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Ira Meislik started this off. The Editor messed with it.

TITLE INSURANCE; AGENT LIABILITY; CLOSING ATTORNEYS: Where a closing attorney represents both the purchaser/borrower and the title insurance company, as is common in parts of New Jersey, if the title company wants to disclaim liability for the closing attorney's misappropriation of client funds, the disclaimer must be delivered directly to the insured and not merely to the attorney as part of the title insurance commitment, but, even so, the title company will not be liable for the closing attorney's act that took place before the title company appointed the attorney as its agent.

New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guaranty Co., A-44-09 (N.J. Super. App. Div. 8/2110)

The buyers contracted to purchase a new home. They retained their neighbor, an attorney, to represent them in the transaction and instructed him to deposit the net sale proceeds from the sale of their home into his attorney trust account to use those funds to pay the purchase price for their new home. They also deposited additional funds into their attorney's trust account, believing that those funds would be needed for the closing. The attorney then ordered title insurance and received a title insurance commitment. It had a disclaimer stating that the attorney was not an agent of the title company and the title company would not be responsible for the attorney's malfeasance. Prior to even ordering the title insurance, the buyer's attorney stole his client's funds. As a result, the checks he wrote from his trust account were not honored by reason of insufficient funds. The buyer filed a claim with the title company, but it was denied.

The New Jersey Lawyer's Fund for Client Protection (Lawyers' Fund) reimbursed the buyers and assumed their rights to recover from other sources. The lower court found that the title company was not liable for the attorney's misconduct because the buyer's attorney stole the funds before he had any contact with the title company. Lawyers' Fund appealed and the Appellate Division reversed. That court rejected the title company's argument that it was shielded from liability because of the disclaimer in the title commitment stating that it was not liable for the attorney's misconduct. The title company argued that

since the attorney was the buyer's agent, delivery of the commitment with the disclaimer to the attorney put the buyers on constructive notice that they would not be insured if their attorney stole their money. The Appellate Division disagreed, noting that this case involved the "North Jersey" closing practice where the buyer's attorney handles the closing of title and disbursement of funds. In North Jersey practice, the buyer's attorney acts as agent for the title company for the purpose of dealing with the insured. Therefore, there is an inherent conflict of interest between the role served by the attorney when acting as both attorney for the buyer and as closing agent for the title company.

The Appellate Division held that if a title company wants to disclaim liability for a closing attorney's misappropriation of client funds, a disclaimer notice must be delivered directly to the insured. Inclusion of the disclaimer as an insert with the title insurance commitment is insufficient.

The New Jersey Supreme Court reversed.

Although the title company's commitment stated that "the attorney closing title on the property was not the agent of the title company and the title company assumed no liability for any loss caused by the attorney's mistake or misapplication of funds. The New Jersey Supreme Court agreed with the Appeals Court that the disclaimer was insufficient because it was "buried" in the commitment, , but held this concept applied only to acts taken by the agent after the agent's appointment. .

The basis for the Supreme Court's reversal of the Appellate Division's decision and for its reinstatement of the lower court's decision was that "[n]o agency relationship existed between the title company and the attorney who misappropriated the client's funds at the time the misappropriation occurred," and therefore "the title company [was] not liable for the misappropriation." According to the Court, a trial court "must examine the totality of the circumstances to determine whether an agency relationship existed in a situation in which the principal did not have direct control over the agent." The buyers gave their attorney funds before the attorney even ordered title insurance and, by that time, he had already misappropriated the funds.

The Supreme Court rejected the Appellate Division's conclusion that title companies are in a better position than the insured to prevent misappropriation at any time during the closing process, and therefore should bear liability where the title company knows that the buyer's attorney will oversee the transaction and ultimately will become its agent for issuing insurance.

Comment: The editor isn't familiar enough with New Jersey practice to comment directly on the case, but isn't there something to the notion that the title company's responsibilies for lawyer behavior arise sooner than at the single moment that the policy is issued? There was a commitment here. Who ordered it? Who was responsible for interpreting it for the buyers? Who arranged the closing in which the insurance was to be delivered? If the answer to all those questions was that the closing lawyer did it as a predictable and customary part of the services provided, isn't there a relationship that could gvie rise to a title company duty of care? Editor is just asking. He hasn't decided.

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