TORT TRIAL & INSURANCE PRACTICE

Committee News

Defending Liberty
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Summer 2015

Title Insurance Litigation Committee*

PRACTITIONER NOTES: IS OWNER'S TITLE INSURANCE REALLY "(OPTIONAL)"?

By: Deborah S. Bailey and Tania T. Trumble

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The Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly referred to as Dodd-Frank, established the Consumer Financial Protection Bureau (the "CFPB" or "Bureau"), a new federal agency that consolidates Federal consumer financial protection authority into one agency . The CFPB is tasked with, among other things, educating consumers on consumer financial products. Among the many rule changes the Bureau is proposing is that creditors must place the notation "(optional)" when displaying a quote for an owner's title insurance policy on their Loan Estimated and Consumer Disclosure forms for residential mortgage loans originated after August 1, 2015.

When it comes to the notation "(optional)," consumers must be educated as to the significance of owner's title insurance. This notation could cause confusion as it is in no way intended to mean that an owner's title insurance policy is not beneficial to the consumer or that consumers

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*Before citing any case or legislative enactment mentioned or discussed in this Newsletter, be sure that the decision has not been overruled or modified, or that the statute has not been amended, subsequent to the time these summaries were prepared.

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CHAIR'S MESSAGE 2015-2016

Welcome to the American Bar Association Title Insurance Litigation Committee ("the Committee"). The Committee is composed of lawyers who are engaged in private practices and employed by title insurance companies, with a focus on claims involving land title, title insurance, and escrow closing. The Committee has been active since 1991, almost 25 years. Its members are distinguished lawyers from around the country, and include members from the nation's finest law firms and corporations. In recent years our members have been from such diverse states as Alabama, Florida, Illinois, Massachusetts, Minnesota, Ohio, Oregon, South Carolina, Tennessee, Texas, Washington, Wisconsin and even Ontario, Canada. We are a diverse group of title industry folks devoted to the awareness of developing title case law, social networking, keeping up with trends in the title industry and being a resource to each other. The Committee has several goals for the upcoming year that I would like to share with you.

Programming

We meet a couple of times a year at various locations across the country. The Committee got off to a strong start in 2015 at the **Committee's Spring business meeting** and Continuing Legal Education seminar ("CLE") in Hilton Head, South Carolina, May 14-17, 2015. We were fortunate to have J. Bush Nielsen as our headline speaker, and his use of the Serenity Prayer as an outline to present "*Hot Coverage Issues*" was brilliant. He discussed everything from date of loss, to access, marketability of title, Exclusion 3(a) and the Federal Deposit Insurance Corporation ("FDIC") splitting of policy and closing protection letter ("CPL") claims. Rounding out the seminar was our bi-annual title case law update presentation by Jerel Hill and an all-star panel of in-house counsel discussing "*Getting Retained and Staying Retained: Best Practices*". The panel consisted of Debra Look (First American Title Insurance Company), Pamela Butler O'Brien (Stewart Title Guaranty Company), Robert Baker (Old Republic National Title Insurance Company) and Jennifer Gaytan (Fidelity National Title Group). We received much positive feedback concerning the program.

This year the **annual Committee Meeting** coincided with the ABA's annual meeting and was held in Chicago, July 30-August 2, 2015 and the Committee presented a CLE program addressing Ethical and Conflict Situations in Title Insurance Litigation, Civility in the Legal Profession and a Title and Escrow Case law Update. Stay tuned for more information concerning the Committee's **Spring 2016 Meeting** and CLE, which will be held in Santa Monica, CA most likely in March 2016. If you have ideas about the program for this meeting you may contact Chair-elect Jamie Walson at James.Walson@lowndes-law.com. In addition to the Annual meeting and Spring meeting, the Committee will make an effort to **co-sponsor a third program or webinar** with another title industry entity. This effort will be led by Programming Vice Chair Marc Brown. For more information or to assist Marc, you may contact him at mwbrown@goldbergsegalla.com.

Membership

One of the expectations of the ABA is that each committee demonstrates efforts to increase its membership. One of the ways we will try to do that this year is to market our committee to local bar associations in the locale of our annual and spring meetings. We will also make an effort to reach out to minority bar associations, student law school associations, and the like. For those geographical areas with a large concentration of attorneys practicing in the title industry, we will explore hosting a regional social mixer to introduce the Committee to title industry professionals and potential members. For more information about assisting the Committee with its membership efforts you may contact Membership Vice Chair Vanessa Widener at vhw@amclaw.com.

In-House Counsel Sponsorship Program

Over the last few years the Committee's private practice members have generously contributed to the Committee's **In-House Counsel Sponsorship Program**, which allows in-house counsel, to attend our annual and spring meetings, who otherwise might not. I expect that the committee will continue this program to ensure that in-house counsel can continue to participate in the Committee meetings and seminars. Firms will continue to have an opportunity to contribute to a scholarship fund, which will permit in-house attorneys to attend the CLE who would otherwise be unable to do so. More information about the scholarship program will be available leading up to the Spring 2016 meeting. In the meantime if you have questions about receiving a sponsorship or offering one, please contact Treasurer Robert Graham at Robert.Graham@fnf.com.

Social Media/Technology

Under the leadership of Ryan Squire, the Committee expanded its social media presence. We will continue to increase the Committee's online presence to assist with recruiting and information sharing. In addition to the Committee's **ABA-sponsored website**[1], the Committee has also created a **LinkedIn website**[2], and most recently a **Facebook page**[3]. The goal is to launch a Twitter account for our committee, with regular, relevant title insurance updates compiled from members and within the title industry, as well as updates regarding the work of the committee. For more information concerning the Committee's online presence, please contact Social Media Vice Chair & Chair-elect Designee Amy Steindorff at asteindorff@balch.com.

Publications

Through the efforts of Jerel Hill and in recent years with support from Amy Steindorff and Vanessa Widener, the Committee has participated in the Tort Trial and Insurance Practice Law Journal by contributing an article entitled ***Recent Developments in Title Insurance Law***. The publication serves as a resource to our Committee members, title and escrow professionals and marketing tool to increase our membership. For more information concerning the article please contact Jerel Hill jerel@jjhlawoffice.com. In addition to the Committee's annual contribution to the journal, the Committee also publishes no fewer than two editions of the **Title Insurance Litigation Committee Newsletter** which is available on the Committee's website.[4] The newsletter is an interesting collection of articles of interest to lawyers practicing in areas that concern title insurance, escrow closing and land title claims and litigation. The newsletter is compiled by Newsletter Vice Chair/Editor Scott Mueller with assistance from Jennifer Nicolitz. For more information concerning contributing to the newsletter please contact Scott at SMueller@gallowayjohnson.com. A Committee brochure will be published soon and will be used for marketing the Committee to folks in the title industry.

Many thanks to outgoing chair Ryan Squire for all of his hard work, organization and leadership. He did a fantastic job growing our membership, expanding our social media presence and facilitating great CLE programming. I am looking forward to working with Chair-elect Jamie Walson, Social Media vice-chair/Chair-elect Designee, Amy Steindorff, Newsletter Vice Chair Scott Mueller, Programming Vice Chair Marc Brown, Treasurer Robert Graham, Secretary Kevin Razban, Membership Vice Chair Vanessa Widener, Diversity Vice Chair Jessica Hew and all of our members to make 2015-2016 a success.

Hope to see you in Santa Monica next year. If you have any questions, please send me an email to steven.parker@fnf.com.

Truly yours,

Steven R. Parker, Esq.
Vice President Senior Claims Counsel, *Fidelity National Title Group*

1 http://apps.americanbar.org/dch/committee.cfm?com=IL226600
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DISTINGUISHING BETWEEN FRAUD BASED AND MISTAKE BASED CPL DAMAGES

By: Scott Mueller and Mary Giles

***Scott Mueller** is a Director in the St. Louis office of Galloway, Johnson, Tompkins, Burr & Smith and focuses his practice on real property litigation in Kansas, Missouri and Illinois. **Mary Giles** is an Attorney in the St. Louis office of Galloway, Johnson, Tompkins Burr & Smith and also primarily practices in real estate litigation throughout Missouri and Illinois.*

In recent years, Courts around the country have opined on the issues and complications that arise when insured lenders claim extra-policy damages pursuant to closing protection letters ("CPL") issued in conjunction with policies of title insurance. Throughout the various decisions, themes, if not bright-line rules have certainly developed and this article delves into those cases and distinguishes them from one another. Specifically, a line of CPL decisions stemming from the Superior Court of New Jersey's decision in *First American Title Insurance Co. v. Vision Mortgage Corp., Inc.*, seems to definitively establish that the holder (or "addressee") of a CPL may claim and receive damages under a CPL calculated in such a way as to surpass the relief that the lender could expect from a standard lender's title policy claim. 689 A.2d 154 (N.J. App. Div. 1997).

Although a lender's policy of title insurance issued in conjunction with a CPL only protects against actual loss of collateral value (or the cost to cure such a loss), the court in *Vision* holds title underwriters to different standards under CPL claims. *Vision* expands the potential loss to include outstanding loan amounts that the lender does not actually *collect*. This "collection" expectation versus "security" expectation spawned much litigation of late as to what, in fact, a CPL actually protects against. The lender's heightened loss expectation (as evidenced by the recent and heightened litigation) may even completely depart from pure loan problems, and implicate only the lender's collateral title. That is to say *Vision* and its progeny, according to one commentator, effectively render the CPL a loan guaranty made by a title insurance underwriter in the business of indemnifying against actual loss of collateral. *See* J. Bushnell Nielsen, Title & Escrow Claims Guide, § 14.1-22 (2d ed. 2007).

The *Vision* CPL loss calculation is determined by the type of loss a lender suffers. According to the court in *Vision*, several compromised features of a loan may prompt damages under a CPL above and beyond those associated with simply curing title defects pursuant to the policy. *Vision*, 689 A.2d at 157. These features include the ability to recover against a bona fide mortgagor, the ability to foreclose, and the ability to seek a deficiency. *Id.* So, should a closing agent's mistake deny a lender the ability to collect against its intended borrower, the lender suffers "actual damages" per the terms of the CPL, according to *Vision*. *Id.*

The recent case of *F.D.I.C. v. First American Title Ins. Co.* follows and supplements *Vision* and seems to hold that loan-based damages awarded under a CPL also flow to a lender even after a title insurer cures the underlying title defect. 2015 WL 1906139 (11th Cir. Apr. 28, 2015). Taken together, *Vision* and *F.D.I.C.* certainly remove a CPL out of the realm of a pure indemnity contract as contemplated by underwriters with the CPL's operative language of "actual damages".

Reliance on Fraud vs. Negligence for CPL Damages

As interpreted by one recent CPL decision, specifically, though, these articulated loan deficiencies inherently stem from a title agent's malfeasance. *Bank of America, N.A. v. First American Title Ins. Co.*, 2014 WL 1271227 (Mich. Ct. App. 2014). In other words, the CPL issuing agent's "bad acts" prevented the lender from enjoying some of the benefit of its structured loan transaction. *Id.*[1]

Of course, negligent acts of an agent may trigger CPL liability, too, so the question becomes what damages of a CPL-protected lender flow from a CPL, above and beyond title curation, when an agent's *mis*feasance simply leads to a collateral title defect, and not the loss of one of *Vision*'s three species of loan expectations.

Vision, F.D.I.C., and the related cases that cite to them all share a common theme: damages above and beyond those associated with simple collateral title defects which

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1 *See* New Freedom Mortgage Corp. v. Globe Mortgage Corp., 761 N.W.2d 832, 844 (Mich. App. 2008) (holding title agent's failure to comply with closing instructions due to borrower's dishonesty and fraudulent conduct does not trigger CPL liability for "handling [plaintiff's] funds or documents in connection with such closings.")

CLOSING PROTECTION LETTER CLAIMS

By: Raighne Delaney

Raighne (pronounced "Renny") Delaney is a shareholder with Bean, Kinney & Korman. He practices in the area of general civil litigation. He has prosecuted and defended numerous cases in the following areas: real estate litigation, business litigation, government contracts and construction litigation.

I. Introduction

Litigation surrounding a closing protection letter ("CPL") frequently focuses on the tension between how the lender and title insurer view the form. The exact wording of a CPL in a specific case may vary in some respects, but one finds that the tension spots relate to who has standing to make a claim, what losses are covered, and are there any good reasons why a claim should not be paid? This article will review the background of CPLs, briefly discuss three selected cases, and will comment on the American Land Title Association's ("ALTA") 2014 revisions to the CPL form.

II. Background

As noted by J. Bruce Davis and J. Bushnell Nielson, as a secondary market for mortgage loans was created in the 1960's, lenders began to require title insurance.[1] To meet demand, title insurers formed networks of policy issuing agents, and likely for the purpose of faster and cheaper closings, lenders hired the same policy issuing agents to act as the settlement agent. In most states, the lender would have borne the risk of loss of the settlement funds.[2] So, to provide lenders with confidence that their funds were protected from mishandling by the persons in a title insurer's network, the title insurers provided a letter to the lenders that would protect them from such an occurrence.

Prior to 1987, no standard letter existed for title insurers' use, and the lenders received "closing indemnities differing in protection from state to state or from time to time as issued by the same insurer."[3] To address this lack of uniformity, ALTA developed over time a standardized single transaction form that a title insurer might use. In general, the forms have promised that when lenders purchase title insurance for the closing of a specific real estate transaction, the title insurer will reimburse them for "actual loss incurred by you" in connection with closings conducted by an issuing agent, when 1) such loss arose out of the failure of the issuing agent to comply with the lender's written instructions, or 2) the issuing agent committed fraud or dishonesty in the handling of the lenders' funds or documents.

While the CPL's promise seems simple, its interpretation is more complex. Not all states agree whether a CPL constitutes insurance or a contract of indemnity. Conceptually, the risk covered by a CPL differs in many ways from the risk covered by a policy. Policies look backward in time, to protect a property's title as of the date of the policy issuance. CPLs look forward in time, to protect the funds that a lender will advance for use at the closing table, and the documents that the closing should generate. Thus, for this reason, some courts believe that CPLs do not constitute insurance under their state's definition of title insurance.[4] Others take the contrary view, or even prohibit the issuance of CPLs.[5]

As the courts have decided cases under various state laws, we have learned much about CPLs. Happily for title insurers, the Courts have held that issuing agents are not the title insurer's agent for any other purpose,[6] the insurer may not be liable for an issuing agents' errors that did not relate to the CPL's promises,[7] and before a title insurer is liable under the CPL's fraud or dishonesty provision, the addressee must prove fraudulent intent on the part of the issuing agent.[8] On the other hand, title insurers have learned that the CPL's promise might not cover just the original addressee, but any assignees

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1 Davis, *The Law of Closing Protection Letters*, 36 Tort & Ins. L.J. 845 (2001), Nielsen, *Title Claims and Escrow Guide*, Chapter 14.

2 Davis, at 847.

3 Davis, at 846.

4 *Regions Bank v. Stewart Title Guar. Co.*, 2015 U.S. Dist. Lexis 13313, 2015 WL 433486 (D.S.C. 2015).

5 Murray, *Closing Protection Letters, What is (And is Not) Covered*, ABA Law Trends & News Newsletter, Vol. 4, No. 3 (June 2008).

6 *Wells Fargo Bank, NA v. Old Republic Title Ins. Co.*, 413 Fed. Appx. 569 (4th Cir. 2011).

7 *New Freedom Mortg., Corp. v. Globe Mortg. Corp.*, 761 N.W.2d 832 (Mi. 2008).

8 *Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp.*, 654 S.E.2d 190 (Ga. 2007).

LEGISLATIVE IMPROVEMENTS TO OHIO TITLE LAW GAINING MOMENTUM

By: Michael J. Sikora III, *Sikora Law LLC*

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For years, Ohio real estate professionals and parties to real estate transactions faced a serious problem. Mortgages that had been paid-off remained of record, and all-too-often it was extremely difficult to have those mortgages released. Because of the satisfied but unreleased mortgages that remained of record, many real estate transactions were delayed, and some transactions could not be completed. Likewise, title claims sometimes involve situations in which a mortgage has been satisfied, but it has not been released of record. Ohio's new Mortgage Satisfaction Statute, which I drafted and worked for years to advance, became effective on March 23, 2015, and it is already curbing these issues.

The unfortunate reality was that Ohio's mortgage satisfaction law provided a statutory financial consequence of only $250 when a mortgagee failed to record a release within 90 days after satisfaction of the mortgage. That aspect of the Mortgage Satisfaction Statute remains.

Now, under Ohio's new Mortgage Satisfaction Statute, a supplemental notice may be tendered by the current owner of the property to the mortgagee whose mortgage was satisfied but not released. The mortgagee will then have 15 days to record the release of mortgage. Otherwise, the mortgagee faces financial consequences of $100 per day, plus attorneys' fees. The ability to recover attorneys' fees is a significant deterrent to lazy mortgage release practices. The $100 per day consequence is capped at $5,000 – as the result of a compromise reached with the interested parties in the legislative advocacy process.

The old law also did not apply to mortgages that encumber commercial property. The new law does. Ohio's new Mortgage Satisfaction Statute has already proven to be an effective tool to help with title claims and transactions.

Another Bill will soon be introduced in Ohio to overhaul Ohio's curative statute. A study conducted by the Ohio Land Title Association of the curative statutes of all 50 states revealed that Ohio's curative statute is by far the weakest in the country, which opens the door for a plethora of hyper-technical attacks on instruments. Bankruptcy trustees, competing lienholders, and even borrowers routinely challenge mortgages based upon relatively minor defects in the form of instruments or the formalities of execution.

This author drafted a new proposed statute that borrows positive attributes from the best curative statutes throughout the country. The Ohio State Bar Association will be advocating for its passage over the next several months. Legislation following the Restatement View of equitable subrogation passed the Ohio House unanimously in the previous legislative session. One Ohio Senator opposed the passage of that legislation in the final days of that session, blocking its passage. That Bill will soon be reintroduced with the benefit of additional time to convince the Ohio Senate why it should become Ohio law.

These legislative initiatives should dramatically improve Ohio title law. Real property title law leaves a lot to be desired in many states, and similar opportunities to improve title law may exist in your state. The recent economic crisis followed by the turnaround in the real estate market can help capture the attention of legislators to support long overdue (and much needed) change to some of our most antiquated title laws.

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should forego this insurance. The concern among many title agents is that designating owner's title insurance as "(optional)" will dissuade homebuyers from purchasing an owner's policy despite the huge protections that come from the same. The addition of the "(optional)" notation is simply for the purpose of informing the consumer (the homebuyer) that the creditor is not *requiring* this beneficial and cost-effective insurance product as a condition of issuing the underlying loan. The Bureau believes that consumers should be aware of any item that is not *required* for approval of a loan so that the consumer can make his/her own informed decision based on available information. The key to best understanding this new disclosure requirement is that the Bureau is solely focusing on its mission of making sure that information is accurately and effectively disclosed to the consumer that it believes permits the consumer to better understand costs, benefits and risks associated with their transaction.

In practical terms, describing owner's title insurance as "(optional)" is simply creating a consumer shopping tool meant to allow consumers to distinguish between costs that are required by the creditor verses those that are not required as conditions of the loan. Consumers should therefore be educated as to the importance of an owner's title insurance policy and urged not to use this "(optional)" notation as the sole basis to decline owner's title insurance. Unfortunately, many homebuyers are not aware of the importance of an owner's title policy or even what title insurance is in general. It is therefore imperative that all those working in the realm of title insurance, both those issuing policies and those defending them, be able to explain the value of a title insurance policy to the consumer.

It is easy to tell a consumer that without the coverage of an owner's policy, he/she could be exposed to losses from title defect, challenges to their legal ownership of the property and a whole host of title issues that could expose them to significant losses. However, it is often more effective to provide real life examples of an owner's policy providing worth that far exceeds the nominal one-time fee. We all have the stories to tell and they are often crazy enough to be plots for daytime dramas but are unfortunately more common than a homebuyer realizes. There is the couple who was sued by a neighbor because half of their pool was on the neighbor's property and the seller "forgot" to disclose the known encroachment or the developer who bought a strip mall only to discover a prior open lien from twenty years prior when that lienholder started sending demands for payment of rents to his tenants. There are tales of forgotten easements and missed tax sales and missed estates that result in unresolved interests of numerous heirs All of these stories result in thousands of dollars in attorney's fees and losses that could be in the tens or even hundreds of thousands of dollars, all which would be the responsibility of the homebuyer if an owner's title policy was not in play. From the closing side, examples can be given of how a seller's prior owner's policy prevented delayed refinances or the loss of a loan lock due to title issues that could have been resolved due to the existence of an owner's policy. Again, thousands of dollars or even a lost sale or refinance that were prevented by a one-time purchase of an owner's title insurance policy.

So the fact that owner's title insurance is notated as "(optional)" should not suggest to the consumer that this insurance is not required. The designation is a disclosure issue, not a statement as to the efficacy of an owner's policy. As we move forward with the new disclosures, it is our job to educate both the individual and the community. Consumers must understand that interpreting the designation of an owner's policy as being "optional" as the reason to decline this valuable insurance are actually doing so at their own risk. At the end of the day, these "consumers" being protected are still clients and customers and, as American business author Michael LeBoeuf stated, "a satisfied customer is the best business strategy of all".

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result from the dishonesty or fraudulent conduct of the underwriter's agent. But CPLs may also be triggered simply by the "mishandling" (read: negligent) conduct in relation to a lender's closing. *Vision* and *FDIC* did not speak to the applicability of extra CPL damages for negligence, but other recent cases do.

In so doing, the cases of *Bank of America, N.A. v. First American Title Co.,* and *Fifth Third Mortgage Co. v. Kauffman,* (2013 WL 474506 (N.D. Ill.)), stand for the proposition that damages potentially awarded under the standards of *FDIC* and *Vision* may not be applicable in cases solely based on CPL negligence. In fact, even dicta in decisions in favor of extra damages also supports the common sense notion that negligence which purely impacts a collateral title expectation should not prompt loan collection based damages. *See Bank of America, NA v. First American Title Co.* (adding a fraud qualifier to damages expectation) and *Kauffman* (discussing economic loss as separate from loss caused by fraud).

In *Bank of America,* an underlying fraudulent scheme, replete with straw purchasers, over inflated values and multiple "flips," led to an insured lender's loss, but sucht fraudulent conduct could not be set up against the closing agent that apparently innocently closed the transactions at issue. 2014 WL 1271227 at *1-2. Ultimately, the lender took a valid first lien position mortgage as bargained for, but the mortgage encumbered vastly over inflated and over valued real estate. *Id.* The lender found itself inadequately secured, but not as a result of the agent's fraudulent conduct or dishonesty, but, rather, from the dishonesty of its borrowers. *Id.*

The Court held that because those damages did not flow from the agent's fraud or dishonesty, extra, non-collateral-security-related CPL damages failed to accrue in the lender's favor since it could still foreclose and pursue the borrower of its choosing for a deficiency. *Id.* at *5. The *Bank of America* court specifically discussed *Vision*, but read the extra, loan collection based damages as naturally and implicitly stemming from fraud or dishonesty on the part of an agent – something that did not exist in *Bank of America*'s facts. *Id.*

Similarly in *Kauffman*, although the Court did award extra-policy CPL damages against an underwriter whose agent acted dishonestly, in explaining its decision the court went on to state that had purely economic conditions dragged down the collateral value and rendered the bank's loan uncollectible, then a different analysis would apply. 2013 WL 474506 at * 3. This seems to distinguish the common sense rationale of pure CPL "collateral defect loss analysis" from the "loan guaranty" type of interpretation of *Vision* and *F.D.I.C*.

The court in *JP Morgan Chase Bank, N.A. vs. First American Title Ins. Co.* holds another wrinkle in the CPL collection versus collateral damages dichotomy. 795 F.Supp.2d 624 (E.D. Mich. 2011). In *JP Morgan.*, the Court explicitly stated that should First American want to tie or "tether" the damages of the CPL (potentially loan collectability based damages) to the loan policy of title insurance (indemnity based on actual loss of collateral value based damages) it should have done so expressly in the language of the CPL's conditions and exclusions. *Id.* at 629. This seems to create an explicit endorsement and approval of loss-limiting CPL language, if contained on the face of the CPL itself. Otherwise, as the court in *JP Morgan* reasons, the cost to cure title and the uncollectability of the underlying loan can be considered actual damages and not a "double recovery". *Id.* at 630-631. Thus, the practitioner involved in CPL disputes regarding CPL losses or damages should carefully review and consider the language under the conditions and exclusions of the CPL to determine whether or not an explicit "tether" to the title policy's calculation of damages exists.

So, it appears that various courts around the country have started to establish a distinguishing toe-hold to separate CPL damages for negligence as opposed to damages caused by outright fraud. It remains to be seen if a "bright line" rule will a la *Vision* will come to fruition for negligence based CPL claims, but that rule should be consistent with the holdings and dicta discussed here.

CLOSING PROTECTION...

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as well,[9] and if the CPL does not define what "actual loss incurred" means, then the lender might recover the advanced funds plus interest,[10] or to the extreme, perhaps any monetary loss that it can prove.[11] Other decisions are a mixed bag, such as a decision that an express limitations period in a CPL, under Florida law, runs from the date of discovery of facts that reveal a claim,[12] and whether a lender's own deficient underwriting standards and fraud committed by persons other than the issuing agent have a bearing on a claim.[13]

III. Selected Cases Since 2001

Three cases in which the author participated provide further elaboration of how some judges view CPL claims: 1) *Gold v. Old Republic* (2010),[14] 2) *Boucree v. Greenpoint Mortgage* (2011),[15] and 3) *GMAC v. Flick*, (2012). Each is discussed briefly.

In *Gold v. Old Republic*, Vijay Tenaja,[16] and a mortgage loan originator controlled by him known as Financial Mortgage, Inc. ("FMI"), filed chapter 11 bankruptcy petitions. Allegedly, the settlement agents, at Taneja's instigation, failed to pay off prior encumbrances and/or to record mortgages securing new loans, but FMI still sold the loans to the secondary market. The Trustee filed a complaint against five title insurers for breaches of closing protection letters, title insurance commitments and title insurance policies, and sought $68 million in damages. While it was unclear how FMI would have incurred any actual loss after having sold the loans, the Court dismissed the case for two other reasons. First, the Trustee's claims were barred under the *in pari delicto* doctrine,[17] because while the Trustee did not do anything wrong, his claims were of no higher dignity than FMI's, and while normally the adverse interest exception would permit the Trustee to pursue such claims, the sole actor exception required application of the doctrine. In essence, because Taneja solely controlled FMI, Taneja's fraud was attributable to the corporation. Additionally, the Trustee's claims were dismissed, because while the settlement agents were also issuing agents for the title insurers, they were not agents for the purpose of collecting and disbursing funds, or recording instruments.

Next, in *Boucree v. Greenpoint Mortgage*, the plaintiffs alleged that they refinanced their home in 2002, by borrowing $400,000 from Greenpoint Mortgage, and the settlement agent, also an issuing agent for a title insurer,[18] was to use approximately $100,000 of the new loan to pay off the plaintiffs' tax debts. The plaintiffs continued paying their new mortgage, but sued Greenpoint alleging contractual breaches and torts. Greenpoint then filed a third party complaint against the title insurer, alleging the title insurer breached the CPL by failing to reimburse Greenpoint for all actual losses, including but not limited to its cost of defense. In a lengthy unpublished opinion, the Court ruled on summary judgment that the CPL's use of the term "actual loss incurred" was ambiguous both as to the general scope of the title insurer's coverage of Greenpoint's losses, and specifically with respect to whether the title insurer was required to reimburse Greenpoint for Greenpoint's defense of the Boucrees' Complaint. The matter was then resolved.

Finally, in *GMAC Mortg., LLC v. Flick Mortg. Investors, Inc.*,[19] the borrowers refinanced their home using the services of an Approved Attorney, who also acted as settlement agent, to borrow money from the lender, Flick. The settlement agent misappropriated the loan proceeds.[20] But, by prior arrangement, Flick sold the loan to GMAC immediately after closing. Upon discovering the fraud, GMAC demanded Flick repurchase the loan. Instead, Flick made a claim on the CPL. The claim was denied, as Flick would not incur an "actual loss" until it repurchased the loan. Instead of repurchasing the loan, Flick filed suit against the title insurer and the loan purchaser, GMAC, then filed suit

9 *JPMorgan Chase Bank, NA v. First Am. Title Ins. Co.*, 750 F.3d 573 (6th Cir. 2014).

10 *Herget National Bank v. US Life Title Insurance Co.*, 809 F.2d 413 (7th Cir. 1987) (funds advanced plus interest).

11 *First American Title v. Vision Mortg. Corp.*, 689 A.2d 154 (N.J. App. 1997).

12 *FDIC v. First Am. Title Ins. Co.*, 2015 U.S. App. Lexis 7037, 2015 WL 1906139 (11th Cir. 2015).

13 *Bank of Am. v. First Am. Title Ins. Co.*, 2014 Mich. App. Lexis 569, 2014 WL 1271227 (2014) (under appeal).

14 *Gold v. Old Republic Nat'l Title Ins Co.*, 2010 Bankr. Lexis 4203, 2010 WL 4882826 (Bankr. E.D. Va 2010).

15 *Boucree, et al v. Greenpoint Mortgage Funding, Inc.*, et al, Civil Action, case no. 2008 CA 4951, Superior Court of the District of Columbia, 2011.

16 Mr. Vijay Tenaja was convicted and incarcerated for his role in this matter.

17 "in equal fault," sometimes phrased as "the pot calling the kettle black."

18 The settlement and policy issuing agent, Ivan Bogachoff, was convicted and incarcerated.

19 2012 U.S. Dist. Lexis 28305 (W.D.N.C. 2012).

20 The settlement agent, Armina Swittenberg, was convicted and incarcerated.

against Flick. However, Flick was insolvent, and could never repurchase the loan. The title insurer moved to dismiss asserting that until Flick repurchased the loan, the insurer was not in breach of the CPL. Among other rulings, the Court ruled that even if Flick could not repurchase the loan, the Court might order some form of contingent relief, and denied the title insurer's motion to dismiss.[21] Thereafter, the title insurer purchased Flick's claim for a nominal sum, inasmuch as Flick no longer had any real interest in the case. The Court dismissed Flick from the action but permitted GMAC to attempt to recover against the title insurer on two alternative theories. First, GMAC might have some basis for continuing to pursue Flick's claims against the insurer despite Flick's sale of its claim. Second, by virtue of Flick's original assignment of the mortgage to GMAC, that GMAC might pursue a direct claim against the title insurer. The matter was then resolved.

IV. The 2014 ALTA CPL Form

There is much to admire about the 04-02-14 ALTA CPL Form, which is a revision of the 12-1-11 form. The drafters have taken care to solve many of the problems that have and still are winding through the courts regarding older CPL versions. Of special note, the new Condition and Exclusion ("Condition") 2's definitions appropriately clarifies the meaning of the defined terms. For example, "You" affirms the CPL's coverage extends beyond addressees to assignees of an insured mortgage, and/or a warehouse lenders. "Funds" means "the money received by the [policy issuing agent] for the Real Estate Transaction." While "You" arguably expands lender rights, it is balanced by Condition 3's clarification of risks that are more properly borne by lenders. For example, Condition 3(g) excludes loss due to violations of federal or state consumer laws, such as predatory lending practices. The continued limit on the maximum liability for loss, now found in Condition 6, ensures that title insurers will have greater confidence as to the possible limits of their losses. Human nature being what it is, in the future, lenders will still need CPLs and title insurers will still need to issue them. Nevertheless, one would think that the new form will promote greater certainty about the risks being covered by both lenders and title insurers, and for both groups to spend a great deal less on litigation costs.

21 *GMAC Mortg., LLC v. Flick Mortg. Investors, Inc.*, 2010 U.S. Dist. Lexis 53595, 2010 WL 2132184 (W.D.N.C. 2010).

2015-2016 TIPS CALENDAR

October 2015

14-18	**TIPS Fall Leadership Meeting** Contact: Felisha A. Stewart – 312/988-5672	**Westin Kierland Resort** **Scottsdale, AZ**
22-23	**2015 Aviation Litigation National Program** Contact: Donald Quarles – 312/988-5708	**Ritz Carlton Hotel** **Washington, DC**

November 2015

4–6	**2015 FSLC & FLA Fall Meeting** Contact: Donald Quarles – 312/988-5708	**Liaison Capitol Hill** **Washington, DC**

January 2016

20-22	**Fidelity & Surety Committee Midwinter Meeting** Contact: Felisha A. Stewart – 312/988-5672	**Waldorf Astoria** **Hotel, New York, NY**

February 2016

3-9	**ABA Midyear Meeting** Contact: Felisha A. Stewart – 312/988-5672	**Manchester Grand Hyatt** **San Diego, CA**
18-20	**Insurance Coverage Litigation Midyear Mtg.** Contact: Ninah Moore – 312/988-5498	**Arizona Biltmore** **Phoenix, AZ**

April 2016

6-9	**Motor Vehicle Product Liability Program** Contact: Donald Quarles – 312/988-5708	**Arizona Biltmore** **Phoenix AZ**

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