FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title Company's Claim that a Closing Protection Letter Has No Binding Effect when Read with the Corresponding Title Policy, for Purposes of Avoiding Liability, Is Rejected by a Federal Court

Our last newsletter focused on a case where, notwithstanding a grievous mistake made by a title company in its abstract search, the title company was able to avoid any and all liability, related to its mistake, to a fee policy holder because there was an intervening conveyance of ownership of the affected property. The legal case that is presented for this month's newsletter involves a title company which issued a loan title policy that ensured a mortgage loan was in first lien position. However, as you might have expected, the insured loan was not in first lien position when the loan title policy was issued.

In the case of Wells Fargo Bank, N.A. v. Bank of America, N.A. et al, No. 11 Civ. 4062 (JPO) (U.S. Dist Ct., S.D.N.Y), the chain of events apparently begins on or about November 29, 2006 when Bank of America (hereinafter "BOA") made a loan of $2,000,000.00 to the borrower, One Hundred Twelve, LLC, to assist the borrower in its purchase of certain parcels of property within the state of Michigan. The mortgage was dated November 29, 2006 and recorded on December 4, 2006. Subsequently the mortgage was sold by BOA to an affiliated company. The mortgage, along with others, was then placed into a trust (LaSalle Commercial Mortgage Securities Trust 2007-MF5), for which Wells Fargo Bank served as the Trustee.

Of record at the time of the issuance of the BOA mortgage was a mortgage in the amount of $15,190,000.00 executed by One Hundred Twelve, LLC to Madison Class B Investors LLC. That mortgage was dated March 28, 2006 and was recorded on March 29, 2006. That mortgage encumbered part of the properties that were encumbered by the November 29, 2006 mortgage.

Prior to the issuance and recording of the November 29, 2006 mortgage, BOA was given a title commitment from Fidelity National Title Insurance Company (hereinafter "Fidelity"). The title commitment stated that Fidelity was to ensure the "discharge of the mortgage executed by One Hundred Twelve LLC, a Michigan limited liability company, to Madison Class B Investors LLC, a Michigan limited liability company, in the original amount of $15,190,000.00 dated March 28, 2006 and recorded March 29 2006 in Liber 4548, Page 167." On November 1, 2006, Fidelity provided to BOA with a closing protection letter. The closing protection letter stated that Fidelity would agree to reimburse BOA for actual losses incurred by BOA in connection with the closing of the $2,000,000.00 loan where such losses arose from the "failure of Policy Issuing Agent to comply with your written instructions to the extent that they relate to the status of the title of said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to establish such status of title lien." BOA instructed its policy issuing agent, Main Street Title, that it had to ensure to BOA the "first lien status of the Lender's Mortgage." BOA's supplemental instructions required Main Street Title "to make sure" that BOA "must have the 1st and only lien against the subject property."

BOA purchased a title policy from Fidelity on December 4, 2006. The title policy insured against "loss or damage sustained or incurred by the Insured for reason of, '*inter alia,*' the priority of any lien of encumbrance over the lien of the insured mortgage." But the title policy explicitly excepted from coverage the "mortgage, and the terms, conditions and provisions contained therein, executed by One Hundred Twelve LLC to Madison…" At the time the BOA mortgage was executed and the title policy was purchased, the Madison mortgage was still open of record. The Madison mortgage was eventually foreclosed by auction and that portion of the properties encumbered by both the BOA and Madison mortgages was conveyed free and clear of the trust's lien.

Based upon the exception from coverage of the Madison mortgage found in the title policy, Fidelity filed a motion to dismiss BOA's third-party complaint, for indemnification and breach of the title policy, against Fidelity. However, upon a review of how contracts are interpreted in New York and how those contract interpretation rules apply to both title policies and closing protection letters, the United States District Court held that it could not dismiss the third-party complaint against Fidelity. The Court held that "at this stage of the litigation, this Court is not able to determine that the parties did not intend the CPL and the Title Policy to be read as a single contract. By extension, it must be assumed, as BOA has alleged, that the CPL is integrated into the Title Policy." Moreover, the Court held that the agreement between BOA and Fidelity, assuming that the closing protection letter is to be incorporated into the title policy, was not clear and unambiguous due to the opposing provisions of the closing protection letter and the exception within the title policy. As such, the Court held that "because these provisions are facially at odds, it would be inappropriate to determine the meaning of the agreement as a matter of law at this stage of the litigation. Therefore, Fidelity's Motion to Dismiss is denied."

Looking into the Court's analysis of contract interpretation rules, it is apparent that the Court will eventually rule in favor of BOA and order Fidelity to indemnify BOA for its losses incurred as a result of the non-discharge of the Madison mortgage. The Court stated in its opinion that "for this Court to hold that the language of the CPL is not binding on Fidelity as a matter of law would appear to directly contravene the majority of case law considering the relationship between a CPL and a Title Policy." In short, title companies better adhere to the provisions within a closing protection letter. If not, a title company exposes itself to a serious amount of liability..