FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

Title Insurance Coverage: Market Value Rider

The importance of the Market Value Rider offered with every fee policy was underlined in a recent decision of the Appellate Division, Second Department. On or about April 10, 1997, the plaintiff purchased residential property for $59,031 and obtained a title insurance policy with a Market Value Rider. The property appeared to have access to Old Albany Post Road. Prior to closing, the plaintiff found out that this access was only by means of an easement, and that the neighbor (i.e. the owner of the property that had to be traversed to access the road) disputed the easement. These facts were reported to the title insurer prior to closing. The title insurer excepted the cost of enforcing the easement through the courts, but insured that, ultimately, the easement would be upheld for vehicular access.

After closing, the plaintiff commenced an action against his neighbor to declare the validity of the easement. In 2004, the Supreme Court ruled that the easement existed, but was only as a pedestrian (i.e. non-vehicular) right-of-way. The Appellate Division confirmed and, by order dated May 23, 2006, the Court of Appeals denied leave to appeal.

The plaintiff then filed a claim on her title policy. The title insurer offered to pay the full amount of the title policy, $59,031, but the plaintiff rejected and commenced an action. The title insurer soon made a motion for summary judgment seeking to declare that its maximum liability under the policy was $59,031. The Supreme Court agreed, but the Appellate Division reversed. According to the Market Value Rider, the plaintiff's loss would not be limited by the face amount of the policy, but would be limited by the value of the property "at the time of the loss." The Court reasoned that, since the insurer had insured that the final decision on the easement would be favorable to the plaintiff, the "time of loss" occurred when the last appeal was denied on May 23, 2006. Hence, the maximum amount of the plaintiff's claim under the market value rider would be the value of the property on May 23, 2006, and not the original 1997 purchase price of $59,031. *Appleby v. Chicago Title Ins. Co.,* 80 A.D.3d 546, 914 N.Y.S.2d 257 (2nd Dep't, 2011).

Insurable Title and Opportunity to Cure

The purchaser entered into a contract to buy property from an LLC. The title report raised as an exception a deed from a former partner of the seller LLC to a third party. Upon further inquiry, it appears that the property was tied up in an

arbitration dispute among the seller's partners. The seller commenced an action to quiet its title in order to complete the sale.

About one month after the contracted "on or about date", the purchaser terminated the contract and subsequently commenced an action to recover the down payment. The purchaser soon made a motion for summary judgment.

The Supreme Court noted that the contract called for a 90-day opportunity to cure and denied summary judgment on the basis that, since the purchaser had terminated the contract only 30 days after the "on or about date", there was an issue of fact as to whether the seller had been given a reasonable opportunity to cure.

On appeal, the Appellate Division reversed. When the parties agree to deliver any title that the purchaser's company will insure, "the seller breaches the contract when the title insurance company refuses to insure unconditionally and without exception, unless the exception in contemplated in the contract." According to the Court, the purchaser had made a *prima facie* showing that neither the arbitration nor the action to clear title would reach their end within the 90-day opportunity to cure. Moreover, as of the time of the decision, the 90 days had elapsed and the deed that had caused the original exception remained on record. *Eurovision 426 Develop't, LLC v. 26-01 Astoria Develop't, LLC*, 80 A.D.3d 656, 915 N.Y.S.2d 288 (2nd Dep't, 2011).
