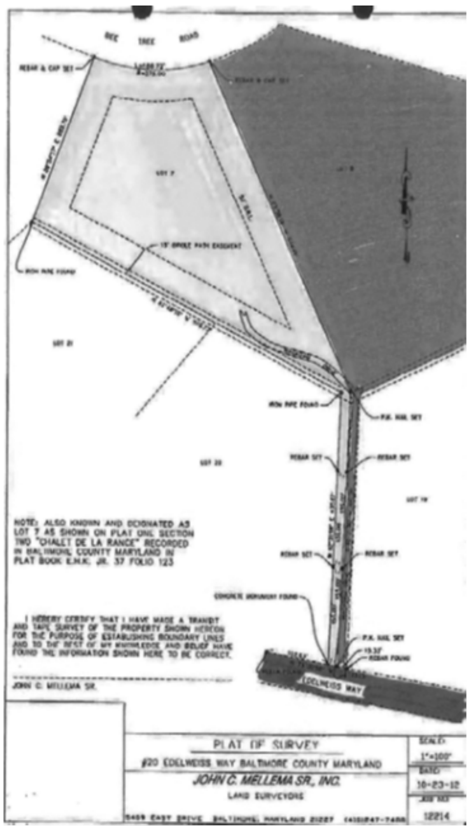
Title Insurance

## Access Coverage Not Invoked When Insured Parcel Abuts Public Street

*Chicago Title Ins. Co. v. Jen*, ___ *A.3d* ___, 2021 WL 286073 (Md.Sp.App. 2021) (permanent citation not yet available).

An insured parcel that includes ownership of a narrow strip of land leading to and abutting a public street did not lack a right of access. The court refused to adopt the Marriott theory that the policy insures a "reasonable" right of access. However, the insurer had a duty to defend the insured in a lawsuit brought by the neighbor concerning joint maintenance costs of the access strip, half of which is owned by the neighbor.

Allynnore Jen and Charles Shuler bought a house in Parkton, Md. Their lot abuts a public street to the north and includes a 15-foot-wide panhandle that extends south to a second public street, Edelweiss Way. Dennis and Teresa Bull own the lot to the east. The Bull lot also includes a 15-foot panhandle leading to Edelweiss Way, which abuts the Jen and Shuler strip. The survey below was introduced as evidence at the hearing before the Maryland Insurance Administration. The Jen and Shuler lot is on the left; the Bull lot is on the right.




The Bulls demanded that Jen and Shuler pay to maintain the single, shared driveway on the panhandle, most of which is built on the Bull side. When they refused, Bull obstructed part of the driveway. Jen and Shuler made a claim on their Chicago Title policy. The insurer denied the claim, because the insured parcel has a right of access.

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The Title Insurance Law Newsletter

AMERICAN LAND TITLE ASSOCIATION

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*The Title Insurance Law Newsletter*, which is distributed electronically each month by the American Land Title Association (ALTA), reports on cases addressing title insurance coverage, class actions and regulatory enforcement, escrow and closing duties, agent/underwriter disputes, conveyancing law, and RESPA and TILA compliance and violations.

This publication provides helpful information for title agents, approved attorneys, underwriters, claim administrators and attorneys who practice in title insurance defense work or conveyancing disputes.

**J. Bushnell Nielsen** serves as editor. Please submit news and guest columns to **bnielsen@reinhartlaw.com**.

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Jen and Shuler sued the Bulls for interfering with their use of the shared driveway. The Bulls counterclaimed for unjust enrichment. They alleged that Jen and Shuler had used the driveway located mainly on the Bull property, but had not paid any part of the cost to maintain the shared driveway. Jen and Shuler asked Chicago Title to pay for the defense of the counterclaim, which it refused to do.

Jen and Shuler filed a complaint with the Maryland Insurance Administration. That body made an investigation, and an MIA Enforcement Officer issued a letter in March of 2017 ordering Chicago Title to treat the claim as being covered by the policy. Chicago Title asked for a hearing before the MIA. A hearing was held. Your editor testified as an expert witness for Chicago Title.

The Insurance Commissioner issued a Memorandum and Final Order, finding that the insured parcel had a right of access, and therefore that Chicago Title had not violated Sections 4-113 and 27-216 of the Insurance Article of the Maryland Annotated Code. However, the commissioner ruled that Chicago Title had a duty to defend the Bull counterclaim. The Commissioner directed Chicago Title to pay Jen and Shuler for the cost of defending the counterclaim.

Both sides appealed to the Circuit Court for Baltimore County. The circuit court reversed in part, finding in favor of Jen and Shuler on all issues.

Chicago Title appealed again. The appeals court reversed again, finding for Chicago Title on the indemnity claim but ruling that it had a duty to defend the Bull counterclaim.

The appeals court began by noting that Jen and Shuler claimed that the policy assured them of a right to vehicular access. They claimed that county ordinances prohibited them from building a driveway on their own fifteen-foot panhandle. Therefore, they said, Chicago Title was required to purchase for them an easement from the Bulls allowing them to use the driveway on the Bull property. The appeals court noted that the hearing commissioner had rejected that claim in part based on your editor's credible testimony that the "right of access" does not "include vehicular access or equate to vehicular access."

The appeals court rejected Jen and Shuler's claim that the policy insured a "reasonable" right of access, including the assurance of a vehicular access path. It found it notable that Jen and Shuler could have obtained an assurance of vehicular access by endorsement, but they did not buy that coverage. It said:

> *Without this particular endorsement, or another endorsement requiring a survey, Chicago Title was not obligated to perform a survey of the Property. If a survey had been performed, Chicago Title would have been on notice of the later disputed issue regarding the panhandle strip and the driveway. Accordingly, it would be inequitable to require Chicago Title to insure against a condition of which they had no notice, nor a reason to have such notice.*

There is no prior Maryland decision addressing the policy access coverage. However, the appeals court noted,

> *Eight jurisdictions have considered cases involving a similar claim between 1951 and 2016. Of those eight jurisdictions, seven have concluded that the necessary access is satisfied if the parcel touches a public roadway.*

The court cited *Krause v. Title & Trust Co. of Fla.*, 390 So.2d 805, 806 (Fla. Dist. Ct. App. 1980) for its ruling that the access coverage does not assure "reasonable and practicable access." It also noted that the Missouri Court of Appeals held that the policy insured only a legal right of access, even if such access is difficult or "of only limited usefulness," in *Gates v. Chicago Title Ins. Co.*, 813 S.W.2d 10, 12 (Mo.App. 1991). In *Magna Enterprises, Inc. v. Fidelity National Title Ins. Co.*, 127 Cal. Rptr. 2d 681 (Cal. App. 2002), the access coverage was not invoked although the sole means of access to a public road was via the insured's adjoining parcel. The *Magna* court said that "access" does not mean "practical access."

Jen and Shuler relied exclusively on *Marriott Financial Services, Inc. v. Capitol Funds, Inc.*, 217 S.E.2d 551 (N.C. 1975), in which the insured parcel abutted a public street but the city refused to issue a permit for a curb cut in the street at the insured parcel. The appeals court said that, "in dicta, the [*Marriott*] court noted that because the property was located in a commercial area, it was 'beyond reasonable limits to hold that' the insurer and insured 'understood that the insurance as to access could be satisfied by pedestrian access.'" The *Marriott* court said that "when an insurer contracts to insure against lack of access to property, it must be deemed

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to have insured against the absence of access which, given the nature and location of the property, is [r]easonable access under the circumstances."

This court observed that "the *Marriott* decision has been continuously criticized by other jurisdictions which have considered the issue of a lack of right of access." It noted that the Florida decision of *Barrows* had distinguished *Marriott* and relied on "other cases with more consistent holdings" in defining the right of access coverage. The court also noted that *Gates* had held that the *Marriott* statements were "obiter dicta" and an outlier which "stand[s] alone." The *Riordan* decision said that the "dicta in Marriott has been roundly criticized." 393 F. Supp. 2d at 1105. The court reached this conclusion:

> *We agree with the majority of jurisdictions that have considered this issue and hold that a lack of right of access provision in a title insurance policy insures only against legal access and does not equate to reasonable access. Accordingly, we hold Chicago Title did not withhold payment of a claim without just cause. The insurer performed the necessary investigation and denied coverage based on the wealth of persuasive case law supporting Chicago Title's determination that the Jen-Shulers' claim was not covered under their title insurance policy.*

The court also said that Chicago Title's denial of the Jen and Shuler claim did not violate Md. Code Ann., Ins. § 27-216(a), which says an insurer cannot collect a premium for a coverage "on which no loss is paid." Under that law, "if an insurer provides insurance for certain coverage and accepts premiums, yet never provides coverage, the insurer is in violation of § 27-216(a)." See *Carter v. Huntington Title & Escrow, LLC*, 420 Md. 605, 630–31 (2011).

Jen and Shuler said that, if the access coverage was limited to an assurance that the parcel has some right of access, no matter how limited, no title insurer would ever pay a loss. They argued that Baltimore County no longer allows a landlocked parcel to be created. The MIA presented testimony at the hearing from David Thaler, a land surveyor and engineer. Mr. Thaler testified that a landlocked property in Baltimore County is rare and that, to his knowledge, no parcel had been "recently created" in Baltimore County that lacked access to a public road.

Your editor, however, testified that there are thousands of parcels of land in this country that are landlocked, and that title insurers have paid millions of dollars to defend their insureds' access rights. The appeals court accepted Chicago Title's evidence:

> *The Commissioner determined that Mr. Nielsen's testimony was more persuasive than the other testimony that was presented and determined that Chicago Title had proven by a preponderance of the evidence that it did not collect a premium and refuse to provide coverage. … The Commissioner was entitled to rely on its testimony that he found persuasive. Critically, as the Commissioner found, Chicago Title, and other insurers, had provided coverage and paid claims under this identical provision in other cases. We, therefore, hold that there was substantial evidence presented for the Commissioner to find that while Chicago Title collected premiums under a lack of right of access provision, it did not fail to offer coverage in violation of § 27-216(a).*

The appeals court found, however, that Chicago Title had a duty to defend the insureds against the Bull counterclaim. Maryland follows the standard that an insurer must defend its insured in litigation "if there is a potentiality that a claim could be covered by the policy." *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 407–08 (1975). The mere potentiality that a pleading might be covered can trigger the duty to defend by the insurer. In addition, "[a]n insured may rely on extrinsic evidence where the underlying complaint 'neither conclusively establishes nor negates a potentiality of coverage.'" Notably, "[i]f there is any doubt as to whether there is a duty to defend, it is resolved in favor of the insured."

Chicago Title argued that the Bull counterclaim did not create the potential for coverage, because it made two claims—defamation and unjust enrichment—neither of which attacked title. The court said that Jen and Shuler had conceded the lack of coverage for defamation. As to unjust enrichment, however, the appeals court said:

> *The Bulls claimed in their counterclaim that the Jen-Shulers used the Bulls' driveway without their permission. Although the majority of the driveway was on the property of the Bulls, a small portion of the driveway was also on the Jen-Shulers' property. Nowhere in the counterclaim did the Bulls contend that they were bringing a claim against the Jen-Shulers for using only the portion of the driveway that was on the Bulls' property. Rather, the Bulls referenced the entire driveway in their counterclaim. Inasmuch as this counterclaim could potentially interfere with the Jen-Shulers' use of their own property, there was substantial evidence to find that the failure to provide a defense under the lack of right of access provision was arbitrary and capricious and a violation of Ins. § 27-303(2).*

This is an excellent addition to the body of law construing the access coverage, and rejecting the dictum in *Marriott*. Chicago Title was very ably represented by Michael W. Tompkins, of Fidelity National Law Group, in its Vienna, Virginia office.

Title Insurance

# Insurer Has No Duty to Defend Insureds Sued for Trespass; Discovery Response Also Does Not Invoke Duty to Defend

*Safeco Ins. Co. of America v. Fidelity Nat'l Title Ins. Co.*, ___ F.Supp.3d ___, 2021 WL 252236 (W.D.Wash. 2021) (permanent citation not yet available).

A Washington federal court has issued a very careful decision that concludes that a title insurer had no duty to defend the insureds against their alleged trespass. The court also considered claims made in discovery responses, because Washington law requires an insurer to consider such extrinsic evidence in analyzing the duty to defend. This lawsuit was brought by the property insurer that paid to defend the owners, seeking contribution from the title insurer toward those defense costs.

Matilda Erickson owned a 20-acre parcel in Washington. She divided the land into four five-acre parcels, and created a private road parcel running from north to south between the parcels for access and utilities. Erickson sold three of the four parcels. She kept one, which passed to Kenneth and Brenda Erickson on her death.

Scott and Debra Dalgleish bought one of the parcels. Schedule A of their Fidelity National Title policy excepts from the insured Land the "private road along the east margin of above described property that provides ingress, egress, and a right of way for utilities for other tracts." The policy also contains a survey exception.

The Ericksons claimed that the two other grantee owners, the Nelsons and Jensens, did not have the right to use the private road. The Nelsons and Jensens sued the Ericksons in state court over that claim. The Dalgleishes were not sued. However, they sent a claim notice to Fidelity, claiming that the Ericksons were "hostilely taking over" their property.

Before Fidelity could make a coverage determination, the Ericksons filed a third-party complaint naming the Dalgleishes. The insureds sent that pleading to Fidelity, which declined to defend the Dalgleishes.

A few months later, the Ericksons responded to an interrogatory asking why the Nelsons and Jensens had no legal right to use the private drive. The Ericksons' response was that two private roads had been established over the years, and the Nelsons and Jensens only had the right to use the other private drive. Some months later, the lawyer for the Dalgleishes sent the discovery response to Fidelity, asking it to reconsider its position on defense. By that time, the trial had been held and the court had issued findings of fact and conclusions of law ruling against the Ericksons. The lawyer told Fidelity that the Ericksons were expected to appeal. Fidelity again refused to defend.

The Dalgleishes had also tendered to Safeco Insurance Company, which paid for their defense. After Fidelity issued the second denial, Safeco sued Fidelity in a declaratory judgment action. Safeco sought a judgment declaring that Fidelity was required to reimburse Safeco for "an equitable share of the defense costs."

Both insurers moved for summary judgment. Magistrate Judge Christel issued a report and recommendations, suggesting that the court rule in Fidelity's favor. In this decision, the district court accepted his recommendations.

The court began by reviewing Washington principles about an insurer's duty to defend. The duty arises if the complaint, "construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43 (2007). The court construes an ambiguous complaint liberally in favor of "triggering the insurer's duty to defend." *Woo* at 53. The insurer must also "look beyond the allegations of the complaint and reasonably investigate when the allegations are in conflict with facts known to or readily ascertainable by the insurer, or if the allegations of the complaint were ambiguous or inadequate." *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417 (1999).

Because of this standard, the court considered the allegations of the complaint, and also the information given by the lawyer to Fidelity when the tenders were made, including the Erickson discovery response.

The court first held that the Erickson third party complaint did not invoke a duty to defend. The Ericksons claimed that the Dalgleishes had trespassed by filling in a ditch, cutting down trees and removing survey stakes. The Dalgleishes argued that there might be coverage for the trespass claim because their activity might have been on the insured land. They emphasized that the width of the private drive was not stated in their deed or the policy, leaving their boundary line open to debate.

The magistrate judge had concluded that coverage for the trespass claim was negated by the post-policy exclusion, the survey exception, the definition of Land and the no-loss exclusion. The district court accepted his conclusion, but found the no-loss exclusion dispositive. It accepted Judge Christel's reasoning as to that exclusion, which was:

> *Here, the trespass claims could not result in a loss or damage to the insured. If the Dalgleishes were found to have trespassed on the Ericksons' property when they filled a drainage ditch, removed, trees, or removed stakes, the Dalgleishes would not have suffered a loss or damage because they never owned the property. The same is true if the Dalgleishes were found to have not trespassed; they continued to maintain ownership in the property wherein they filled the ditch, removed trees, or removed stakes. Thus, there would be no resulting loss or damage to their property interest.*

Safeco's main objection was that it would be harsh or absurd to conclude that title insurance never protects the insured against his or her own trespass. The Court disagreed, saying:

> *The general purpose of*

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> *title insurance is to insure against defects, liens, encumbrances, or adverse claims against title, not to provide coverage for the insured's alleged intentional torts.*

It said that "resolution of trespass claims could reveal the parameters of the private road excepted in the Dalgleishes' deed rather than change them." Thus, the third party complaint created no duty to defend.

Next, the court considered the Erickson interrogatory response, in which they claimed that there were two private roads, though the claimed second roadway was never built. The question was whether the Erickson claim about the phantom second road "implicated the Dalgleishes' title." Safeco argued that, although it was not clear where the second roadway path was, "it is clear it was a claim against the Dalgleishes." The court said, however, that the Ericksons only claimed to own the private road carved out of the Dalgleish legal description. Thus, the Ericksons never alleged ownership of any part of the insured parcel.

Finally, the court dealt with the fact that the insureds' lawyer attached a survey to his second tender letter. The lawyer said that the survey depicted the phantom second road as being "almost entirely" located on the Dalgleish property. The district court did not consider the issue because Safeco did not claim, in its briefs to Judge Christel, that the letter or survey created an independent foundation for a duty to defend. The court observed in a footnote, however, that:

> *Had the Court considered the letter, it would not have changed the conclusion that only one roadway was actually the subject of the underlying claims, consistent with the state trial court's [findings of fact and conclusions of law].*

This is the latest in a string of orthodox decisions holding that the policy does not cover the insured's tortious conduct or trespass, particularly when that conduct does not pertain to the insured parcel. See *Horwood v. North American Title Ins. Co.*, 2020 WL 7635765 (Mich.App.) (unpublished), reported in the February issue, which held that there was no coverage under the Homeowner's policy for the insureds' trespass on their neighbor's land, including tearing up their fence and making rude gestures while driving across that adjoining parcel. Similarly, in *Tritapoe v. Old Republic Nat'l Title Ins. Co.*, 2020 WL 1487813 (W.Va.) (unpublished), reported in June, 2020, the insurer was not required to defend its insured in a lawsuit brought by a neighbor after the insured blockaded a road that was near the insured parcel but not on it.

The issue of apportionment of defense costs between two insurers has been addressed only occasionally. In many states, an insurer only has a right to seek contribution from another insurer if its policy contains an "other insurance" clause. The 2006 ALTA policy contains a brief other insurance provision at Condition 13(b). That provision remains unchanged in the 2021 ALTA policies.

Title Insurance

# Georgia Court Misunderstands Nature of Closing Protection Letter

*CoreVest American Finance Lender LLC v. Stewart Title Guar. Co.*, ___ S.E.2d ___, 2021 WL 302656 (Ga.App. 2021) (permanent citation not yet available).

In reversing dismissal of a lawsuit against an insurer, the Georgia appeals court has betrayed a fundamental misunderstanding of the nature and purpose of a closing protection letter.

CoreVest American Finance Lender made a loan that was to be secured by a security deed on property in Valdosta, Georgia. Two deeds were to be recorded simultaneously, conveying the land from the record owner, K2, to intermediate buyer Alvarez Investment Group, and then from Alvarez to borrower Springhill Property Group. The security deed was to be recorded after the second deed.

Two companies were involved in the closing and issuance of a policy to CoreVest, Worden and Asociados and SSP Title and Escrow Solutions, LLC. The appeals court said that Worden issued a title insurance commitment. CoreVest sent loan closing instructions to Worden. Those instructions said that Worden would serve as escrow agent and SSP Title as the title company. SSP Title was to issue the CoreVest policy. SSP Title signed the instructions as "title company." A Worden attorney signed the instructions as "closing attorney."

Stewart Title sent a closing protection letter to CoreVest on behalf of Worden as its issuing agent. The standard form ALTA CPL said that Worden was Stewart's agent "only for the limited purpose of issuing title insurance policies [and not] for the purpose of providing closing or settlement services."

The closing took place. The settlement statement listed SSP Title as settlement agent. SSP Title received payment for title examination, title binder and attorney fees. The title insurance premium was listed as being paid to "W.A./ Title Company."

No policy was issued after closing.

Springhill defaulted on the CoreVest loan. The lender got a title report showing that, although the CoreVest security deed had been recorded, the deedd to borrower Springhill had not, and a prior mortgage had not been satisfied. CoreVest sent a claim notice to Stewart Title. The insurer denied the claim because its agent, Worden, had not closed the loan and no policy had been issued. Initial seller K2 then sent a letter to CoreVest telling it to release its security deed. CoreVest made another claim on Stewart Title, which again denied the claim.

CoreVest sued Stewart Title, Worden, SSP Title, Springhill and its two members, alleging claims of breach and misrepresentation. CoreVest alleged that Stewart Title had breached the CPL and the policy.

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Stewart Title moved for judgment on the pleadings, which the trial court granted. The appeals court reversed, finding that dismissal of the claims was premature.

Stewart Title had convinced the trial judge that its agent, Worden, had not issued a policy or acted as the title agent for the CoreVest loan. Thus, the CPL was not in effect. The appeals court held that the CPL might have been in effect, based on this confused statement:

> *Here, the CPL required Stewart to indemnify CoreVest from any losses incurred in connection with the closing "conducted by the Issuing Agent or Approved Attorney" as long as the loss arose out of the failure to comply with the closing instructions, or was due to the Issuing Agent's or Approved Attorney's fraud or negligence in connection with the closing. Under the terms of the CPL, Stewart would indemnify CoreVest "provided [it] issues or is contractually obligated to issue title insurance." The trial court did not analyze this provision and instead limited its reasoning to its conclusion that Worden had not closed the loan, and, therefore, the duty to indemnify was never triggered. But the CPL provided that Worden was Stewart's agent "only for the limited purpose of issuing title insurance policies [and not] for the purpose of providing closing or settlement services." Thus, the CPL would still require indemnification for Worden's conduct as the issuing agent, and the fact that Worden may not have been the closing attorney would not preclude application of the indemnification provision in the CPL.*

This passage completely misconstrues the CPL. The CPL correctly states that the title company is the insurer's agent only for issuing policies, because that is the true limit of authority under the agency contract. The CPL creates direct liability from the insurer to the letter's recipient because the title agent is not the insurer's agent for closing duties. The assurances of the CPL can be triggered only if the title agent both issues the policy to the addressee and serves as closer.

The court also said the claim for breach of the policy should not have been dismissed. The court acknowledged that no policy had been issued. It said that the complaint alleged that Worden had issued a commitment to CoreVest. The lack of a policy did not settle the question, the appeals court said, because there was an allegation that a premium had been paid at closing for a CoreVest policy. Thus, it was premature to dismiss the breach of policy claim.

The appeals court allowed that, "after discovery, Stewart may be entitled to summary judgment, but that is not the procedural posture before us." Your editor's hunch is that this was a split closing and a double escrow. If Worden issued a title insurance commitment, it may have been for an owner's policy to be issued to the borrower, Springhill. Even CoreVest's own loan closing instructions identified SSP Title as being the title agent for the issuance of the loan policy. CoreVest should have obtained a CPL for the closing acts of SSP Title, since it had engaged SSP to issue the loan policy.

Title Insurance

# Possession Exception Negates Duty to Defend Adverse Possession Lawsuit

*Melamed v. First American Title Ins. Co.*, ___ N.Y.S.3d ___, 2021 N.Y. Slip Op. 00166, 2021 WL 115887 (N.Y.A.D. 2 Dept. 2021) (permanent citation not yet available).

A New York court has ruled that a title insurer has no duty to defend its insureds in a lawsuit brought by their neighbor claiming title to some of the insured parcel by adverse possession, because the policy contains a possession exception.

David N. Melamed and Mahvash M. Danielian bought a house in Roslyn Harbor. They got a policy from First American Title that contains an exception for parties in possession of the insured land.

Susan F. Abeles owns an adjoining parcel. She filed a lawsuit against Melamed and Danielian claiming title by adverse possession of a portion of the insured land. The insureds demanded that First American Title defend them in the Abeles action. First American declined to do so.

Melamed and Danielian sued First American for the cost of defending the Abeles action. The trial court ruled in the insurer's favor on summary judgment. The appellate division affirmed.

The appeals court observed that, when an insurer relies on an exclusion as a defense to its policy duties, the exclusion "must be specific and clear in order to be enforced, and an ambiguity in an exclusionary clause must be construed most strongly against the insurer." *A. Gugliotta Dev., Inc. v. First Am. Tit. Ins. Co. of N.Y.*, 112 A.D.3d 559, 560, 976 N.Y.S.2d 172. The insurer must prove that there are no other reasonable interpretations of the exclusion. *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873, 476 N.E.2d 272. Also, the insurer must defend the insured against even meritless claims. Even if the plaintiff alleges claims for which there is no coverage, there is a duty to defend if "the complaint alleges any facts or grounds which bring the action within the protection purchased."

The court rested its conclusion on the leading New York decision concerning the possession exception, *Herbil Holding*. It said:

> *Here, we agree with the Supreme Court's determination that First American was not required to defend and indemnify the plaintiffs in the Abeles action. The subject title insurance policy included an exception for claims arising from the rights of persons in possession. Abeles's claim for possession of a portion of the plaintiffs' property*

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*by adverse possession was a claim arising from the rights of persons in possession (see Herbil Holding Co. v. Commonwealth Land Tit. Ins. Co., 183 A.D.2d 219, 228, 590 N.Y.S.2d 512). Contrary to the plaintiffs' contention, there was no other reasonable interpretation of this exception to the policy… . Furthermore, as there was "no possible factual or legal basis on which" First American "might eventually be obligated to indemnify" the plaintiffs, it was not required to defend them in the Abeles action… . Since the plaintiffs' demand for First American to defend and indemnify them in the Abeles action fell squarely within the foregoing exception from coverage, we agree with the court's determination denying their motion for summary judgment on the complaint and granting First American's cross motion, in effect, for summary judgment declaring that it was not obligated to defend and indemnify the plaintiffs in the Abeles action.*

This is an excellent though brief reiteration of the principle that the parties in possession exception negates coverage for claims of ownership by adverse possession, because such a right is based on obvious occupation of the property for which there is no notice in the real estate records. The Florida decision of *Guarantee Abstract & Title Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 216 So.2d 255, 257 (Fla.App. 1968), explained why it reached the same conclusion:

*The rationale for including an actual possession exclusion in a title insurance policy stems from the fact that possession of the land is notice of an interest in it. Blackburn v. Venice Inlet Co., Fla.1948, 38 So.2d 43. When a person, who does not appear in the chain of title, is found in possession of property it may indicate, for example, that he is making claim to the property by adverse possession, or that he is claiming under an unrecorded deed. A title examiner, however, seldom visits the land the title to which he is concerned with. J. McBrayer, Examination of Florida Titles Section 275 (1958). Thus, both to protect themselves and to put their client on notice of this state of affairs, title examiners and title insurance companies generally exclude from their title opinions and policies claims of parties in actual possession of the land insured.*

Numerous other courts have found that the possession exception negates coverage for adverse possession. See *Fischer v. First American Title Ins. Co.*, 388 S.W.3d 181 (Mo. App. W.D. 2012); *Zimmerman v. Chicago Title Ins. Co.*, 28 S.W.3d 584 (Tex.App.1999); *Boyadjiev v. Transnation Title Ins. Co.*, 2005 WL 3556156 (Mich.App. 2005) (unpublished); *Cheverly Terrace Partnership v. Ticor Title Ins. Co.*, 100 Md.App. 606, 642 A.2d 285 (Md.App. 1994); *Panciocco v. Lawyers Title Ins. Corp.*, 147 N.H. 610, 794 A.2d 810 (2002); and *Smith v. McCarthy*, 195 S.W.3d 301 (Tex.App.-Fort Worth 2006).

### Escrow Matters

# California Escrowee Cannot Enforce Bank's Payoff Letter

*Rubie's, LLC v. Wells Fargo Bank, N.A.*, ___ F.Supp.3d ___, 2020 WL 7388093 (E.D.Cal. 2020) (permanent citation not yet available).

A California court has held that an escrowee has no legal power to compel a lender to release its deed of trust after receiving payment of the amount stated in its payoff letter.

In 2006, David and Linda Moscovic got an SBA loan. The loan was secured by a deed of trust on the Moscovic's house in Stockton, California. Wells Fargo was the loan servicer.

In 2014, the Moscovics sold their house to Amar Mathfallu. First American Title Company served as escrowee in the sale. First American sent a payoff request to Wells Fargo. The request said that First American would "rely upon lender's written demand/letter/statement to establish the amount necessary to pay the obligation in full, and as lender's commitment to deliver a full reconveyance/release and/or satisfaction." Wells Fargo sent First American a payoff letter and an updated letter. The second letter said that the payoff figure for the loan was $108,736.75. First American delivered that sum to Wells Fargo. Neither Wells Fargo nor the SBA caused the deed of trust to be released.

Later in 2014, Mathfallu conveyed the house to Rubie's, LLC, of which Mathfallu is the sole member.

In 2018, Rubie's LLC and Mathfallu sued First American in state court, claiming it was negligent in conducting the escrow because the deed of trust was not released. First American filed a third-party complaint naming Wells Fargo and SBA as third-party defendants. The case was removed to federal court.

Wells Fargo and the SBA moved to dismiss First American's claims. In this decision, the court granted that motion. Because the court had previously allowed First American to amend the pleading, it dismissed the claims with prejudice, and remanded the claims of the insured against First American to the state court. The district court took judicial notice of documents not in the pleadings, including the payoff requests and payoff letters.

The court dealt first with First American's claim for implied contractual indemnity. Such a claim is predicated on the existence of a contract between the parties. A leading decision on this type of claim in the title insurance world is *Bear Creek Planning Comm. v. Title Ins. & Tr. Co.*, 164 Cal. App. 3d 1227, 1239 (1985), which stated that an action for implied contractual indemnity is "grounded upon the indemnitor's breach of duty owing to the indemnitee to properly perform its contractual duties."

The SBA and Wells Fargo said the payoff demands and letters did not create a contract between either of them and First American. Wells Fargo argued that there was no contract because there was no mutual consent. Mutual consent is "[a]n essential element of any contract."

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*Lopez v. Charles Schwab & Co., Inc.*, 118 Cal. App. 4th 1224, 1230 (2004)). The California Civil Code section 1580 says that "Consent is not mutual, unless the parties all agree upon the same thing in the same sense."

The court agreed that there was no contract or mutual consent. It said:

> *The gravamen of First American's argument is that "Wells accepted First American's offer which unconditional acceptance was communicated by responding to First American's offer with a payoff demand." … Each of First American's written requests stated that First American would "rely upon [Wells Fargo's] written demand/letter/statement to establish the amount necessary to pay the obligation in full, and as [Well Fargo's] commitment to deliver a full reconveyance/release and/or satisfaction." … While the SAC alleges that Wells Fargo submitted the payoff demand to First American in response to First American's written request for the same, Wells Fargo's payoff demand does not corroborate this allegation. As Wells Fargo notes, First American's request for the issuance of a payoff demand and Wells Fargo's actual payoff demand do not match up: Well Fargo's payoff demands are neither directed to any person or company identified in First American's request for payoff demand, nor were they delivered to the fax number or email listed on First American's requests. … Rather, Wells Fargo sent its payoff demands letters to [the local SBA affiliate] pursuant to the SBA's regulations. …*
>
> *As Wells Fargo puts it, "the agreement at issue is the SBA Deed of Trust between the borrower and the CDC, which was assigned to the SBA," and "[a] payoff letter is the method by which the borrower obtains the payoff amount, not its own separate contract." … The court finds this reasoning to be persuasive. First, the order of events accords with California statutory requirements for mortgages and liens. As the escrow holder, First American was statutorily authorized to send a written request for the payoff demand, and the SBA, as the beneficiary's assignee, was statutorily required to respond to First American within 21 days of receipt of a payoff demand request. (See … Cal. Civ. Code §§ 2943(a)(4), (5), (b)(1). Second, Wells Fargo's actions are corroborated by the SBA's regulations and policies. See 13 C.F.R. § 120.800 et seq. The SBA's policies state that when a borrower provides notice that it wishes to prepay a 504 loan, the CDC obtains the Central Servicing Agent's ("CSA") estimate of a prepayment amount, and the borrower wires payment funds to the CSA. …*
>
> *Thus, the SAC is "devoid of facts tending to show that these were actions taken in exchange for the alleged promises" set forth in First American's written request, as opposed to being actions taken within the scope of Wells Fargo's statutory role as the CSA. … As such, First American has failed to adequately allege that it had a contract with Wells Fargo and, by extension, the SBA. The court must therefore dismiss First American's implied contractual indemnity claim.*

The court also dismissed First American's equitable indemnity claim against Wells Fargo. The court accepted Wells Fargo's argument that equitable indemnity applies only when one of two joint tortfeasors seeks indemnity from the other. First American had alleged that the loss suffered by the property owner was caused by Wells Fargo's negligence, so Wells Fargo should indemnify First American, which did not cause the harm. The court gave this harsh and unrealistic assessment of the situation:

> *As concluded above, the SAC does not adequately allege that Wells Fargo contractually agreed to do anything in its response to First American's written requests for payoff demand. Thus, any duty that Wells Fargo owed plaintiffs must arise from some other source. Wells Fargo argues that it had neither a contractual duty to plaintiffs nor a duty to them under the law.*

First American argued that the duty to cause a reconveyance is found in California Civil Code § 2941, which requires the lender to reconvey within 60 days of payment in full. Wells Fargo twisted that statute around, arguing that it "places reconveyance obligations on the beneficiary/assignee of a deed of trust (the SBA) and a title insurer (First American)." The court agreed, and said that Wells Fargo's sole duty was to collect money:

> *But the course and scope of Wells Fargo's authority, defined by the SBA's regulations, is solely to process funds. … Even if Wells Fargo could be the SBA's agent, and Wells Fargo could have reconveyed on the SBA's behalf, First American's SAC simply does not sufficiently allege the existence of such a principal-agent relationship between the SBA and Wells Fargo. … Moreover, the court is not persuaded that Wells Fargo had a duty to reconvey under either California Civil Code § 2941 or the SBA's regulations.*
>
> *Thus, § 2941 created a duty for Alliance Title Company [the trustee on the deed of trust] to reconvey in the first instance, and the SBA in the second instance. That section is designed with "backup methods to assure the trustor can promptly clear title to the secured property" when the trustee fails to reconvey. <u>Markowitz v. Fid. Nat. Title Co.</u>, 142 Cal. App. 4th 508, 522 (2006). The first backup method requires the beneficiary to "substitute itself in as trustee and execute a full reconveyance." Id. If the beneficiary also fails to act, then a title insurance company may reconvey. Id. at 523.4 It is clear, however, that nothing in this statutory scheme implicates Wells Fargo as the CSA.*

The court ended by noting that the property owner and First American "may have claims against SBA and Alliance Title Company."

Such ivory tower reasoning completely ignores the reality of daily life, to the detriment of the ordinary citizen who assumes that a lender will release its lien from his home when its loan is paid in full.

Escrow Matters

## Closing Attorney Must Trace Money He Claims Was Stolen From Escrow Account

*Campbell v. Riggs*, ____ So.3d ___, 2021 WL 49872 (Fla.App. 4 Dist. 2021) (permanent citation not yet available).

An attorney who claims that his employee stole money from his client trust account must prove the theft, and show how that theft related to the larger shortage in his client escrow account that was caused by the attorney's own improper use of escrowed money.

Florida attorney Jerry Riggs wrote insurance for Attorneys' Title Insurance Fund, Inc. He conducted a closing on a Miami house sale. He did not pay off a mortgage loan from closing, apparently because his client trust account had a shortage and there was not enough money in the account to make the payment. Attorneys' Title paid about $124,000 to protect the insured after the bank foreclosed on the mortgage.

Attorneys' Title sued Riggs to recover the loss. Riggs joined his employee, Tammy Campbell, as a defendant. Riggs claimed that Campbell had caused the shortage in the account by stealing about $84,000 from the account through a fake refinance closing on her home. Riggs said that Campbell then sold that house, bought a new one, and transferred her new home to a relative to shield it from creditors. Riggs sought an equitable lien on the replacement house.

Riggs and Attorneys' Title settled. That left only Riggs' claim against Campbell. Riggs filed a summary judgment motion. He attached a number of documents, including the checks that Campbell allegedly forged, his client trust account bank statements, and a chart showing the money flow in the account.

In response to Riggs' summary judgment motion, Campbell argued that Riggs had been investigated by the state bar after he failed to make the payoff in the Miami closing, and had his license suspended for three years based on evidence that Riggs had used money from the client trust account to pay his personal expenses. Riggs did not blame Campbell in the state bar investigation.

The trial court granted summary judgment in favor of Riggs, awarding him the money stolen by Campbell and an equitable lien on the house titled in Campbell's relative.

The appeals court reversed. It found that Riggs had not proved the theft by Campbell. It relied heavily on the referee's findings in the disciplinary complaint against Riggs. The court noted that:

> *The referee did not find that Campbell was responsible for the missing funds. Riggs handled the refinancing of Campbell's home approximately one month after the closing on the Miami property. Riggs did not file an incident report with the police until two months after the Bar filed the disciplinary complaint and over eighteen months after the Miami closing funds disappeared. The referee concluded that Riggs failed to adequately supervise Campbell and failed to properly maintain his trust account.*

The court said that Riggs was required to prove that the checks had been forged by Campbell, and to trace the stolen money to her bank account. It noted that the Campbell "refinance" happened a month after the Miami closing, so that the shortage allegedly created by Campbell would not have prevented the payoff from the Miami closing. The court also noted that Riggs did not file a police report against Campbell until nearly two years after the Miami closing. Thus, there were material issues of facts in dispute, and it was premature to enter summary judgment.

The requirement of tracing of funds can be a difficult obstacle when there is an escrow account shortage. When money is stolen from the escrow account, the theft is not related to any particular closing or escrow. Because of the float in the typical escrow account, months or years may pass between the theft (or series of thefts) and the closing from which money is not disbursed due to the shortage. The harm is suffered by a certain party simply because his or her closing occurs on the day when the float can no longer cover the account shortage. Proof of the chain of events is complicated. Courts are often frustrated with the lack of a simple cause-and-effect chain of evidence. This subject is thoroughly addressed in *Title and Escrow Claims Guide* § 17.8.3, *Losses Caused By Theft Of Money From Escrow Account or Defalcation*.

This decision presents an interesting example. It may be true that both Riggs and Campbell stole from the same account. The ultimate legal issue may be whether Riggs' own theft is a legitimate bar to his recovery against Campbell for her theft from the same account. The further issue, not addressed by this decision, is whether Riggs has standing to sue Campbell, given the fact that all of the money in the account was the property of other parties.

Escrow Matters

## Escrow Principal Cannot Deny Escrow Exists Because Instructions Were Delivered Late

*Bar Kochba Botach v. Nibo,* 2020 WL 7066266 (Cal.App. 2 Dist.) (unpublished).

One party's claim that the other party delivered escrow instructions one day late did not cause the escrow to fail or render the purchase agreement unenforceable.

In 2016, John E. Nibo agreed to sell property in Los Angeles to Bar Kochba Botach for $1,380,000. Before the sale closed, Nibo demanded changes in the purchase terms, including an increase in the price to $1,800,000. Nibo then sued Bar Kochba, claiming that it had reneged on an oral agreement for a sale at the higher price.

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The case went to trial in 2018. After a recess, Bar Kochba's lawyer told the trial judge that the parties had reached a settlement and he wanted to put the terms on the record. Nibo was not represented by counsel. The judge had Nibo confirm that there was a settlement. The agreed-on sale price was $1,600,000. There would be a 90-day escrow period. Nibo was to deliver the property free and clear of city violations. Nibo stated on the record that he would deliver the property free of any environmental problem. The court then cancelled the balance of the trial.

Nibo hired a lawyer to help reduce the oral agreement to writing. Only then did Nibo disclose that the City of Los Angeles had recorded a lis pendens against the property and had recorded an abstract of judgment in that action for more than $2.8 million. Botach agreed to give Nibo a "reasonable time" to negotiate with the city for a release of the abstract of judgment.

Both Nibo and Botach signed the purchase agreement, but they did so several days after the original agreed-on closing date of March 31, 2019. Botach agreed to Nibo's request to extend the date to April 26. Escrow instructions were drafted. Botach signed them and delivered them on April 4. Nibo refused to sign the escrow instructions or to close. Botach went back to court to enforce the settlement. The court set a hearing date in late May. Just before the hearing date, Nibo filed an ex parte application, asking the court to find that the agreement was not enforceable, largely because Botach had not signed and delivered the escrow instructions within the three days called for under the purchase agreement.

The trial court enforced the settlement agreement. The appeals court affirmed. The court held that the settlement agreement was enforceable, both as an oral agreement and in the subsequent written agreement that was signed by both buyer and seller. It held further that the closing date had been extended by both parties, through an agreement articulated by exchanged emails.

The appeals court rejected Nibo's claim that Botach had breached the contract by purportedly delivering the escrow instructions later than three days after the purchase agreement's effective date, as called for in the contract. The term "effective date" was not defined in the contract. The court construed that term to mean the date on which the last party signed the agreement. It said that "substantial evidence" supported the conclusion that Nibo signed the contract on April 1, making Botach's April 4 delivery of the escrow instructions timely. Thus, Nibo had not shown "any defect in the opening of escrow, and therefore fails to show the court erred by enforcing the escrow instructions."

The court might have concluded that Nibo was barred from asserting a technical breach by Botach as a defense to enforcement of the settlement agreement and its attendant escrow instructions. The court did not make that finding, suggesting that even in this context both parties were required to fully comply with the purchase terms.

Agent Focus

## Cancelled Agent Who Issued Fake Policies Must Serve Sentence

*United States v. Cunningham*, 2021 WL 75694 (W.D.N.C. 2021) (permanent citation not yet available).

A former title agent who issued fake policies after her cancellation must serve her prison sentence despite her claimed worries over the Covid virus, because of the societal effects of her crime.

Ginger Lynn Cunningham formerly owned and operated a title agency in Buncombe County, North Carolina. She was cancelled by her underwriter. She began issuing fake policies after collecting premiums for those policies. Before she was stopped, she had written bogus policies with an aggregate coverage amount of more than $100,000,000.

The fake policies "caused losses to the title insurance company and over a dozen closing attorneys, all of whom also suffered damage to their credibility and reputations."

In October of 2019, Cunningham pled guilty to one count of wire fraud. She stipulated that the loss caused by her fraud scheme was more than $550,000 but less than $1,500,000. She was sentenced in July of 2020 to 14 months in prison, to be followed by three years of supervised release. She was also ordered to pay $412,344 in restitution.

Cunningham had her prison report date deferred twice based on claims that she was more susceptible to the Covid virus due to certain medical conditions. In December of 2020, she filed a third motion, asking that her prison sentence be changed to an "alternative form of punishment" because the federal prison to which she had been assigned had seen an increase in the number of prisoners who contracted the virus.

The court denied the motion on January 7. The court said Cunningham's medical conditions were not extraordinary. Further, the court said, she needed to serve time for what she did:

> *… [T]he Defendant's crime was serious. Her fraud jeopardized over one hundred million dollars' worth of title insurance policies and caused losses to the title insurance company and over a dozen closing attorneys, all of whom also suffered damage to their credibility and reputations. The need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment all continue to favor an active term of incarceration.*

The issuance of a forged title insurance policy is a crime in every state. The act typically falls under a general statute about forged instruments. Some states, however, have adopted laws that specifically identify the issuance of such a policy as a crime having a certain offense classification. See, for example, Wisconsin Statute 943.38(f), which says a person is guilty of a Class A misdemeanor if he or she "[f]alsely makes or alters a certified abstract of title to real estate, a title insurance commitment, a title insurance policy, or any other written evidence regarding the state of title to real estate." In Nevada, it is a misdemeanor to issue a fake insurance policy, under 43 NRS 485.350. Under federal law, a forged title insurance policy that concerns interstate commerce sometimes falls under 18 U.S. Code § 1033, which can lead to a sentence of up to 15 years.

Agent Focus

## Conviction Affirmed for Woman Who Impersonated a Real Title Agency to Close Fraudulent Loans

*United States v. Hernandez,* 831 Fed.Appx. 932, 2020 WL 6256684 (11th Cir. (Fla.) 2020) (unpublished).

The Eleventh Circuit has affirmed the conviction of a woman who ran a fake title agency, closely mimicking a real title agency, to assist in the closing of fraudulent loans.

Luz Hernandez was a title agent holding a license issued by the State of Florida. She agreed to help Javier Coballes close on two fraudulent loans secured by properties in Miami Beach. Hernandez concocted a sham title company, America's Title & Escrow Corporation, and a fake title agent, Roberta Prida. These names were "strikingly similar to" Hernandez's former employer of two years, America's Title Corporation, and her former colleague, Roberto Prida. The sham title company also used the real company's former business address. Hernandez contacted Coballes' loan broker, posing as Cathy Walker. Hernandez submitted false closing documents, including a warranty deed that bore a notary stamp that Hernandez had altered using Adobe Photoshop. Hernandez signed closing documents using the names Cathy Walker and Roberto Prida.

Hernandez's bank account records showed that she made cash deposits of $34,100 in 2015 and $57,710 in 2016. Those deposits corresponded with the loan closings. Hernandez did not report that money as taxable income. When the FBI agent presented the falsified documents to Hernandez, she "attempt[ed] to avoid providing a valid handwriting sample by intentionally distorting [her] handwriting." At her trial, the jury accepted the testimony of a forensic document examiner to find that Hernandez's intentional distortion of her own signature was evidence of "a consciousness of guilt."

In her appeal, the court found that the jury was entitled to consider the evidence of Hernandez's handwriting distortion as proof of her guilt. It also refused to find error in the court's order requiring Hernandez to pay $4.7 million in restitution. Hernandez "remained silent when the government stated at sentencing that the parties agreed as to the amount of restitution." The restitution order was based on the amount of money stolen with Hernandez's paid assistance.

This decision is yet another indication of the attitude of federal prosecutors, that loan fraud can rarely succeed without the witting or unwitting assistance of a closer or escrow officer. The fact that Hernandez created a fake title agency to conduct the two loan closings, and then created fake documents to support the loans, weighed heavily against her in the trial and sentencing. The disparity between the loan amounts and the money actually paid to Hernandez is a sobering reminder that this kind of crime nets shockingly low wages to boot.

Agent Focus

## Court Will Not Decide if E & O Carrier is Liable for Indemnity Until Suit Against Agent is Decided

*RLI Ins. Co. v. Baywalk Title Inc.*, ___ F.Supp.3d ___, 2020 WL 6742789 (M.D.Fla. 2020) (permanent citation not yet available).

When a title agent is being sued in what may become a class action suit, the errors and omissions carrier is premature in asking a federal court to determine that it will not have to pay a loss no matter how the underlying case is decided.

Baywalk Title Inc., a Florida title agent, has been sued by a buyer customer who says that he was wrongly charged a closing fee, because the contract said all closing fees were to be paid by the seller. The plaintiff seeks to represent a class of thousands of allegedly similarly situated people. That action, couched as claims for negligence, gross negligence, breach of fiduciary duty and unjust enrichment, is ongoing in Pinellas County. *Kruk v. Baywalk Title, Inc. d/b/a Title Insurors of Florida*, 20-001888-CI, Dkt. (Fla. Cir. Ct.).

Baywalk Title holds an errors and omissions policy issued by RLI Insurance Company. Baywalk asked RLI to defend the state court action and to indemnify if it loses that case.

RLI filed a declaratory judgment action in Tampa federal court. RLI contends that its policy does not obligate it to defend or indemnify Baywalk. It cites policy exclusions for "dispute[s] over any fees ... charged ... by" Baywalk, or claims involving a claim that the insured gained "personal profit, remuneration or advantage to which [it] was not legally entitled." RLI also cites exclusions for Baywalk's criminal, fraudulent or dishonest conduct, and for claims stemming from "any actual or alleged violation of any ... unfair trade practices, consumer protection, or other similar law."

The court has not ruled on RLI's duty to defend Baywalk in the Pinellas County action. In this decision, the court dealt with Baywalk's motion to dismiss RLI's count asking the court to rule that it will have no duty to indemnify Baywalk if it loses the state court suit.

Baywalk said the indemnity duty issue was premature because the state court action is still pending. A duty to defend exists when there is even a potential for coverage based on what is alleged in the complaint. By contrast, "to determine whether there is a duty to indemnify, [the court] looks at the actual facts, not only those that were alleged in the state court complaint." *Stephens v. Mid-Continent Cas. Co.*, 749 F.3d 1318, 1324 (11th Cir. 2014). For this reason, "an insurer's duty to indemnify is not ripe for adjudication unless and until the insured or putative insured has been held liable in the underlying action." *Interstate Fire & Cas. Co. v. McMurry Constr. Co., Inc.*, No.

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616CV841ORL41TBS, 2017 WL 821746, at *3 (M.D. Fla. Mar. 2, 2017) (collecting cases); and *Mid-Continent Cas. Co. v. Delacruz Drywall Plastering & Stucco, Inc.*, 766 F. App'x 768, 770 (11th Cir. 2019). The duty to indemnify "is dependent upon the entry of a final judgment, settlement, or a final resolution of the underlying claims." *Diamond State Ins. Co. v. Boys' Home Ass'n, Inc.*, 172 F. Supp. 3d 1326, 1342 (M.D. Fla. 2016).

This court said that RLI's request for a declaration as to indemnification was premature because the state court action is still pending. If Baywalk is not liable, no loss will be payable. Before a ruling is made, the request "amounts to nothing more than [a request for an] advisory opinion of the parties' respective rights and liabilities," it said, quoting from *Safeco Ins. Co. of Illinois v. Tremblay*, 2018 WL 3648265 (M.D. Fla. Aug. 1, 2018). Florida courts do not issue advisory opinions based on hypothetical facts.

The court rejected RLI's contention that a ruling was needed to prevent a collusive settlement of the lawsuit. RLI cited *Higgins v. State Farm Fire & Casualty Co.*, 894 So. 2d 5 (Fla. 2004) for the proposition that "the duty to indemnify can ... be resolved prior to the underlying action in order to prevent collusion between insureds and claimants and to promote settlement." The court said that *Higgins* did not apply because that decision did not concern the powers of a federal court under the federal Declaratory Judgment Act.

The court also rejected RLI's claim that the federal court could construe the policy now because there were no questions of fact to be decided in the state action. The court said what was in question in the other case was its outcome, even if the facts were not in dispute. If the plaintiff loses, the duty to indemnify for an "unincurred liability remains forever hypothetical and, for that reason, remains a question unavailable for resolution under Article III."

This is a refreshing counterpoint to other decisions in which courts have prematurely found a lack of coverage under errors and omissions policies, including on motions to dismiss.