

NO. A10-1483

State of Minnesota
In Supreme Court

Mattson Ridge, LLC,

Respondent,

v.

Clear Rock Title, LLP, and
Ticor Title Insurance Co.,

Appellants.

RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUES

1. Did the lower courts properly conclude that title to the Property was unmarketable? (Ticor Addendum (“ADD”) 1-14)

Most Apposite Cases:

Lucas v. Indepen. Sch. Dist. No. 284, 433 N.W.2d 94 (Minn. 1988)

Hubacheck v. Maxbass Security Bank, 134 N.W.2d 640 (Minn. 1912)

Glaser v. Minn. Fed. Sav. & Loan, 389 N.W.2d 763 (Minn. Ct. App. 1986)

2. Did the Court of Appeals properly conclude that Mattson Ridge was entitled to recover \$1,911,167 as a result of Ticor’s breach of the Policy? (ADD-1-14)

Most Apposite Cases:

Olson v. Rugloski, 277 N.W.2d 385 (Minn. 1979)

Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576, 611 (N.H. 1978)

STATEMENT OF THE CASE

Ticor's Statement of the Case provides an adequate description of the procedural aspects of the case.

STATEMENT OF FACTS

I. MATTSON RIDGE PURCHASED THE PROPERTY.

Mattson Ridge, LLC was formed in 2004. (A.A.-1; Trial Transcript ("TT") 27:19-28:20 (DuBose), 121:12-121:18 (D. Capra)) In March 2005, Mattson Ridge entered into a purchase agreement to purchase real property in Chisago County (the "Property") from Harold and Judith Shoberg for \$1,286,000. (A.A.-19; Trial Ex. 1) The Property was legally described as:

The North $\frac{1}{2}$ of the Northwest $\frac{1}{4}$ of Section 25, Township 34, Range 21, Chisago County, Minnesota, excepting however, two acres, more or less, in the Northwest corner of the Northwest $\frac{1}{4}$ of Northwest $\frac{1}{4}$ of said Section 25, described as follows: Commencing at the Northwest corner of said Section 25; thence South 30 rods to the intersection of road leading from the county road at or near Charles Magnuson's place in Sunrise City; thence along the center of the road to where said road crosses the section line; thence along the North line of said Section, 24 rods to the Northwest corner of said Northwest $\frac{1}{4}$ of Northwest $\frac{1}{4}$ or to the place of beginning.

Excepting therefrom, all that part of the Northwest $\frac{1}{4}$ of Northwest $\frac{1}{4}$, Section 25, Township 34, Range 21, Chisago County, Minnesota, which lies Southerly of State Aid Road No. 19 and Easterly of State Aid Road No. 80.

(A.A.-59) At that time, the Property was vacant, raw land located outside the city limits of Chisago City. (A.A.-19; TT 33:3-33:16 (DuBose)) There were no city sewer or water connections to the Property. (Id.)

In early 2005, developers targeted the Chisago Lakes area for future residential developments. (A.A.-19; TT 36:18-37:2 (DuBose)) Mattson Ridge expected that Chisago City and the surrounding areas would begin to grow quickly due to a planned extension of sewer and water to the area. (A.A.-19; TT 37:8-37:25 (DuBose)) As a result, in locking up the Property, Mattson Ridge was on the leading edge of the anticipated growth in the area. (A.A.-19; TT 38:1-38:14 (DuBose))

II. TICOR ISSUED MATTSON RIDGE A TITLE INSURANCE POLICY.

In September 2005, Mattson Ridge closed on its purchase of the Property from the Shobergs. (A.A.-20; Trial Ex. 8; TT 39:12-39:16 (DuBose)) In connection with this transaction, Mattson Ridge obtained from Appellant Ticor, through its agent Appellant Clear Rock, a Policy of Title Insurance, dated November 30, 2005 (the “Policy”). (A.A.-20; Trial Ex. 9)

Under the Policy, Ticor agreed to insure Mattson Ridge against, *inter alia*, losses and damages sustained by Mattson Ridge as a result of “unmarketability of the title” to the Property. (Id.) The amount of insurance Ticor agreed to provide under the Policy was \$1,286,000. (Id.)

Prior to issuing the Policy, Ticor did not inform Mattson Ridge regarding any defects with the title to the Property. (A.A.-22; TT 110:6-111:6 (DuBose)) The evidence at trial established, however, that Ticor was aware of a problem with the title prior to issuing the Policy. (A.A.-22) Specifically, in an August 30, 2005 document, entitled “Authorization to Exceed Contractual Liability Limitation,” Ticor identified the “vague legal description” for the Property as a “usual or extrahazardous risk.” (Id.; Trial Ex. 3)

Despite this, Ticor neither notified Mattson Ridge of, nor took any action to address, that risk before issuing the Policy. (A.A.-22; TT 110:6-111:6 (DuBose))

III. MATTSON RIDGE AGREED TO SELL THE PROPERTY TO THOMPSON BUILDERS FOR \$2,900,000.

After Mattson Ridge and the Shobergs entered into the purchase agreement, Chisago City annexed the Property and moved forward with its planned extension of water and sewer to the Property. (*Id.*; TT 48:23-49:21 (DuBose)) The annexation and extension of water and sewer to the Property were vital for residential development of such property. (A.A.-22; TT 219:11-220:15 (Thompson))

By a Purchase Agreement, dated October 21, 2005 (the “Purchase Agreement”), Mattson Ridge agreed to sell the Property to Thompson Builders and Contractors, Inc. (“Thompson Builders”) for \$2,900,000. (A.A.-22; Trial Ex. 10) Prior to entering into the Purchase Agreement, Mattson Ridge had received another written offer for the Property for just under \$2,900,000, and two letters of intent for prices between \$2,600,000 and \$2,900,000. (A.A.-24; TT 107:21-109:15 (DuBose), 356:2-356:13 (Clock))

The Purchase Agreement provided in pertinent part as follows:

DEED/MARKETABLE TITLE: Upon performance by Buyer, seller shall deliver a warranty Deed joined in by spouse, if any, conveying marketable title...

(Trial Ex. 10) The District Court found that, because the Purchase Agreement required Mattson Ridge to provide marketable title, the Purchase Agreement establishes that, as of October 21, 2005, the value of the Property was \$2,900,000. (A.A.-24)

Under the Purchase Agreement, Mattson Ridge and Thompson Builders agreed to close on May 30, 2006 (the "Closing Date"). (A.A.-24; Trial Ex. 10) The Purchase Agreement contained contingencies that allowed Thompson Builders to exit the transaction, but if it did so, the agreement did not allow Thompson Builders to recoup any sums that it invested in pursuing the development of the Property. (A.A.-25)

IV. THOMPSON BUILDERS PROCEEDED TO OBTAIN THE APPROVALS NECESSARY FOR DEVELOPMENT.

After entering into the Purchase Agreement, Thompson Builders and its consultants began working to obtain the governmental approvals necessary to develop the Property. (A.A.-25; TT 54:8-55:4 (DuBose)) During this process, Thompson Builders' civil engineer discovered that the Property's legal description was ambiguous. (A.A.-25; Trial Ex. 14, pp. 4-6; TT 271:6-271:19 (Thompson)) On November 17, 2005, Thompson Builders sent Ticor a fax concerning the ambiguous legal description. (A.A.-25; Trial Ex. 14, p. 1; TT 272:23-273:6 (Thompson)) Thompson Builders wanted to put Ticor on notice of the issue so that Ticor would have time to fix it before Thompson Builders needed to secure title insurance for its purchase of the Property. (A.A.-25; TT 273:11-274:7 (Thompson)) Ticor neither responded to Thompson Builders' fax, nor took any steps to cure the ambiguous legal description. (A.A.-26; TT 274:18-274:20 (Thompson))

By May 2006, Thompson Builders had received preliminary plat approval from Chisago City. (A.A.-26; TT 232:20-233:21 (Thompson)) The preliminary plat approval was for 119 lots within the development. (A.A.-26; TT 233:16-233:24 (Thompson)) The Purchase Agreement contained a contingency allowing Thompson Builders to cancel the

Purchase Agreement if it could not get final plat approval for 135 lots. (A.A.-26; Trial Ex. 10, lines 197-199) However, Thompson notified Mattson Ridge that he was waiving the lot contingency in the Purchase Agreement. (A.A.-27; TT 116:23-117:10 (DuBose)) Thompson Builders was still willing to close with this smaller number of lots. (A.A.-27; TT 233:16-234:16, 236:7-236:15 (Thompson))

V. THOMPSON BUILDERS' TITLE INSURER OBJECTED TO THE AMBIGUOUS LEGAL DESCRIPTION.

Thompson Builders obtained a Title Commitment, dated May 5, 2006, from Commercial Partners Title, LLC (“Commercial Partners”), as agent for Lawyers Title Insurance Corporation (the “Commitment”). (A.A.-27; Trial Ex. 18) In the Commitment, Commercial Partners identified the ambiguous legal description as an issue that needed to be resolved, stating that the legal description for the Property “appears ambiguous and should be surveyed and reformed” (the “Defect”). (A.A.-27; Trial Ex. 18, ¶ 18) Thompson Builders notified Mattson Ridge of this position, and informed Mattson Ridge that the Defect needed to be rectified before Thompson Builders could close on the purchase. (A.A.-27; TT 278:22-279:4 (Thompson))

At trial, Mattson Ridge presented Robert Strachota as an expert witness regarding real estate valuation. (A.A.-34) Strachota testified that the value of the Property subject to the Defect was 75-90% less than the \$2,900,000 value of the Property without the defect. (A.A.-27; TT 201:12-203:3 (Strachota); see also TT 159:11-159:20 (D. Capra)) As the District Court noted, Ticor did not dispute this testimony at trial. (A.A.-27-28)

Thus, the District Court found that the undisputed value of the Property subject to the Defect was between \$290,000 and \$725,000. (A.A.-34-35; A.A.-39)

At the time Commercial Partners issued the Commitment, the purchase transaction was ongoing. (A.A.-28; TT 56:10-56:22 (DuBose)) No one had identified any issues other than the Defect that would have prevented the transaction from closing for \$2,900,000. (A.A.-28; TT 56:10-56:22, 57:8-57:12 (DuBose))

VI. THOMPSON BUILDERS RECEIVED FINAL PLAT APPROVAL AND PREPARED TO CLOSE ON ITS PURCHASE.

Under the Purchase Agreement, Thompson Builders had the right to extend the closing date in exchange for \$10,000 non-refundable payments. (A.A.-28; TT 228:19-229:7 (Thompson)) It twice requested extensions – first from May 30 to the end of June 2006, and then to the end of August 2006. (A.A.-28; Trial Exs. 19, 79) When Thompson Builders requested the extensions, it intended to proceed and close on the project with the approved number of lots. (A.A.-28; TT 233:25-234:16, 236:7-236:18 (Thompson))

In July 2006, the City Council voted to approve the final plat with conditions. (A.A.-28; Trial Ex. 48) The final plat contained 111 lots, even fewer lots than the preliminary plat. (A.A.-28; TT 241:10-241:15 (Thompson)) Thompson Builders did not exercise its “escape clause” to cancel the Purchase Agreement, however, because by that time it had invested \$450,000 in the Property, which it would have forfeited if it had cancelled the Purchase Agreement. (A.A.-28; TT 241:10-242:8 (Thompson)) As of July 2006, Thompson Builders intended to close for \$2,900,000. (A.A.-28; TT 242:9-242:22 (Thompson))

One of the conditions in the City's approval of the final plat was that Thompson Builders resolve the "property title issues" (*i.e.*, the Defect). (A.A.-29; Trial Ex. 48) The City Attorney also recommended that the City not sign the developer's agreement with Thompson Builders until the Defect was cured. (A.A.-29; TT 239:4-240:3 (Thompson)) Thompson Builders had satisfied or was prepared to satisfy all of the other conditions in the City's final plat approval. (A.A.-29; TT 240:4-241:9 (Thompson))

VII. THOMPSON BUILDERS REFUSED TO CLOSE BECAUSE OF THE DEFECT.

Thompson Brothers did not close on the Property in August 2006, because of the Defect. (A.A.-30; TT 69:7-69:17 (DuBose), 285:22-286:6 (Thompson)) Everything else was ready to close. (A.A.-30; TT 69:7-69:17 (DuBose), 285:22-286:6 (Thompson)) But for the Defect, Thompson Builders would have closed the transaction and paid \$2,900,000. (A.A.-30; TT 270:3-270:12 (Thompson))

After August 31, 2006, and into the fall 2006, the only outstanding issue that prevented the transaction from closing was the Defect. (A.A.-30; TT 69:24-70:4 (DuBose)) Thompson Builders could not close, however, because it could not get financing as long as the Defect existed. (A.A.-30; TT 258:5-259:5 (Thompson)) Development land with a title defect has little or no value to a buyer because, without clear title, the buyer cannot be sure what it owns and cannot subdivide and re-sell the land until the defect is resolved. (A.A.-30; TT 61:10-61:18 (DuBose); 201:12-203:3 (Strachota))

VIII. MATTSON RIDGE MADE A CLAIM TO TICOR UNDER THE POLICY, BUT TICOR REJECTED THE CLAIM AND FORCED MATTSON RIDGE TO CURE THE DEFECT ITSELF.

On August 7, 2006, Mattson Ridge's counsel notified Ticor of the Defect by letter and requested that Ticor take steps to remedy the Defect pursuant to the Policy. (A.A.-31; Trial Ex. 23) Mattson Ridge's counsel specifically noted that the Defect was jeopardizing the sale to Thompson Builders. (A.A.-31; Trial Ex. 23) In his letter, Mattson Ridge's counsel proposed a solution. (A.A.-31; Trial Ex. 23, p. 2) Specifically, he suggested that Ticor provide title insurance that would insure over the Defect so that Thompson Builders could close. (A.A.-31; Trial Ex. 23; TT 282:7-283:1 (Thompson)) If Ticor had accepted the proposal, Thompson Builders could have closed in August 2006 and paid Mattson Ridge \$2,900,000. (A.A.-31; TT 282:7-283:1 (Thompson))

On October 31, 2006, Ticor denied Mattson Ridge's claim under the Policy. (A.A.-32; Trial Exs. 24, 27-28) In addition, Ticor informed Mattson Ridge that it would not take any steps to remedy the Defect. (Id.) Ticor's response did not mention Mattson Ridge's proposed solution. (Id.)

After Ticor denied its claim, Mattson Ridge instructed its counsel to register title to the Property, so as to resolve the Defect. In January 2007, Mattson Ridge's counsel commenced a Title Registration Proceeding in Chisago County (the "Registration Proceeding"). (A.A.-32; Trial Exs. 30, 38-40) The Defect was not cured until July 16, 2007, when the District Court entered an Order and Decree of Registration in the Registration Proceeding (the "Registration Order"). (A.A.-32; Trial Ex. 41) The District

Court's entry of the Registration Order cured the Defect and made title to the Property marketable. (A.A.-32)

IX. THOMPSON BUILDERS WAS UNABLE TO CLOSE AFTER THE DEFECT WAS CURED.

By summer 2007, the residential real estate market in the Chisago Lakes area had deteriorated significantly from August 2006, when Thompson Builders would have closed. (A.A.-32; TT 70:18-71:5 (DuBose), 191:18-192:6 (Strachota)) On June 25, 2007, Mattson Ridge and Thompson Builders agreed to amend the Purchase Agreement to reduce the price from \$2,900,000 to \$2,600,000 due to concerns from Thompson Builders' bank regarding the value of the Property. (A.A.-33; Trial Ex. 11; TT 73:12-73:24 (DuBose)) Because of the deterioration in the market and increased difficulty for developers to obtain financing for new residential developments, Thompson Builders was no longer able to close because it could not get financing for the purchase. (A.A.-33; Trial Ex. 82; TT 294:23-297:17, 300:4-301:10 (Thompson)) The financing terms that were available in August 2006 were gone by the time the Defect was cured in July 2007. (A.A.-33; TT 307:23-308:5 (Thompson))

Mattson Ridge and Thompson Builders eventually entered into a second amendment to the Purchase Agreement that extended the closing date to May 2008. (A.A.-33; Trial Ex. 13; TT 78:4-78:20 (DuBose)) However, Thompson Builders did not close on the purchase before May 2008 because it still could not secure acceptable financing. (A.A.-33; TT 302:10-302:25 (Thompson)) After May 2008, Thompson

Builders informed Mattson Ridge that, given the market conditions, Thompson Builders could not proceed with the project. (A.A.-34; TT 77:2-77:17 (DuBose))

Thereafter, Mattson Ridge marketed the Property for sale, but could not find a new buyer. (A.A.-34; Trial Exs. 69-70; TT 81:12-84:2 (DuBose)) Mattson Ridge's asking price was nearly a million dollars less than the price Thompson Builders had agreed to pay under the Purchase Agreement. (Id.) Despite listing the Property with a broker, Mattson Ridge received no offers on the Property after Thompson Builders walked away from the transaction. (A.A.-34; TT 159:21-160:14 (D. Capra))

X. MATTSON RIDGE INCURRED DAMAGES AS A RESULT OF TICOR'S BREACH OF THE POLICY.

The market's peak for undeveloped land in the Chisago Lakes area was 2005 to early 2006. (A.A.-34; TT 24:22-25:3 (DuBose), 189:13-190:12 (Strachota)) On October 21, 2005, the fair market value of the Property without the Defect was \$2,900,000, as evidenced by the Purchase Agreement between Mattson Ridge and Thompson Builders. (A.A.-34; TT 157:9-158:17 (D. Capra), 203:4-206:23 (Strachota)) The Property (without the Defect) maintained this value throughout the time period that Thompson Builders was supposed to close on the Property. However, the Property's value during this time period was "virtually nothing" because of the Defect. (TT 159:11-159:20 (D. Capra), 201:12-203:3 (Strachota)) Even assuming that the Property with unmarketable title could have sold for a deep discount (75-90%) off the agreed-upon price, the value of the Property subject to the Defect would have been between \$290,000 and \$725,000. (A.A.-34; TT 201:12-203:3 (Strachota)) This was true throughout the time period of October 21, 2005

through September 2006. (See A.A.-34-35)

At trial, Strachota opined that, by the time the Defect was cured in July 2007, the value of the Property had declined to \$1,300,000. (A.A.-35; TT 194:19-198:17 (Strachota)) Ticor's appraisal expert, Rodger Skare, agreed that this value was within a "reasonable range." (A.A.-35; TT 400:10-400:13, 403:23-404:2 (Skare)) The Property's value has continued to decline since July 2007. (A.A.-35) By May 15, 2009, the value of the Property was \$1,000,000 – less than what Mattson Ridge paid to purchase the Property from the Shobergs in 2005. (A.A.-35; TT 198:18-200:9 (Strachota)) At the time of trial, the value had fallen even further. (A.A.-35; TT 200:9-200:19 (Strachota)) It is likely that another developer will not be interested in developing the Property for at least five to ten years. (A.A.-35; TT 333:1-333:8 (Thompson))¹

STANDARDS OF REVIEW

1. **Summary Judgment.** Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Appellate courts review "de novo

¹ Mattson Ridge also presented evidence regarding other costs that Mattson Ridge would have avoided had Ticor performed. In sum, Mattson Ridge presented evidence of \$2,605,919 in damages at trial. The District Court rejected some costs and found others to be consequential damages. (A.A.-37) The Court of Appeals further determined that the costs relating to a mechanic's lien action were not a consequence of Ticor's breach and narrowed the consequential damages figure to the lost sale of \$1.9 million. For purposes of this Court's review, Mattson Ridge is seeking only affirmance of the damages allowed by the Court of Appeals (*i.e.* the lost sale damages and the \$11,169 in attorneys' fees and costs in resolving the Defect and obtaining marketable title to the Property).

whether a genuine issue of material fact exists” and “whether the district court erred in its application of the law.” STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 77 (Minn 2002).

2. **District Court’s Findings of Fact.** The District Court’s factual findings will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01; Runia v. Marguth Agency, Inc., 437 N.W.2d 45, 48 (Minn. 1989). This requires appellate courts to view “the record in the light most favorable to district court.” Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999). Due regard must be given to the District Court’s opportunity to weigh the credibility of witnesses. Minn. R. Civ. P. 52.01. If the District Court’s findings are reasonably supported, they will not be disturbed on appeal. Rogers, 603 N.W.2d at 656.

3. **Conclusions of Law.** When material facts are not in dispute, appellate courts review the District Court’s conclusions of law de novo. In re Collier, 726 N.W.2d 799, 803 (Minn. 2007).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE LOWER COURTS’ HOLDINGS THAT TITLE TO THE PROPERTY WAS UNMARKETABLE.

The Court of Appeals, like the District Court, concluded that title to the Property was unmarketable. (ADD-8) Based on this conclusion, the Court of Appeals affirmed the District Court’s holding that Ticor breached the Policy when it denied Mattson Ridge’s claim. (Id.) Notably, Ticor does not dispute that it breached the Policy if title to the Property was unmarketable. Rather, Ticor argues that both lower courts erred in

concluding that Mattson Ridge lacked marketable title to the Property. Because well-settled Minnesota law and the undisputed evidence in this case both establish that title to the Property was unmarketable, this Court should affirm the lower courts' holdings that Ticor breached the Policy.

A. Title To Real Property Is Marketable Only When, From A Prospective Purchaser's Standpoint, The Title Is Free From Reasonable Doubt.

It has long been the law in Minnesota that title to real property is “marketable” if the title is free from reasonable doubt and is title that a prudent person with full knowledge of the facts would be willing to accept. Hubacheck v. Maxbass Security Bank, 134 N.W.2d 640, 642 (Minn. 1912). Importantly, “[w]hether a title is marketable—i.e., a title that is free from reasonable doubt—must be tested from the prospective purchaser's standpoint, and not from the view point either of the seller or of the court.” Lucas v. Indepen. Sch. Dist. No. 284, 433 N.W.2d 94, 97 (Minn. 1988) (emphasis added). Contrary to the arguments now asserted by Ticor and Amicus Curiae Minnesota Land Title Association (“MLTA”)² for the first time in this appeal, Minnesota law does not demand that a third party must assert a challenge before title to real property may be deemed unmarketable. Under the facts of this case, a prospective purchaser clearly would have had a reasonable basis for objecting to the state of title to the Property prior to Mattson Ridge resolving the Defect, and, as a result, Ticor's and MLTA's arguments must fail.

² Amicus Curiae American Land Title Association (“ALTA”) did not join in the portions of the *Amici* Brief addressing the marketability of the title to the Property.

1. Reasonable doubt exists that renders title to real property unmarketable when there is a risk that a prospective purchaser may need to resort to litigation to resolve a doubt about the title.

It must not be forgotten that “the primary purpose of marketable title is to protect the purchaser from the burden of litigation that may be necessary to remove apparent or real defects in the title.” Glaser v. Minn. Fed. Sav. & Loan, 389 N.W.2d 763 764 (Minn. Ct. App. 1986). Accordingly, to demonstrate that title to real property is unmarketable, “[i]t is not necessary that title be shown to be bad, nor is it enough, even, that the court may on the whole consider it good, if there be doubt or uncertainty about it sufficient to form the basis of litigation; for, if there be a doubt, it cannot be thrown upon the purchaser to contest that doubt.” Townshend v. Goodfellow, 41 N.W. 1056, 1058 (Minn. 1889). As this Court held in Target Stores, Inc. v. Twin Plaza Company, 153 N.W.2d 832 (Minn. 1967), the “marketability of a title turns not only on what interest can be successfully asserted as against a prospective buyer, but also on what a prudent buyer might reasonably, though erroneously, apprehend to be the resolution of a doubtful question affecting the title.” Id. at 843 (finding title was unmarketable even though agreements that created concern about quality of title created no interest in the property). This is a critical distinction that Tigor and MLTA would like this Court to ignore.

2. Minnesota law does not require that a third party must assert a challenge to title before reasonable doubt may exist concerning such title.

Tigor and MLTA both argue³ that Mattson Ridge cannot establish that there was reasonable doubt about title to the Property because “[n]o party has stepped forward to

attack Mattson Ridge's title or claim an interest in the Property." (Ticor's Brief at p. 24; *Amici* Brief at p. 22-23 (stating "no one has ever questioned Mattson Ridge's ownership of its property. . . .")) The Court should disregard this argument altogether because Ticor failed to make this argument to either court below. See, e.g., Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (holding that generally a reviewing court reviews "only those issues that the record shows were presented and considered by the trial court in deciding the matter before it").

Even if Ticor and MLTA could establish that there were no third party challenges to title to the Property in the past (which they cannot), this would still be inapposite to the determination of whether there was reasonable doubt that made title to the Property unmarketable. No Minnesota case has ever held that a party claiming that title to real property is unmarketable may do so only if such party provides proof that a third party has asserted a challenge to the title. This is not surprising because such a holding would turn on its head more than a century of Minnesota jurisprudence that has made clear that the marketability of title is determined based upon the risks presented to prospective purchasers of real property, not based on an analysis of the quantity or type of challenges that have actually been asserted to the title. See, e.g., Target Stores, 153 N.W.2d at 843; Townshend, 41 N.W. at 1058-59. Ticor's and MLTA's arguments are simply not supported by Minnesota law.

3. Ticor's and MLTA's reliance on Dollinger is misplaced.

The only authority Ticor and MLTA cite for their argument that a third party challenge to title is necessary to establish that such title is unmarketable is Dollinger

Deanza Associates v. Chicago Title Insurance Co., No. H035576, 2011 WL 4005915 (Cal. Ct. App. Sept. 9, 2011). This Court should review the California Court of Appeals' decision in Dollinger carefully because it does not support the argument put forth by Ticor and MLTA.

In Dollinger, the insured purchased a parcel of real property in Cupertino, California that the insured believed consisted of seven separate legal parcels. 2011 WL 4005915 at *2. At the time of this purchase, Chicago Title Insurance Company issued a title insurance policy for the property in which policy the land was legally described as seven separate parcels. Id. Subsequently, the insured lost a potential sale of one of the seven parcels when the buyer discovered that years prior to the insured's purchase of the property the City of Cupertino had filed a "notice of merger" that merged all seven parcels into a single legal parcel. Id. The insured submitted a claim to its title insurer based upon the lost sale of the parcel, but the insurer claimed that the notice of merger did not affect title to the insured's property. Id.

The California Court of Appeals held in Dollinger that the notice of merger did not render title to the insured's property unmarketable. 2011 WL 4005915 at *13. It concluded that the notice of merger, while it may have impacted the insured's ability to market and sell the property, did not call into question who owned the property. Id. As a result, it had "no **potential** to affect [the insured's] title." Id. at *12-13 (emphasis added). Title to the property was still marketable because the notice of merger did "not affect the landowner's title to the land." Id. at *12-13. In stark contrast, however, the dispute here involves the legal description for the Property, which dictates which title is and is not

owned by Mattson Ridge. Thus, there should be little question that a problematic legal description potentially affects title to real property.

MLTA states in its brief that the fact that no third party had asserted a claim against title was “pivotal” to the Dollinger Court’s decision that title was marketable, despite there being no discussion of this alleged “fact” in Dollinger. (*Amici* Brief at p. 23) Ticor makes a similar suggestion in its brief. (Ticor Brief at p. 24, fn. 4) Contrary to these arguments, the decision in Dollinger turned entirely on the Court’s conclusion that the notice of merger did not call into question the insured’s ownership of the subject property, and instead was akin to an ordinance or regulation that restricted an owner’s ability to use or sell its land. 2011 WL 4005915 at *13. The Court’s decision had nothing to do with a lack of evidence showing actual challenges to the insured’s title. Indeed, the Dollinger Court expressly recognized that “potential” claims that affect title to real property could render such title unmarketable. *Id.* at *12. Thus, Dollinger is completely consistent with Minnesota case law. See Glaser v. Minn. Fed. Sav. & Loan, 389 N.W.2d 763 764 (Minn. Ct. App. 1986) (noting that purpose of marketable title is to prevent purchasers from having to litigate “apparent or real defects” in title.) Ticor’s and MLTA’s reliance on Dollinger is misplaced.

B. There Is Substantial Evidence In The Record That There Was Reasonable Doubt Regarding Title To The Property.

There should no dispute that the reference in the legal description to “the county road at or near Charles Magnuson’s place in Sunrise City” is unclear. (A.A.-59) The narrow question for this Court is whether this vague and unusual reference in the legal

description created reasonable doubt about the title to the Property. Because there is substantial evidence which establishes that there was reasonable doubt about title to the Property, the Court should conclude that the District Court and Court of Appeals did not err in concluding that title to the Property was unmarketable.

- 1. The evidence shows that multiple individuals, including Ticor's own employee, have concluded that title to the Property is not free from reasonable doubt.**

Ticor and MLTA would like the Court to ignore that the undisputed evidence in the record shows that numerous individuals examined title to the Property and determined that it was not free from reasonable doubt. Remarkably, Ticor even suggests that the only party that has identified an issue with title to the Property was a "title examiner working for a competitor" of Ticor. (Ticor's Brief at p. 16) Contrary to Ticor's suggestion, the record is replete with examples of individuals that have raised doubts concerning title to the Property. All of this evidence establishes that Mattson Ridge lacked marketable title to the Property when it tendered its claim under the Policy.

Perhaps most notably, before it issued the Policy, Ticor's own employee recognized the "vague legal description" as a risk relating to the Property. (A.A.-22; Trial Ex. 3) Not surprisingly, Ticor has left this fact out.

Moreover, when Thompson Builders obtained a commitment for a title insurance policy for the Property, Commercial Partners – a member of both ALTA and MLTA – objected to the legal description, stating that "[t]he legal description at Item No 4 of Schedule A appears ambiguous." (A.A.-27; Trial Ex. 18, ¶18) The fact that Commercial Partners found the legal description to be ambiguous, and would not insure title as a

result, is strong evidence that the Property was unmarketable from the purchaser's standpoint. See, e.g., Howe v. Coates, 107 N.W. 397, 401 (Minn. 1906) (“[T]itle to real estate is not marketable title where a loan company declines to take a mortgage on the property because its counsel will not certify title.”).

The existence of reasonable doubt regarding the legal description is further evidenced by the fact that the City Attorney recommended that the City not sign the developer's agreement with Thompson Builders until Mattson Ridge resolved the problems with the legal description. (A.A.-29; TT 239:4-240:3 (Thompson)) Similarly, the City Council refused to approve the final plat for Thompson Builders' development of the Property unless “property title issues” were resolved. (A.A.-29; Trial Ex. 48)

In short, the record establishes plainly that the legal description, on its face, created significant doubt for several individuals about title to the Property. The fact that so many people, as well as the lower courts, have examined title to the Property and all reached the same conclusion is quite telling and evidences that there was “reasonable doubt” about title to the Property.

2. The legal description for the Property, on its face, was ambiguous and created reasonable doubt regarding title to the Property.

An ambiguity in the legal description for a parcel of real property is one of the many types of defects that create sufficient doubt to render title unmarketable. See Egelhoff v. Simpson, 50 A.D. 595, 601-02 (N.Y. Sup. Ct. App. Div. 1900) (finding title unmarketable where legal description in deed in chain of title was ambiguous). An ambiguous legal description is such a defect because “[a] person desirous of purchasing

the land, upon looking through the title deeds and discovering the defect in the description, would be much less likely to be satisfied with the title, and therefore much less likely to purchase, than if the description had been correct.” Smith v. Turner, 50 Ind. 367, 1875 WL 5995 (Ind. 1875) (holding that title was unmarketable due to ambiguity in legal description); see also, Collins v. Martin, 6 S.W.2d 126, 128 (Tex. Civ. App. 1928) (holding that problems with legal description rendered title unmarketable). “[W]here there is a defect in the record title which can be supplied only by resort to parol evidence, and title may depend upon questions of fact, the general rule is that the purchaser will not be required to perform his contract.” Egelhoff, 50 A.D. at 601-02. The ambiguous legal description for the Property created reasonable doubt about title to the Property.

a) The legal description for the Property was susceptible to more than one meaning.

Whether a legal description in a deed is ambiguous is a question of law. Mollico v. Mollico, 628 N.W.2d 637, 641 (Minn. Ct. App. 2001). A legal description in a deed is ambiguous, in turn, if “judged by its language alone and without resort to extrinsic evidence, it is reasonably susceptible to more than one meaning.” Mollico, 628 N.W.2d at 641. The Supreme Court should conclude that the legal description for the Property, on its face, was susceptible to more than one interpretation.

The legal description to the Property included the following directional call:

Commencing at the Northwest corner of said Section 25; thence South 30 rods to the intersection of road leading from the county road at or near Charles Magnuson’s place in Sunrise City; thence along the center of the road to where said road crosses the section line

(A.A.-59) (emphasis added.) As the Court of Appeals noted, the unartful drafting of this legal description gives rise to a litany of questions, such as whether Charles Magnuson's "place" was a "workplace, a farm, or a residence," whether Charles Magnuson had more than one "place" in Sunrise City, and whether there was more than Charles Magnuson. (ADD-7) To obtain certainty regarding title to the Property, a prospective purchaser would need to turn to extrinsic evidence to resolve the list of questions raised by the legal description. (A.A.-59) Without resort to extrinsic evidence, a prospective purchaser would be forced to guess about the answers to these questions, and the legal description would be subject to multiple interpretations based on these guesses. This is an ambiguous legal description. Mollico, 628 N.W.2d at 641. A legal description, such as the one here, that forces a prospective purchase to engage in this type of guesswork is not free from reasonable doubt and renders title to real property unmarketable. Hubacheck, 134 N.W.2d at 642.

b) Ticor's contention that questions about the legal description may have been resolved using various rules of construction does not change that a prospective purchaser would have had reasonable doubt about the title to the Property.

Ticor dismisses all of Mattson Ridge's and the Court of Appeals' questions about the legal description as "speculative flights of fancy." (Ticor's Brief at p. 18) Instead, Ticor argues that the Court of Appeals erred by allegedly deciding to "throw up its hands" and not use a variety of rules of interpretation to attempt to reconcile the questions raised by the legal description on its face. (Ticor's Brief at pp. 18-20, 23-25) The Court should reject Ticor's argument for at least three reasons.

First, Ticor's entire argument about how the Court of Appeals and the District Court could have used the "order of control" and other rules of interpretation to allegedly reconcile the issues on the face of the legal description is a new argument that Ticor never made to the Court of Appeals or to the District Court. Ticor is barred from now raising this argument for the first time in its appeal to the Supreme Court. See Thiele, 425 N.W.2d at 582.

Next, there is no evidence which establishes that, by applying the "order of control" or any of the other "rules" put forth by Ticor, the legal description for the Property would have closed and there would no longer be any doubt about the real property covered by this legal description. Stated simply, Ticor's entire argument on this issue is based upon conjecture about what would happen if these rules of construction were applied. This rank speculation does nothing to remove the reasonable doubt created by the ambiguities in the legal description.

Finally, and most notably, none of the rules of construction referenced by Ticor would eliminate the ambiguous reference in the legal description to "the county road at or near Charles Magnuson's place in Sunrise City." (A.A.-59) Even if this Court were to focus on other parts of the legal description to try and discern what property is actually described in this description, it still cannot avoid that the disputed call creates doubt about any conclusions that may be reached. Try as they might, Ticor and MLTA cannot read this troublesome language out of the legal description for the Property. No amount of effort by the Court of Appeals or District Court to attempt to reconcile the elements of

the legal description would have changed the conclusion that the legal description is susceptible to multiple meanings.

- c) **Ticor's and MLTA's argument that there was not reasonable doubt regarding the legal description for the Property because it merely referenced an adjoiner is without merit.**

Both Ticor and MLTA attempt to minimize the doubts raised by the legal description for the Property by claiming that the reference to “the county road at or near Charles Magnuson’s place in Sunrise City” was merely a reference an adjoining landowner. (Ticor’s Brief at pp. 19-20; *Amici* Brief at p. 22) They go to great lengths to explain why such an alleged reference to an adjoining landowner could not result in title being unmarketable. (*Id.*) The Court should reject this argument for a number of reasons.

- (1) **There is no evidence in the record that Charles Magnuson is or ever was an adjoining landowner.**

Perhaps most significantly, there is not one shred of evidence in the record that Charles Magnuson is or ever was the owner of any real property that adjoined the Property. Ticor and MLTA repeatedly contend that Charles Magnuson was an “adjoiner,” but the record simply does not support this assertion. Thus, there is no evidentiary basis for Ticor’s and MLTA’s repeated assertion that the reference to Charles Magnuson’s “place” was merely to an adjoining landowner’s property.

(2) The disputed call in the legal description was not a reference to an adjoiner.

Ticor and MLTA both attempt to gloss over that the fact the legal description did not refer to property owned by Charles Magnuson. Rather, the disputed call was to “the county road at or near Charles Magnuson’s place in Sunrise City.” (A.A.-59) (emphasis added) A careful review of the legal description reveals that it does not refer to an adjoining landowner’s property. Indeed, as highlighted by the Court of Appeals, the reference to Charles Magnuson’s “place” could have been a reference to one of a number of locations other than a parcel of land owned by Charles Magnuson. (ADD-7) This ambiguous reference to such a “place” is materially different than a reference to a specific parcel of property owned by an identified individual.

(3) It is irrelevant to the determination of marketability of title whether a legal description is sufficient to withstand a legal challenge to the validity of title conveyed thereby.

Finally, Ticor’s and MLTA’s argument conflates the question of whether there was reasonable doubt about the legal description for the Property with the question of whether Thompson Builders, as the prospective purchaser of the Property, could have prevailed in an action to defend title to the property covered by this legal description. Ticor cites a number of cases in which courts have considered the sufficiency of legal descriptions in the context of actions where the validity of a conveyance is being challenged. (Ticor’s Brief at pp. 23-24) Notably, though, none of these cases analyzes whether a legal description that is ambiguous on its face may create sufficient doubt that will render title unmarketable from a purchaser’s perspective.

For instance, in National Bond & Sec. Co. v. Board of Com'rs of Hennepin County, 97 N.W. 413 (Minn. 1903), the question was whether a legal description in a conveyance of tax forfeited land was “so indefinite and uncertain” that such conveyance was void Id. at 414-15. Likewise, in St. Paul Land Co. v. Dayton, 43 N.W. 782 (Minn. 1889), the question was whether a legal description in a contract for the sale of real estate was so indefinite as to render the contract void, thereby preventing its enforcement by specific performance. There was no discussion in either of these cases of whether issues with the legal descriptions rendered title unmarketable.

Ticor’s reliance on Triple B&G, Inc. v. City of Fairmont, 494 N.W.2d 49 (Minn. Ct. App. 1992) is similarly misplaced. In Triple B&G, the question was whether a legal description in a settlement agreement was so indefinite and incomplete that it rendered the entire settlement unenforceable. Id. The Court of Appeals refused to void the parties’ settlement, and noted that, while the description of the subject property in the settlement documents was “imperfect” and “arguably ambiguous,” these issues could be resolved by the use of parol evidence. Id. Again, though, the Triple B&G Court did not consider whether a purchaser could have been forced to accept title to real property using the description that was included in the parties’ agreement.

Ticor also relies on City of Mankato v. Carlstrom, 2 N.W.2d 130 (Minn. 1942). In Carlstrom, this Court examined whether issues with the legal description in a deed to the original owner of real property were sufficient to render the original deed void, which would have left the current owner without the ability to claim that he held good title to the property. Id. at 132. The Court ruled that “a deed will not be declared void for

uncertainty in description if it is possible by any reasonable rules of construction to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed.” Id. at 133 (emphasis added). Notably, in Carlstrom, the problems with the legal description in the original deed had been fixed more than seventy years before the lawsuit, so the prospective purchaser of the property was unable to claim that title was unmarketable because of current problems with the legal description. Thus, the Court in Carlstrom did not analyze whether problems with the legal description, if not fixed, would have allowed the purchaser to object to the status of title.

In short, the question of whether a legal description is free from reasonable doubt from a purchaser’s prospective is different from the question of whether a legal description is sufficiently definite to prevent a conveyance from being void. Neither Tigor nor MLTA has cited a single case from Minnesota or any other jurisdiction in which a court has held that, for purposes of determining whether sufficient doubt exists regarding a legal description to render title unmarketable, the appropriate question is whether the legal description is sufficient to prevent a deed from being voidable. The entire discussion in their briefs about references to adjoining in legal descriptions is inapposite to the issues before the Court in this matter.

C. This Court Should Dismiss Tigor’s And MLTA’s Warnings That The Conclusion That Title To The Property Was Unmarketable Will Establish A Dangerous Precedent.

The determination of whether title to the Property was unmarketable necessarily turns on the narrow and unique facts of this case. Indeed, the limited question before the Court on this issue is whether the reference in the legal description to “the county road at

or near Charles Magnuson's place in Sunrise City" created reasonable doubt for potential purchasers so as to render title to the Property unmarketable. Because each legal description is unique and must be analyzed independently, the resolution of the marketability question in this case will not establish a sweeping precedent for future cases.

Yet, despite the inevitable narrowness of any decision the Court issues in this case, Ticor and MLTA both warn that there will be dire consequences if this Court affirms the Court of Appeals' conclusion that Mattson Ridge's title to the Property was not marketable. Ticor warns that such a holding would likely impact "thousands of property descriptions" and would potentially lead to a "tsunami of litigation." (Ticor's Brief at p. 13) MLTA similarly warns that such a holding would "needlessly undermine untold numbers of existing legal descriptions. . . ." (*Amici* Brief at p. 23) The Court should dismiss these warnings as overblown fear mongering.

The lower courts' decisions in this case do not create a *de jure* or "bright-line" rule that "all references to adjoining are *per se* ambiguous thereby rendering any title containing such references unmarketable." (Ticor's Brief at pp. 24-45) As discussed above, this case does not even involve a legal description that contains a call to an adjoining's property – rather, the disputed call is to a county road at or near some person's "place." This is a far cry from an unambiguous call in a legal description to an identified monument or to a parcel of property known to be owned by a specific individual. Because of the uniqueness of the legal description, this case will hardly provide the basis

for a bright-line rule that “will give rise automatically to ambiguity and unmarketability of title whenever, as here, it is lucrative for a party to do so.” (Ticor’s Brief at p. 25)⁴

Ultimately, the question for marketability is whether a legal description is sufficient enough, from a purchaser’s standpoint, such that there is not reasonable doubt about title. Lucas, 433 N.W.2d at 97. No bright-line rule can be announced concerning the specific problems with legal descriptions that will and will not render title unmarketable because each legal description must be analyzed on a case-by-case basis. Ticor and MLTA attempt in a variety of ways to escape the conclusion that the doubt raised by the plain text of the legal description rendered title to the Property unmarketable, but all of these arguments are unavailing. This is not a close case. The Court of Appeals and District Court both were correct when they concluded that title to the Property was unmarketable.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT MATTSON RIDGE IS ENTITLED TO RECOVER \$1,911,169 FROM TICOR FOR ITS BREACH OF THE POLICY.

The District Court found that Mattson Ridge suffered \$1,973,397 in damages as a proximate result of Ticor’s breach of contract. (A.A.-37) It subsequently concluded, however, that the Policy limited Mattson Ridge’s recovery to the Policy amount of

⁴ Ticor’s suggestion that this case will encourage insureds to hold onto and make claims only when market conditions make it “lucrative” to do so is a red herring. Section 3 of the Policy requires insureds to provide notice to Ticor “promptly” of any potential defect upon learning of the same, and in the event that an insured does not provide prompt notice, Ticor disclaims liability for any “prejudice” caused by the delay. (A.A.-99) This provision would protect Ticor from the exact scenario it warns will occur if this Court affirms the Court of Appeals.

\$1,286,000.⁵ (A.A.-40) The Court of Appeals reversed on the policy limit issue and found that Ticor cannot use the Policy to limit Mattson Ridge's damages, and remanded for entry of judgment for \$1,911,169 for Mattson Ridge's lost sale and cost to cure the Defect. (ADD-14) This Court should affirm the Court of Appeals.

A. Ticor's Breach Eliminated Its Ability To Rely Upon Favorable Performance Terms To Limit Its Exposure For Breach Of Contract Damages.

Ticor and the *amici* repeatedly argue that the Policy caps Ticor's liability at the Policy amount, regardless of whether Ticor breaches or performs. The Court should reject this position because it is contrary to Minnesota law and sound public policy.

1. Under Olson, Ticor cannot rely upon the Policy's performance terms to limit Mattson Ridge's breach of contract damages.

Ticor forfeited its right to rely upon provisions of the Policy governing performance when it breached the Policy. Under Minnesota law, when an insurer breaches its contract with an insured, the insurer loses its ability to limit its exposure to the policy limitations. Olson v. Rugloski, 277 N.W.2d 385, 387-88 (Minn. 1979).

In Olson, an insured suffered a loss covered by an insurance policy. Id. Had the insurer performed by paying for that loss, it would have been entitled to rely upon favorable policy terms and limited its liability to the policy amount. Id. Rather, the insurer breached the contract by refusing to pay or unreasonably delaying payment of an undisputed amount. Id.

This Court held that, by breaching the policy, the insurer lost the protection of the

⁵ Ticor does not challenge the District Court's separate conclusion that Mattson Ridge was entitled to recover \$11,169 for the cost to cure the Defect. (A.A.-40).

policy limits and became “liable for the loss that naturally and proximately flows from the breach.” Olson, 277 N.W.2d at 387-88. The damages recoverable for such a breach are those that “either arise naturally from the breach itself or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach” Francis v. Western Union Telegraph Co., 59 N.W. 1078, 1079 (Minn. 1894); see also Lassen v. First Bank Eden Prairie, 514 N.W.2d 831, 838 (Minn. Ct. App. 1994).

The Olson Court further stated that lost profits may be recovered as consequential damages if they are a “natural and proximate result of the breach and are proved with reasonable, although not absolute, certainty.” Olson, 277 N.W.2d at 388; see, e.g., La Minnesota Riviera, LLC v. Lawyers Title Ins. Corp., 2007 WL 3024242, *4 (M.D. Fla. Oct. 15, 2007) (denying a title insurer’s motion to dismiss a breach of contract claim brought after a title defect cost the insured a purchase offer and stating that “[l]ost profits may also be recoverable”). This Court upheld the trial court’s award of lost profit damages in an amount in excess of policy limits. Olson, 277 N.W.2d at 388. In other words, Olson established that an insured in Minnesota may seek breach of contract damages – including consequential and incidental damages – without being limited by policy amount limitations when an insurer breaches an insurance policy.

Other courts have likewise concluded that policy limits in an insurance contract limit only the amount the insurer may have to pay in the performance of the contract, not the damages that are recoverable for its breach. See Lawton v. Great Southwest Fire Ins. Co., 392 A.2d 576, 579 (N.H. 1978) (“The subject insurance contract limits the insurer's

liability to \$ 250,000 for damages that result from the casualties insured against, not its liability for damages resulting from its own breach of contract”); see also Dreibelbiss Title Co., Inc. v. MorEquity, Inc., 861 N.E.2d 1218, 1222 n. 5 (Ind. Ct. App. 2007) (noting in a title insurance case that “policy limits restrict the amount the insurer may have to pay in the performance of the contract, not the damages that are recoverable for its breach”) (emphasis as in original); Title Insurance Law, § 10:18, p. 79 (“It is an axiom of general insurance law that an insurer who has materially breached its contract to defend and indemnify cannot require its insured to comply with other contract terms.”) Thus, when an insurer breaches its contract, “the alternatives the policy gives the insurer do not limit the insured’s ability to sue for breach of the contract and recover, not only the amount due under the policy, but also consequential, incidental, and punitive damages.” Title Insurance Law, § 10.2, p. 4; § 10:10, p. 27 (“courts have been more likely to limit the insured’s recovery to the ‘difference measure’ of damages when the title insurer has not breached its contract”).

Ticor and the *amici* attempt to avoid Olson by arguing that it is limited to the narrow facts of that case. Effectively, they read the word “only” before this Court’s statement that “[w]hen the insurer refuses to pay or unreasonably delays payment of an undisputed amount, it breaches the contract and is liable for the loss that naturally and proximately flows from the breach.” Contrary to this argument, however, the Olson Court did not state that insurers’ breaches due to refusals to pay or unreasonable delays in making payments are the only types of breaches that allow non-breaching insureds to seek standard breach of contract remedies. Rather, the logic underlying the holding – an

insurer cannot seek refuge under favorable performance terms after breaching – applies equally to all kinds of breaches, not merely the types present in Olson.

Moreover, reading Olson this narrowly would create a bizarre dichotomy, where the measure of damages recoverable for an insurer’s breach would depend entirely upon how the insurer breached its policy. The measure of damages for breach of an insurance contract should not change based upon the type of breach present in a specific case. The Court should refuse to artificially narrow Olson’s holding in this manner, and should affirm the Court of Appeals’ holding that the appropriate measure of damages for Ticor’s breach is the amount of loss or damage Mattson Ridge incurred as a result of that breach.⁶

2. The rule in Olson serves a strong public policy.

The Olson decision also serves a strong public policy. Limiting an insurer’s liability to policy limits even when it breaches a policy would provide no incentive for insurers to perform. See Lawton, 392 A.2d at 579. As the Southern District of Indiana explained:

As for consequential damages, we are somewhat bewildered by Home Indemnity’s argument. It seems to be arguing that even if it did breach the insurance agreement, it can be liable for at most the amount of the insurance policy. This is clearly wrong. An insurance agreement is like any other contract in this regard: “A breaching party is liable for damages which are the direct, probable, and proximate result of its breach....” [citation omitted]

* * *

⁶ Even if Olson were limited to cases involving a refusal to pay or unreasonable delay in payment, Ticor’s argument still fails. The undisputed trial evidence shows that Ticor could have performed under the Policy by taking any number of actions, including paying Mattson Ridge.

Indeed, while there is an argument that an insurer should be able to dispute claims in good faith without potentially increasing its liability, insurers must understand that, like everyone else's, their pursuit of their interests risks creating added liability costs. ... under the rule Home Indemnity pushes, the insurer in a policy limits case would usually have nothing to lose by contesting a claim.

Lee v. The Home Indemnity Co., 1994 WL 16495091, *4 (S.D. Ind. Dec. 15, 1994).

Ticor and its *amici* attack Professor Palomar's Title Insurance Law treatise and try to limit the cases she cites. They also rely on cases from other jurisdictions applying policy amount limitations even after breaches by the insurer. This approach misses the forest for the trees.

Some courts in other jurisdictions may have allowed insurers to rely on policy limitations after a breach. This Court, however, has already determined in Olson that policy limits do not apply after a breach, and that is the correct rule. The line of cases Ticor and the *amici* rely upon raise a "serious policy objection," because those cases "give title insurers absolutely no incentive to comply with their contractual duties—if the insurer defends the title and pays the loss promptly, the amount it must pay is the diminution in value of the insured interest; and if the insurer wrongly denies the claim, the amount it must pay still is only the diminution in value of the insured interest." Title Insurance Law, § 10:18, pp. 82-83.

Ticor's arguments bear out this "serious policy objection" because Ticor would end up paying the same amount for breaching the Policy as it would have paid to perform, which provides no downside to denying coverage. This is precisely the

situation Professor Palomar and the Lawton and Lee courts warn about. The Olson Court got it right on policy grounds.

3. Ticor provides no compelling public interest for its proposed rule.

The closest Ticor and the *amici* come to making a policy argument for their proposed rule is claiming that allowing damages in excess of policy limits “would inject uncertainty into the process by which potential losses are assessed and insured against.” (*Amici* Brief at p. 5) If insurers are genuinely concerned that Olson exposes them to ordinary breach of contract damages, they can always limit their liability and protect themselves by performing. If insurers choose not to perform, they take the risk that a judge or jury will later find that they breached and award appropriate breach of contract damages. Olson provides insurers an incentive to perform, while Ticor’s proposed rule provides a disincentive.

Moreover, Ticor’s concern about windfalls is unfounded. The law regarding the measure of damages for a breach of contract is well-established. Contract damages are limited by the familiar doctrines of causation and foreseeability. See Olson, 277 N.W.2d at 388. Outside of the insurance context, Minnesota courts have little trouble applying these standards. The District Court found that some of Mattson Ridge’s asserted damages were the proximate and natural result of Ticor’s breach, and some were not. In this case, Mattson Ridge’s damages exceeded policy limits, but in other cases they might not. The Olson rule does not allow windfalls from breach of contract actions because the damages still must necessarily be tied to a breach.

Regardless, Ticor is the wrong insurer to complain that Olson is unfair. The Policy provided Ticor with several options that would limited, reduced, or eliminated its liability, but Ticor ignored those options. For example, Ticor could have avoided all liability for losses caused by the Defect by performing under Section 9(a) of the Policy, which provides, in relevant part, as follows:

If the Company ... cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method ... it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

(Trial Ex. 9) (emphasis added). In other words, Ticor could have obtained the “certainty” sought by the *amici* by performing as required in the Policy. Had it done so, it would be fully protected from liability.

Finally, even if Ticor legitimately believed that it was entitled to deny coverage under the Policy, it could have agreed to perform under a reservation of rights and filed a declaratory judgment action to determine coverage. See Knapp v. Commonwealth Land Title Ins. Co., 932 F.Supp. 1169, 1170-71 (D. Minn. 1996) (holding that insurer had a right to recover defense costs from insured pursuant to reservation of rights after the Court found no coverage existed). Had it taken this approach, Ticor would still be able to rely on the Policy limits. Instead, Ticor refused to take any steps to limit its liability in this case.

Ticor breached the Policy by refusing to take any action when notified of the Defect. The Court of Appeals correctly determined that, by breaching the Policy, Ticor

forfeited its right to rely upon the performance terms in the Policy and exposed itself to standard breach of contract damages. This Court should affirm the Court of Appeals.

B. The Policy Does Not Bar Mattson Ridge From Recovering Consequential Damages..

The other major premise for Ticor's challenge to the Court of Appeals' decision is that the Policy's "plain language" allegedly bars Mattson Ridge from recovering consequential damages. (Ticor's Brief at pp. 25-28, 35) This premise is flawed. Nothing in the Policy bars Mattson Ridge from recovering consequential damages for a breach of the Policy. Moreover, Ticor's claim that title insurance policies, by their very nature, exclude lost sale damages is untenable in light of multiple cases awarding lost profit damages to insureds. The Court should reject Ticor's consequential damages arguments.

1. The Policy's "plain language" does not bar Mattson Ridge from recovering consequential damages.

Ticor's consequential damages theory rests on a flawed reading of the Policy. Despite Ticor's claim that the "plain language" of the Policy excludes such damages, the District Court specifically stated that the "Policy does not mention consequential damages." (A.A.-38)

Lacking explicit language in the Policy, Ticor unilaterally defines the terms "loss" and "actual monetary loss" in the Policy as not including consequential damages. Even assuming, *arguendo*, that Ticor's definition of "loss" is correct, this argument fails because it ignores the plain text of the Policy. For example, the Policy's first page states that Ticor shall be liable for "loss or damage ... sustained or incurred by [Mattson Ridge]

by reason of” any of the specifically enumerated risks covered by the Policy. (Trial Ex. 9) (emphasis added) Section 7 similarly states that the Policy is “a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by the policy and only to the extent herein described.” (Id.) (emphasis added) Ticor conveniently ignores the term “damage” in arguing that the “plain language” excludes consequential damages, instead focusing solely on the term “loss.” (Ticor’s Brief at pp. 27-28, 35)

As a matter of pure contract interpretation, the terms “loss” and “actual monetary loss” must have different meanings than the term “damage.” ALTA, who wrote the policy form that Ticor used in this case, separated “loss” and “damage” by a disjunctive, “or.” This signals that ALTA did not intend for their meanings to be identical. See Kastner v. Star Trails Ass’n, 658 N.W.2d 890, 894 (Minn. Ct. App. 2003) (noting that separating clauses in a sentence with the disjunctive “or” indicates that the clauses have distinct meanings). The Court should reject Ticor’s construction of the Policy because the Court is “bound by a rule of contract interpretation that requires [it] to give effect” to all of the Policy’s terms. Metro. Airports Comm’n v. Noble, 763 N.W.2d 639, 645 (Minn. 2009) (internal citation omitted).

In addition, Ticor’s argument fails because the term “loss” does not exclude consequential damages. Multiple courts have concluded that damages incurred as a result of lost sales or lost rent are recoverable in title insurance cases. See, e.g., Hedgecock v. Stewart Title Guaranty Co., 676 P.2d 1208, 1210 (Colo. Ct. App. 1983); Pioneer Title Ins. Co. v. Ina Corp., 391 P.2d 28, 30 (Nev. 1964); Montemarano v. Home Title Ins. Co.,

258 N.Y. 478, 481-83 (1932); Title Insurance Law, § 5:7, p. 44; § 6:23, p. 110 (“A purchaser, assignee, or mortgagee’s refusal to close the transaction because of an encumbrance or title defect which was not excepted from a title policy also has been held sufficient to show a loss to the insured.”). The measure of damages for this type of loss is the difference between the negotiated sale price without the defect and the eventual sale price. Hedgecock, 676 P.2d at 1210; Pioneer Title Ins. Co., 391 P.2d at 29-30; Montemarano, 258 N.Y. at 481.

The Montemarano case further undermines Ticor’s assumption that the term “loss” does not include consequential damages. The Montemarano Court found that damages that resulted from a lost sale of property constituted an “actual loss” that fell within the scope of coverage provided by the title insurance policy. 258 N.Y. 478 at 481-83 (emphasis added.) The Montemarano Court’s holding flatly contradicts Ticor’s position that the “loss or damage” language in the Policy bars Mattson Ridge from recovering lost sale damages.

2. Ticor’s reliance on First American Bank is misplaced.

With nothing in the Policy on consequential damages, Ticor next relies on First American Bank v. First American Trans. Title Ins. Co., 585 F.3d 833, 838-39 (5th Cir. 2009) to argue that consequential damages are not available to Mattson Ridge under the Policy. Ticor’s reliance on that decision is misplaced.

In First American Bank, the Fifth Circuit analyzed language similar to that present in this case and determined that it does not allow an insured to recover consequential damages. Id. Importantly, though, the First American Bank Court examined the

damages recoverable for a claim under a title policy, not for a breach of the policy. Id. Nothing in First American Bank addresses the rule discussed in Olson regarding the role of the policy limitations after a breach. 277 N.W.2d at 78.

Moreover, the Fifth Circuit's reasoning is questionable. The Court first used *Black's Law Dictionary* to interpret the phrase "actual loss or damage" as used in a title insurance policy for a gaming ship. 585 F.3d at 839. Based on this guidance, the Court concluded that (1) "actual loss" is limited to a "loss resulting from the real and substantial destruction of insured property," and (2) "actual damages" are "damages that repay actual losses." Id. at 839. The Fifth Circuit then concluded that consequential damages are not "actual losses," and that, as a result, consequential damages are excluded by the policy language. Id. This analysis was flawed.

By determining that "actual loss" and "damage" are effectively one and the same, the Court committed the precise error described above – it read the separate "damage" term out of the policy. Additionally, the Court interpreted the phrase "actual loss" to only cover those losses arising from the physical destruction of property. Importantly, though, title insurance policies for real property are not intended to protect against the physical destruction of real property. Rather, the typical "loss" in a title insurance case is the impairment in value of the insured's interest in a parcel of real property. See, e.g., Overholtzer v. N. Counties Title Ins. Co., 116 Cal. App.2d 113, 123 (Cal. Dist. Ct. App. 1953); Title Insurance Law, § 1:12, p. 33; § 6:19, pp. 87-89 ("an insured does suffer a financial or 'monetary' loss when its property becomes less valuable because of a lien title defect, or encumbrance that limits marketability or use."). For example, the

Hedgecock, Pioneer Title, and Montemarano cases cited above were title insurance cases that did not involve physical destruction of property.

The Fifth Circuit's logic, if applied in this case, produces an overly narrow reading of the Policy. The Court should reject Ticor's arguments regarding First American Bank and affirm the Court of Appeals' determination that the Policy does not bar Mattson Ridge from recovering consequential damages.

3. Consequential damages are available for a breach of contract without an independent tort.

The last, and most puzzling, argument Ticor and the *amici* make on this issue is that a party cannot recover consequential damages for a breach of contract unless the breach is accompanied by an independent tort. They cite to R.L.B. Enterprises, Inc. v. Liberty Nat'l Fire Ins. Co., which does in fact state that consequential damages cannot be recovered without an independent tort. 413 N.W.2d 551, 554 (Minn. Ct. App. 1987). However, a review of R.L.B. Enterprises reveals that the Court of Appeals was mistaken about this Court's precedent and misinterpreted the case law it cited.

First, the Court of Appeals cited only two cases in support of its statement: Haagenson v. Nat'l Farmers Union Property & Casualty Co., 277 N.W.2d 648, 652 (Minn. 1979) and Saltou v. Dependable Ins. Co., 394 N.W.2d 629, 633 (Minn. Ct. App. 1986). These cases do not support the R.L.B. Enterprises decision. Haagenson and Saltou both state that a party may not obtain "extra-contractual" damages (*e.g.* mental anguish, emotional distress, and punitive damages) for a breach of contract without an independent tort. Id. Neither case mentions consequential damages.

Second, the statement in R.L.B. Enterprises conflicts with several of this Court's decisions, such as Olson and Lesmeister v. Dilly, 330 N.W.2d 95, 103 (Minn. 1983). The Olson Court affirmed an award of consequential damages for breach of contract without evidence of an independent tort. 277 N.W.2d at 388. In fact, the Court reversed the trial court's award of punitive damages, stating that "[p]unitive damages are not recoverable for breach of contract except in exceptional cases where the breach of contract constitutes or is accompanied by an independent, wilful tort." Id. In Lesmeister, this Court again affirmed an award of consequential damages for breach of contract without evidence of an independent tort. 330 N.W.2d at 103. Under Ticor's rule, the Olson and Lesmeister Courts would have rejected the consequential damage awards instead of affirming them. Given this precedent and the actual language in Haagenson and Saltou, the Court of Appeals' statement in R.L.B. Enterprises is not supported by this Court's precedent.

Despite the protests by Ticor and the *amici*, nothing in the Policy prevents Mattson Ridge from recovering consequential damages. The plain language is silent regarding consequential damages. The Court of Appeals said it best: if "Ticor had not breached the policy, Mattson would not be able to recover consequential damages; the policy provides that, if Ticor cures a title defect, there is no further recovery." (ADD-13) This Court should affirm the Court of Appeals' conclusion that Mattson Ridge may recover its lost profit damages from Ticor.

C. The District Court Did Not Clearly Err By Finding That Ticor's Breach Was The Proximate Cause Of Mattson Ridge's Lost Profit Damages.

Ticor challenges the District Court's factual findings regarding damages without even attempting to apply the proper standard of review. This Court may set aside the District Court's factual findings only if the Court determines that the findings were "clearly erroneous." Minn. R. Civ. P. 52.01; Runia v. Marguth Agency, Inc., 437 N.W.2d 45, 48 (Minn. 1989). In analyzing the findings, this Court must view "the record in the light most favorable to district court," and may not disturb any findings that are reasonably supported by the record. Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999). Because Ticor has failed to demonstrate that the findings regarding Mattson Ridge's lost profits are clearly erroneous, the Court should not disturb them.

1. The District Court made extensive findings regarding Mattson Ridge's damages.

At trial, Mattson Ridge submitted evidence that it incurred \$2,605,919 in damages due to Ticor's breach. Ticor countered by arguing that its breach did not cause the damages and that the lost profit damages were not reasonably foreseeable or within the contemplation of the parties at the time of contracting.

The District Court considered the evidence and entered 20 pages of factual findings. Regarding damages, it found that Thompson Builders would have closed on the purchase of the Property in August 2006 but-for the Defect. (A.A.-30) Mattson Ridge notified Ticor that the Defect was jeopardizing the sale and proposed that Ticor insure over the Defect to allow the sale to go forward. (A.A.-31) The District Court found that, had Ticor accepted the proposal, "Thompson Builders could have closed under the Purchase Agreement in August 2006 and paid [Mattson Ridge] \$2,900,000."

(A.A.-31) Instead, Ticor denied coverage and refused to do anything regarding the Defect. (A.A.-32)

The District Court also found that, by the time Mattson Ridge cured the Defect in July 2007, Thompson Builders was no longer willing or able to purchase the Property. (A.A.-33) In other words, although Mattson Ridge and Thompson Builders tried to keep the sale alive after July 2007, the District Court determined that the deal had died while Mattson Ridge was trying to cure the Defect. (Id.) Meanwhile, the Property's value fell from \$2.9 million in August 2006 to \$1.0 million at the time of trial. (A.A.-35)

In light of these facts, the District Court found that the "inability to close the sale of the Property with Thompson Builders in August 2006, due to Defendants' breach of the Policy, was the proximate cause of certain consequential and incidental damages" to Mattson Ridge. (A.A.-37) The consequential damages included \$1.9 million in lost profits from the lost sale. (Id.) In total, the District Court found that Mattson Ridge incurred \$1,973,397 in damages as a proximate result of Ticor's breach of the Policy. (Id.) The Court of Appeals reduced that finding to \$1,911,169 by removing the mechanic's lien damages, leaving \$1.9 million for the lost sale and \$11,169 for the cost of curing the defect. (ADD-14) Because the District Court's findings were based on substantial evidence in the record and are not clearly erroneous, this Court should refuse to disturb these findings.

2. Ticor has failed to show clear error in the District Court's findings.

Ticor does not challenge these factual findings directly. Rather, it emphasizes different facts and retreats to rearguing its position from trial. Ticor has failed to meet its burden of showing clear error in the District Court's factual findings.

First, Ticor argues that neither its breach nor the Defect actually caused the lost sale. (Ticor's Brief at pp. 29-32, 37-39) The District Court already considered Ticor's factual arguments and rejected them. (A.A.-30-33) The District Court based its findings, in large part, on unrebutted testimony from Scott Thompson, who testified that his company was able to close in August 2006, but not after July 2007. (Id.) The District Court specifically found Thompson to be a credible witness. (A.A.-23) Ticor cannot meet its burden of showing clear error by simply arguing that the evidence also could have supported different findings.

Second, Ticor argues that, because the lost sale damages were consequential damages, they were not "within the contemplation of the parties at the time the policy was executed." (Ticor's Brief at pp. 36-37). Ticor has the test backwards. Consequential damages are damages that "naturally flow from the breach of a contract, or may reasonably be contemplated by the parties as a probable result of a breach of the contract." Indieke v. Blenda-Life, Inc., 363 N.W.2d 121, 125 (Minn. Ct. App. 1985). The determination as to whether damages qualify as "consequential damages" is purely a question of fact. Franklin Mfg. Co. v. Union Pacific R.R. Co., 248 N.W.2d 324, 326 (Minn. 1976). As Ticor admits, the District Court found that the lost sale damages were "consequential damages." (Ticor's Brief at pp. 36-37) Accordingly, the District Court necessarily found that the lost profits either naturally flowed from the breach of the

Policy or were reasonably within the contemplation of the parties at the time Tigor issued the Policy. See Indieke, 363 N.W.2d at 125. Tigor has not demonstrated that these findings were clearly erroneous.

In short, the District Court considered and rejected the same factual assertions Tigor now makes to this Court. Tigor cannot simply reargue its version of the facts without showing that the District Court's factual findings were clearly erroneous. The Court should affirm the District Court's determination that Mattson Ridge suffered \$1.9 million in lost profit damages and remand for entry of judgment for \$1,911,169.

III. IF THIS COURT DETERMINES THAT THE POLICY LIMITS DO APPLY, IT SHOULD AFFIRM THE DISTRICT COURT'S \$1,297,169 AWARD TO MATTSON RIDGE.

Absent a breach, Section 7(a) of the Policy limits Tigor's liability to the lesser of (1) the Policy amount or (2) the difference between the Property's value with and without the Defect. The District Court applied the formula in Section 7(a) and awarded Mattson Ridge the Policy limit. If this Court decides, despite Olson, that policy limits do apply after a breach, it should also find that the District Court properly applied the Section 7(a) formula and affirm the \$1,297,169 award.

A. The District Court Correctly Applied The Formula In Section 7(a) Of The Policy.

The District Court concluded that Mattson Ridge could only recover from Tigor the damages specified under Section 7(a). This Section states that Mattson Ridge is entitled to recover "the lesser of either: (1) the policy amount of \$1,286,000 or (2) 'difference between the value of the insured estate or interest as insured and the value of

the insured estate or interest subject to the defect, lien, or encumbrance insured against [by] this policy.” (Trial Ex. 9)

To calculate the “with-and-without” part of this formula, the District Court correctly compared the value of the Property immediately before and after Mattson Ridge discovered the Defect. See, e.g., Jalowitz v. Ticor Title Ins. Co., 1991 WL 271040, *4 (Wis. Ct. App. Oct. 8, 1991); Allison v. Ticor Title Ins. Co., 907 F.2d 645, 652 (7th Cir. 1990); Overholtzer v. N. Counties Title Ins. Co., 116 Cal. App.2d 113, 125 (Cal. Dist. Ct. App. 1953); Title Insurance Law, § 10:16, p. 69-70 n. 14; (Ticor’s Brief at p. 32). It found that the Property was worth \$2,900,000 immediately before and 75-90% less immediately after Mattson Ridge discovered the Defect. (A.A.-24, A.A.-34-35) Thus, the value of the Property subject to the Defect was between \$290,000 and \$725,000. (Id.) Ticor does not challenge these factual findings.

Based on these values, the difference between the value of the Property with and without the Defect was between \$2,175,00 and \$2,610,000. Because these amounts exceed the Policy limit of \$1,286,000, the District Court awarded Mattson Ridge the Policy amount plus the cost to cure. (A.A.-40)

B. Ticor’s “Cost To Cure” Measure Of Damages Conflicts With The Plain Language In Section 7(a).

Rather than quibble with the District Court’s math, Ticor ignores Section 7(a) altogether. Ticor first claims that when a title defect can be cured, “loss is limited to the lesser of the cost to cure or the with-and-without calculation.” (Ticor’s Brief at p. 33) Ticor’s argument conflicts with the plain language of the Policy.

Section 7(a) undeniably states that the measure of damages is the lesser of the policy amount or the with-and-without calculation. It says nothing about the “cost to cure,” much less state that the cost to cure is a third limitation in the “lesser of” equation. If ALTA wanted the cost to cure measure to limit damages, it could have put it in Section 7(a) with the other two limitations. Ticor is asking this Court to ignore the plain language of Section 7(a).

The actual language of Section 7(a) does not support its position, so Ticor relies instead on Aboussie v. Chicago Title Ins. Co., 949 S.W.2d 207 (Mo. Ct. App. 1997) and Breck v. Moore, 910 P.2d 599 (Alaska 1996) to argue that the cost of cure is the better measure of damages. Neither case discusses, however, the actual language of the policies at issue. Simply put, there is no indication that the Aboussie and Breck courts even faced a provision like Section 7(a) that provided a measure of damages. These cases have no value in interpreting the plain language of Section 7(a).

Ticor next argues that, even using the “with-and-without” formula instead of cost to cure, Mattson Ridge’s damages are \$0 because Mattson Ridge cured the Defect. This argument fares no better. Section 7(a) compares the Property’s value before and after Mattson Ridge discovered the Defect – not the current value. Further, Ticor’s argument effectively changes the “with-and-without” test in Section 7(a) into a “without-and-without” test that will always yield \$0 in damages whenever the defect is curable. This would impermissibly graft onto Section 7(a) an additional requirement that would bar an insured from recovering damages relating to a title defect unless it could show that the defect resulted in some permanent impairment of its rights. The Court of Appeals

properly rejected this argument because there is nothing in Section 7(a) that distinguishes between claims involving curable defects and claims that involve total failures of title. (ADD-10-11) Ticor's arguments fail under the plain language of the Policy.

C. Ticor Cannot Rely Upon Section 9 Because It Did Not Cure The Defect.

Finding no helpful language in Section 7(a), Ticor and the *amici* rely on Section 9 of the Policy to again argue that the measure of damages is the cost to cure. It is undisputed that Section 9 would have barred Mattson Ridge from recovering any damages from Ticor relating to the Defect if Ticor had cured the Defect. (Trial Ex. 9). This is a contractual 'out' that Ticor possessed under the Policy. However, Ticor did not exercise its 'out' in this dispute.

Undeterred, Ticor and the *amici* argue that the Court should apply Section 9 here anyway "as a limitation on loss" because "it should not matter who corrects the title." (Ticor's Brief at p. 31; *Amici* Brief at p. 18) This argument stretches Section 9 beyond any logical bounds. Section 9 begins by specifically requiring action by the insurer: "If the Company establishes title, or removes the alleged defect ... it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby." (Trial Ex. 9) (emphasis added) In Ticor's view, the prefatory "If the Company" phrase is meaningless and can be replaced with "If anyone." This would cap the insurer's exposure at the amount of costs incurred to remedy a defect, regardless of whether the insurer actually remedies that defect. Ticor's reading again removes any incentive for an insurer to perform under the Policy.

Finally, Ticor contends that the Court must read a “cost to cure” limitation into Section 7(a) or 9 to avoid Mattson Ridge receiving a “windfall.” There is nothing inequitable or unjust, however, in applying the terms of the Policy as written and allowing Mattson Ridge to recover the Policy limit in this case. Mattson Ridge would have been better off selling the Property to Thompson Builders for \$2.9 million than it will be if it collects the Policy amount. Adding the District Court’s \$1,297,169 award to the Property’s current \$1.0 million value means that Mattson Ridge would receive \$2,297,169 instead of \$2.9 million. There is no “windfall” to Mattson Ridge. Conversely, Ticor is in this position because it refused to honor its obligations under the Policy when it could have easily invoked the protections in Section 9. This is a problem of Ticor’s own making.

D. Ticor’s Newly-Minted Coinsurance Argument Must Fail.

In a last-ditch effort to reduce the damages award, Ticor and the *amici* argue that Mattson Ridge underinsured the Property and any damages must be limited by the “coinsurance provision” in the Policy. (Ticor’s Brief at p. 43) Ticor did not raise this argument to the District Court or the Court of Appeals. Thus, Ticor waived this argument by failing to raise it below. See Thiele, 425 N.W.2d at 582.

Even assuming Ticor could raise the coinsurance argument for the first time here, this argument fails on the merits. To invoke Section 7(b)(i), Ticor must prove that the value of the Property was higher on the “Date of Policy” than the amount of insurance. (Trial Ex. 9) Ticor cannot meet this burden, however, because the only evidence regarding the value of the Property on the date of the Policy is the price that Mattson

Ridge paid the Shobergs for the Property, which also happens to be the Policy amount. Ticor has not and cannot cite to any evidence which proves a different value of the Property on that date, as this was not a fact on which the parties offered evidence at trial. The Court should reject Ticor's newly-minted coinsurance argument as simply another attempt by Ticor to evade its obligations under the Policy.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Mattson Ridge respectfully requests that the Court affirm the District Court's grant of summary judgment that Ticor breached the Policy. Mattson Ridge further requests that the Court affirm the Court of Appeals' conclusion that Mattson Ridge is entitled to \$1,911,167 in damages and remand to the District Court for entry of judgment for \$1,911,167, plus pre-judgment interest. If this Court reverses the Court of Appeals and concludes that Section 7(a) applies, Mattson Ridge requests that the Court affirm the District Court's award of \$1,297,169, plus pre-judgment interest.

Dated: October 24, 2011



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CERTIFICATION OF BRIEF LENGTH

I hereby certify that that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01. The length of this brief is 13,877 words, exclusive of the table of contents and table of authorities. This brief was prepared using Microsoft Word 2003.

Dated: October 24, 2011



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