

The Docket: Exclusion 3(a) and The Fortuity Doctrine **August 2, 2018**

The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee, which reviews significant court rulings and other legal developments and explains the relevance to the title insurance industry.

Lance Pomerantz, a member of ALTA's Title Counsel and a New York-based sole practitioner who provides expert testimony, litigation consulting and strategic advice in land title disputes, reviews a recent Texas case that applied policy exclusion 3(a) and the fortuity doctrine to relieve an insurer of coverage. He can be reached at lance@landtitlelaw.com.

Citation: *Moser, et al v. Fidelity National Title Insurance Company*, Civil Action No. 4:17CV104 (U. S. D. C., E. D. Tex., March 21, 2018).

Facts: Stanley Thaw was being sued in state court by his ex-business partner for some personal debts. During the pendency of that litigation, Thaw entered into a contract with a third-party to purchase a new home. After the abstract of judgment against Thaw was recorded, Thaw moved into the new home. While Thaw's appeal was pending, he obtained private financing, paid off the contract, received and recorded a deed for the home. Soon thereafter, Fidelity issued a title insurance policy (Texas Form T-1R), and soon after that, Thaw lost his state court appeal. Less than a month later, Thaw filed a Chapter 7 bankruptcy petition.

During the bankruptcy proceedings, the found the state court judgment lien of the ex-business partner was a secured lien. It was satisfied from the proceeds of the liquidation sale of the home. The Chapter 7 trustee and Thaw then sought indemnity from Fidelity in an adversary proceeding. The bankruptcy court held that policy exclusion 3(a) ["we do not cover title risks . . . that are created, allowed, or agreed to by you"], as well as the fortuity doctrine [which relieves insurers from covering certain behaviors that the insured undertook prior to purchasing the policy] both relieved Fidelity from the indemnity provisions of the policy. The trustee and Thaw ("the Appellants") then sought this appeal to the district court.

Relying on the *Doubletree Partners* case, Appellants argued application of exclusion 3(a) required proof that Thaw had full and specific knowledge of the judgment lien to show "some degree of intent by the insured to acquire the property with the defect in its title." Unlike in *Doubletree Partners*, however, the judgment lien was not an "undisclosed preexisting condition." It arose because of the insured's actions.

Holding: The court affirmed the determination below. It pointedly noted that under the appellants' reading of exclusion 3(a), "an insured who engages in substantial misconduct would be entitled to insurance benefits whenever an insurer cannot prove the insured acted with full and specific knowledge that the insured's conduct would result in liability, including circumstances of willful ignorance. This interpretation would essentially make a title insurer the guarantor of an insured's debt where, as here, an insured who intentionally refuses to fulfill the insured's financial obligations later denies knowing that a lien would arise as a consequence." The court declined to adopt such an unreasonable policy interpretation. Relying in part on *BB Syndication Services, Inc.*, the court noted "Courts have upheld Exclusion 3(a) when liens arose as a result of an insured's decision not to pay financial obligations pursuant to a contractual agreement."

"Under the fortuity doctrine, an insured cannot obtain coverage for something that has already begun and which is known (or should have been known) to have begun." The fortuity doctrine bars coverage for "known losses" and "losses in progress." Because Thaw was aware of the ongoing state court litigation, and the potential loss it might entail, both before and after the policy issuance, the fortuity doctrine was appropriate to shield Fidelity from liability.

Relevance to the Title Industry: The application of exclusion 3(a) continues to protect Insurers from liability to those who decide not to pay debts, even if the debt is unrelated to the insured property. While the fortuity doctrine is more typically applied in casualty insurance settings, the Court in *Moser* pointed out that under Texas law, however, "fortuity is a requirement of all insurance policies."

Read the full opinion [here](#).