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State of Minnesota
In Supreme Court

Mattson Ridge, LLC,

Respondent,

v.

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

Appellants.

BRIEF AND APPENDIX OF MINNESOTA LAND TITLE ASSOCIATION AND AMERICAN LAND TITLE ASSOCIATION AS AMICI CURIAE

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STATEMENT OF INTEREST

The Minnesota Land Title Association ("MLTA") and the American Land Title Association ("ALTA") submit this brief as amici curiae requesting that the decision of the Minnesota Court of Appeals be reversed.[1] Both MLTA's and ALTA's interest in this matter is public. MLTA and ALTA will offer insight as to the public benefits of reversing the Court of Appeals to ensure that loss under title insurance policies is measured correctly, consistently, and in accordance with longstanding principles of title insurance law. Insight will also be offered as to the public benefits of reversing the Court of Appeals to ensure that legal descriptions are interpreted in a manner that does not result in unwarranted claims of ambiguity or unmarketability.

The MLTA was established in 1908 as a professional organization interested in securing the integrity of land titles throughout Minnesota. Now with over 130 members statewide, MLTA is Minnesota's largest land title association. MLTA's members provide abstracts of title, real estate closing services, title insurance and related assistance to the real estate and lending industries on behalf of the public. Since 1907, ALTA has been the national voice for the abstract and title insurance industry. ALTA's membership consists of nearly 4,000 title agents, abstracters, and title insurance companies – businesses that search, review, and insure land titles to protect home buyers, real estate

[1] In accordance with Minn. R. Civ. App. P. 129.03, MLTA and ALTA hereby certify that that no part of this brief was authored by counsel of any party to this case. MLTA and ALTA further disclose that their expenses and attorneys' fees for the preparation and submission of this brief are being fully paid by Ticor Title Insurance Company ("Ticor"). Ticor was given opportunity to review and comment on this brief prior to its filing, but no part of this brief was drafted by Ticor or its counsel.

investors, and mortgage lenders who invest in real estate. ALTA and MLTA alike have a public interest in ensuring that the laws governing real estate, land titles, and title insurance operate fairly for all and promote sound public policy.

DISCUSSION

I. CONSEQUENTIAL DAMAGES SHOULD NOT BE ALLOWED AS PART OF A CLAIM UNDER AN OWNER'S POLICY OF TITLE INSURANCE.

A. The Court of Appeals erred in allowing damages in excess of policy limits.

The plain language of the title insurance policy at issue limits the insurer's liability to the policy limits and the trial court did not allow recovery in excess of policy limits. The Court of Appeals, however, overturned the trial court and awarded an amount for a purported loss that exceeded policy limits based on reasoning that is without basis.

The title policy language regarding policy limits is unambiguous. The first page of the policy states that it insures "against loss or damage, not exceeding the amount of insurance stated in Schedule A." The "Amount of Insurance" is stated on Schedule A as $1,286,000.00. Further, under paragraph six of the Conditions and Stipulations, Ticor reserved the absolute right to elect, under any circumstances, to pay policy limits and have no further liability. In addition, paragraph seven of the Conditions and Stipulations, which concerns determination of the extent of liability and coinsurance under the policy, emphasizes the policy limits as the extent of the insurer's liability.

In contravention of this clear language, the Court of Appeals reversed the trial court and awarded consequential damages for lost profit which exceeded policy limits. This was done under the dubious axiom that "an insurer who has materially breached its contract to defend and indemnify cannot require its insured to comply with other contract terms." *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 2011 WL 2175832, at *5 (Minn. Ct. App., June 6, 2011). The sole authority cited for this supposed axiom is Professor Joyce Palomar's treatise, *Title Insurance Law*. *Id.* Palomar cites no authority for this statement but draws the conclusion that where an insurer breaches the contract, "the insured's claim may not be limited to the amount policy conditions provide." Joyce Palomar, *Title Insurance Law* § 10:18, at 10-79 (2010) ("Palomar"). The cases cited by Palomar in support of awards above policy limits and in favor of consequential damages are distinguishable or outdated. Most of the cited cases suggest far less than the proposition for which they are cited.

Palomar cites a single case in support of the proposition that a breach by a title insurer is grounds for ignoring policy limits, namely, *Dreibelbiss Title Co., Inc. v. MoreEquity, Inc.*, 861 N.E.2d 1218 (Ind.Ct.App. 2007). The breach and liability imposed in this case, however, involved an agent's failure to follow payoff instructions in its duties as a closer, not an insurer's rejection of a claim or failure to cure a title defect under the policy. *Id.* at 1220-21. Moreover, the case does not support an award above policy limits. The court only notes in a passing footnote that policy limits may not be a restriction on an award for breach of contract and also notes that the trial court award being upheld was not made pursuant to any policy provision. *Id.* at n.5. *Dreibelbiss* does little to support awards above policy limits and suggests nothing regarding a breach by an insurer of the insurance policy itself.

In contrast with the authority cited by Palomar, modern case law under similar or identical policy language rejects awards in excess of policy limits, even in the context of consequential damages such as lost profits. In a case involving a lost sale due to discovery of a title defect, the policy and its limits were affirmed as an agreement on the extent of the insurer's liability:

> The parties, as is reflected in the commitments, did not contemplate "actual loss" to broadly encompass all damages, including lost profits, causally related to a defect in title. The insurer has agreed to compensate for actual loss incurred in clearing or removing unexcepted encumbrances not to exceed the amount stated in Schedule A. The business success is not what has been insured, only the title.

Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho, 115 Idaho 56, 61-62, 764 P.2d 423, 428-29 (1988). *See also Securities Service, Inc. v. Transamerica Title Ins. Co.*, 583 P.2d 1217, 1220-21, 20 Wash.App. 664 (Wash. Ct. App. 1978) (holding that policy determines duties of insurer and that award of damages in excess of policy limits cannot stand); *Miller v. Ticor Title Ins. Co.*, 93 P.3d 88, 90-91, 194 Or.App. 17, 20-22 (Or.Ct.App. 2004) (explaining that extent of damages allowable under title insurance policy is determined by policy's plain language which has clear limits and method for determining loss). Such cases contradict the supposed axiom relied upon by the Court of Appeals.

The plain language of the policy in the present case limits Ticor's liability to the policy limits. To hold otherwise, and allow recovery in excess of policy limits, abrogates the purpose of a title insurance contract and undermines the ability of insurers to predict liability. There can be no more fundamental precept to insurance law than that the insurer's exposure under the contract is limited to the amount of insurance purchased by the insured. Upending this principle on the suspect pretext advanced by the Court of Appeals would inject uncertainty into the process by which potential losses are assessed and insured against.

B. Consequential damages are not allowable as part of a claim under an owner's policy of title insurance.

The trial court was correct in concluding that consequential damages are not provided for in the policy and are not allowable. The Court of Appeals, however, relied on Palomar's supposed axiom for the proposition that consequential damages are allowed under an owner's policy when an insurer breaches its obligation to defend or indemnify. *Mattson Ridge*, 2011 WL 2175832, at *6. Here too, the cases cited by Palomar are weak and do not support the proposition asserted.

Palomar cites *Swanson v. Safeco Title Ins. Co.*, 186 Ariz. 637, 925 P.2d 1354 (Ct. App. Div. 1 1995). *Swanson* makes only passing mention in a footnote of the damages issue for which it is cited in Palomar, stating in footnote 4:

> Swansons have cited no case law to support their theory of measuring damages by "out-of-pocket" loss; neither party cites to any case other than *Miebach* to support losses and the "loss of equity." As evidenced by the parties' arguments, these terms can be as ambiguous as the term "actual loss." Moreover, to provide a different measure of damages in every case might cause inconsistent results. Furthermore, the insured may be awarded damages that were not foreseeable to the insurer or contemplated by the parties at the time the policy was issued, such as lost profits and consequential damages.

Id. at 641,1358. Such scant discussion of consequential damages provides no basis for a purported general rule of allowing consequential damages as part of a claim under an owner's policy of title insurance.

Another case cited in Palomar is *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932, 240 U.S.App.D.C. 88 (D.C. Cir. 1984). That court determined that the insured was entitled to loss under the policy but remanded the case for a more specific determination of the amount. *Id.* at 936, 92. Regarding breach on the part of the insurer and subsequent damages, the *Eureka* court stated the following:

> Because of its holding that [the insurer's] failure to confess liability for delay damages caused by the tenant actions breached the contract of insurance and justified [the insured's] decision to proceed on its own toward a resolution of the tenant actions, the district court ruled correctly that [the insurer] was "liable for the costs, if proven, of services performed by independent counsel in connection with [the insured's] efforts to resolve the tenants' challenge to title." However, the district court found that [the insured's] evidence was insufficient to support an award of $67,656.38 in unreimbursed attorney's fees and rejected the entire claim. We find that this ruling was clearly erroneous and remand to the district court for further proceedings to assess the amount of attorney's fees to which [the insured] is entitled.

Id. at 940-41, 96-97 (footnotes omitted). This brief comment is the sole mention of consequential damages and breach by the the insurer. The *Eureka* case is specific to its facts and cannot be said to stand for a supposed general rule that a breach entitles an insured to consequential damages or an award above policy limits.

Contrary to what Palomar suggests and what the Court of Appeals held, courts that have specifically addressed the issue of consequential damages have held that consequential damages are not allowed under an owner's policy of title insurance. The trial court noted with apparent approval *First American Bank v. First American Transportation Title Ins. Co.,* 585 F.3d 833 (5th Cir. 2009). In *First American*, the court affirmed that an owner's policy does not allow for recovery of consequential damages. *Id.* at 838-39.

The First American Court's reasoning is persuasive. The court determined that recovery under the policy is limited by the policy language. *Id.* The court held that since the policy defined what is insured against, and did not mention or contemplate consequential damages, consequential damages were not allowed under the policy. *Id.* Other courts have likewise rejected awards of "consequential" damages such as "loss of use", "lost profits" or "lost sale", and instead support recovery only for "real loss" of value based upon fact, not speculation. *See Miller v. Ticor Title Ins. Co.*, 194 Or.App. 17, 93 P.3d 88, 90-91 (Or. Ct. App. 2004); *Chicago Title Ins. Co. v. Huntington Nat'l Bank*, 87 Ohio St.3d 270, 719 N.E.2d 955, 960 (Ohio 1999); *Sullivan v. Transamerica Title Ins. Co.*, 35 Colo.App. 312, 532 P.2d 356, 358 (Colo. Ct. App. 1975).

The Court of Appeals decision allowing consequential damages is based on Palomar's unsupported axiom and is inconsistent with cases nationwide that reject awards of consequential damages. Title insurance policies must be interpreted according to their plain contract language to ensure predictability. There is no support for any general proposition that consequential damages may be recovered by an insured under an owner's policy of title insurance.

C. The Court of Appeals erred in allowing consequential damages for lost profits.

The Court of Appeals makes use of Palomar's axiom and *Olson v. Rugloski* in justifying an erroneous award of damages for lost profits. *Mattson Ridge*, 2011 WL 2175832, at *6. The cases cited by Palomar for lost profits as a form of consequential damages are weak and offer faint authority for the proposition they are cited for. For instance, in *La Minnesota Riviera, LLC v. Lawyers Title Ins. Corp.,* an insured lost a potential sale of insured property because of a restriction. 2007 WL 3024242 (M.D. Fla. 2007) (unpublished). (ACA 16.) Without explanation or elaboration, the court notes in a single sentence: "Lost profits may also be recoverable", citing *Safeco Title Ins. Co. v. Reynolds*, 452 So.2d 45, 48 (Fla. App. 1984). Yet Palomar relies on this as the basis for the general proposition that lost profits are recoverable as consequential damages.

Palomar also cites without discussion two other cases for the proposition that consequential damages such as lost profits are recoverable for a title insurer's breach: *Nebo, Inc. v. Transamerica Title Ins. Co.*, 21 Cal.App.3d 222, 227, 98 Cal.Rptr. 237 (4th Dist. 1971) and *Hartman v. Shambaugh*, 96 N.M. 359, 361, 60 P.2d 758, 760 (1981). In *Nebo,* the court held that the policy does not prohibit an award of actual damages resulting from a defect and accrued while the insurer litigates to remove the defect. *Nebo*, 21 Cal.App.3d at 228, 98 Cal.Rptr. at 241. However, *Nebo* was interpreting an old policy form which did not specifically exclude such damages. Current policies, including the policy at issue herein, prohibit the accrual of damages while the insurer exercises its option to cure title.

In *Hartman*, title to a portion of property purchased by the insured was defective. *Hartman*, 96 N.M. at 359, 361, 60 P.2d at 760. The court determined that the loss should be the difference in value of the property with and without the defect at the time of discovery and remanded the case to the trial court for a determination of the property values used in that measurement. *Id.* at 362, 761. At no point did the court discuss breach by the insurer, consequential damages, or awarding damages in excess of policy limits.

Palomar further relies on *Safeco Title Ins. Co. v. Reynolds* in which an easement and reciprocal parking agreement were discovered and the insured sought damages in breach of contract and negligence for both the diminution in value of the property caused by the defect and lost income and investment value. 52 So.2d 45, 47 (Fla. App. 1984). The court stated that damages are measured by either the difference between the value of the property with and without the defect or the cost to remove the defect. *Id.* at 47-48. The court awarded the insureds damages under the former test and noted that while consequential damages for lost profits may be available where there is a breach of an insurance contract, the insureds had not sufficiently pled such special damages. *Id.* at 48-49. Thus, *Safeco*, a case in which consequential damages were not even pled much less awarded, cannot be cited as authority for the "axiom" advocated by Palomar.

Similarly, in *Buquo v. Title Guar. & Trust Co.*, an insured owner received a policy and constructed a building which was later discovered to encroach upon a neighbor's property. 20 Tenn. App. 479, 100 S.W.2d 997 (1936). While *Buquo* did award the value of the land to which title failed and the cost to correct the encroachment, it denied recovery for consequential damages resulting from the insured's lack of ability to complete the project and also noted that damages for deprivation of planned use apply only where known and contemplated by the contracting parties at the time of the contract. *Id.* at 1000. More importantly, *Buquo* is a long outdated case that deals with a policy with loss limiting provisions vastly different than those in the ALTA 1990 form at issue in the present case.

More well-reasoned modern case law rejects consequential damages following the discovery of a title defect. A good example is *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho*, 115 Idaho 56, 764 P.2d 423 (1988), which involved title policy language equivalent to the policy involved in the present case. The *Brown's Tie* Court affirmed the trial court's decision to exclude evidence regarding business losses noting general contract law principles that "consequential damages are not recoverable unless they were specifically contemplated by the parties at the time of contracting" and that "[l]ost profits are generally not recoverable in contract unless there is something in that contract that suggests that they were within the contemplation of the parties and are proved with reasonable certainty." *Id.* at 428, 61. The court found that the parties agreed on the extent of the insurer's liability in the title policy commitment which stated that liability was not to exceed the amount of the policy. *Id.*

Another case rejecting lost profits as an element of damages is *Pulte Home Corp. v. Industrial Valley Title Insurance Co.*, 25 Cumb. L.J. 157, 73 Pa. D. & C.2d 320, 321, 1975 WL 16878 (Pa.Com.Pl.). A restriction barring subdivision of the property was discovered forcing the insured to rework its subdivision plans to include three less lots.

Id. In analyzing the measure of loss, the *Pulte Home* Court explained that "[w]here one is injured by purchasing a defective title to real estate, the measure of damages is the value of the title without the defect less the value of the title with the defect." *Id.* at 323. The *Pulte Home* Court followed this approach to damages and refused to award the plaintiff damages according to his specific plans for the property noting that allowing damages for profits lost on the anticipated sale of dwellings which have not been constructed would be too remote and speculative to be recovered. *Id.* at 324.

The better reasoned line of cases interpreting language consistent with the policy at issue holds that lost profits are not recoverable as a part of a claim under an owner's policy of title insurance.

D. *Olson v. Rugloski* is not authority for awarding consequential damages under an owner's title insurance policy.

The Court of Appeals and Mattson Ridge rely heavily on *Olson v. Rugloski*, 277 N.W.2d 385 (Minn. 1979) to justify an award above policy limits and cite *Olson* as consistent with Palomar's statement that "[i]t 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." *Mattson Ridge*, 2011 WL 2175832, at *5-6. This reliance is unfounded and misguided.

The principles and holding of *Olson* are inapplicable to title insurance. *Olson* involved casualty insurance and an automobile accident situation in which there was an undisputed loss that the insurer refused to pay. *Olson,* 277 N.W.2d at 387. *Olson* did not involve title insurance and did not apply the same or similar policy language. Title insurance is unique in many respects, notably in that it is a policy of indemnity which covers issues present at the time the policy is created, not potential future events. Furthermore, title insurance policies provide a clear method for determining damages under the policy, a method unique to land titles and the operation, purposes, and function of title insurance. *Olson* also does not apply because in the present case there was no definite loss payable to the insured that the insurer refused to pay. In fact, the claimed "loss" in the present case was not quantified until trial and even now the amount is hotly disputed. *Olson* did not involve title insurance or an analogous fact pattern. *Olson* is distinguishable both on its facts and its theory of recovery, and the Court of Appeals erred in relying on *Olson*.

E. The Court of Appeals erred in allowing consequential damages without an independent tort.

Consequential damages cannot be recovered for a breach of contract absent an independent tort. *See R.L.B. Enterprises, Inc. v. Liberty Nat. Fire Ins. Co.*, 413 N.W.2d 551, 554 (Minn. Ct. App. 1987) (stating that "[i]t is well settled that consequential and punitive damages cannot be recovered for breach of contract unless the breach is accompanied by an independent tort"); *Saltou v. Dependable Insurance Co.,* 394 N.W.2d 629, 633 (Minn. Ct. App. 1986) (explaining that one "must show more than malicious failure to pay an insurance claim in order to recover extra-contractual damages").

The mere denial of a claim by an insurer, even if wrongful, is not a tort. *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 343–44 (Minn. Ct. App. 1997) (stating that insured's bad-faith claim arises from contract and, therefore, sounds in contract, not tort), review denied (Minn. Feb. 19, 1998); *Pillsbury Co. v. Nat'l Union Fire Ins. Co.*, 425 N.W.2d 244 (Minn. Ct. App. 1988) (refusing to recognize tort of bad-faith denial of insurance claim), review granted (Jul. 28, 1988), appeal dismissed (Mar. 13, 1989).

In awarding consequential damages in abrogation of the policy language, the Court of Appeals ignored established law limiting an insured to contract damages unless there is an independent tort by the insurer. There has been no allegation of any independent tort committed by Ticor and therefore damages must be limited to those provided by the policy.

F. The Court of Appeals failed to apply the co-insurance provision of the policy.

The title policy purchased by Mattson contained a co-insurance or under-insurance provision that limits an insured's loss pro rata when the insured purchases a policy in an amount that is less than the value of the property on the date of policy. Section 7(b)(i) of the Conditions and Stipulations provides as follows:

> where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy.

The policy amount is $1,286,000. The Thompson purchase agreement for $2,900,000 was signed one month after the policy date. No improvements had been made to the property in the intervening month.[2] If the insured premises was in fact worth $2,900,000 as the courts below have concluded, then the most that is recoverable under Mattson's policy is 44% of its actual loss, which is the pro rata share of the $1,286,000 policy amount of insurance versus the "total value" of $2,900,000. The loss found by the Court of Appeals was $1,900,000. *Mattson Ridge*, 2011 WL 2175832, at *5-6. Even if this Court affirms all other rulings by the Court of Appeals, the policy states that the loss payable is only 44% of $1,900,000, which is $836,000. Since this was a clear policy provision, the Court of Appeals erred in not applying the plain language of the policy in determining the amount of loss.

II. THE MEASURE OF LOSS UNDER AN OWNER'S TITLE INSURANCE POLICY IS CLEARLY DEFINED BY THE POLICY.

Title insurance, as opposed to other types of insurance, does not insure against future events. It is a policy of indemnity, not a policy of guaranty or warranty. *Gibraltar Savings v. Commonwealth Land Title Ins. Co.*, 905 F. 2d. 1203, 1205 (8th Cir. 1990) (applying Minnesota law); *First Federal Savings & Loan Ass'n v. Transamerica Title Ins. Co.*, 19 F.3d 528, 530 (10th Cir. 1994). That title insurance provides indemnity rather than a guaranty is a critical concept in the analysis of damage questions. As a leading commentator states:

> The distinction between indemnity and guarantee or warranty is essential in two respects. First, in the event a covered

[2] If improvements had been made, a different calculation for the co-insurance provision applies. See the policy at Section 7(b)(i) of the Conditions and Stipulations, which provides for a pro rata loss payment based on 120% of the policy amount versus the value of the property including post-policy improvements.

> defect is discovered, the policy is written to indemnify the insured for losses proximately resulting from that covered defect, and no more. Second, the policy is not intended as a representation or warranty as to anything recited in it.

Nielsen, *Title & Escrow Claims Guide*, §9.1.2 (2nd Ed. 2007).

The measure of loss under an owner's title insurance policy is set out in the policy terms, which state that loss is measured by the diminution in value of the property attributable to the title defect. The cost to cure the title defect is the measure of loss where applicable, and loss does not include the reduction of the insured property's market value. The Court of Appeals failed to measure damages by the cost to cure the title defect and instead erroneously awarded an amount based on changes in market conditions made under a theory of consequential damages not provided for in the policy.

A. The policy terms provide a clear method for determination of loss.

The policy provides a clear method for determining the amount of loss payable under the policy, up to policy limits. The policy provides that loss is determined by calculating "the 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." Conditions and Stipulations, ¶ 7(a)(ii). Exclusion 3(c) reinforces these principles by stating that there is no liability if the existence of the covered title defect does not decrease the value of the property. The policy is written to indemnify the insured for actual losses that result from a covered defect, but no more.

The seminal case in determining loss under owners' title insurance policies is *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113, 253 P.2d 116

(1953). The *Overholtzer* court held that, "liability should be measured by the diminution in the value of the property caused by the defect in title as of the date of the discovery of the defect, measured by the use to which the property is then being devoted." *Id.* at 125. *Overholtzer* has been quoted and applied by numerous courts. *See, e.g.*, *Hartman v. Shambaugh*, 96 N.M. 359, 630 P.2d 758 (1981); *Allison v. Ticor Title Ins. Co.*, 907 F.2d 645 (7th Cir. 1990), 979 F.2d 1187 (7th Cir. 1992); *Sullivan v. Transamerica Title Ins. Co.*, 35 Colo.App. 312, 532 P.2d 356 (1975); *see also Measure, Extent and Amount of Recovery on Policy of Title Insurance*, 60 A.L.R.2d 972. In Minnesota, the principle that a title insurer is responsible only for the diminution in the value of the insured property resulting from the title defect was recently confirmed in *Rakhshani v. Chicago Title Ins. Co.*, 2007 WL 1470460 (Minn. Ct. App. May 22, 2007) (unpublished). (ACA 20.) In *Rakhshani*, the Minnesota Court of Appeals affirmed the trial court's decision that the insured would only be entitled to damages based on the difference between the property with and without the title defect as stated in the owner's policy of title insurance. *Id.* at *1, 3-6.

B. A decline in market value is not the measure of loss under a title insurance policy.

Ticor argued below that Mattson's real damages in this case were the result of a diminution of the property's value not due to the title defect, but due to general market conditions. Ticor pointed to the fact that even after the defect was cured, the parties renegotiated the purchase agreement at a reduced price. The curt dismissal of this argument by the Court of Appeals leaves the erroneous impression that diminution in value of an insured property due merely to adverse market conditions is a legitimate factor to consider in measuring loss. The Court of Appeals decision is incorrect and should be corrected to avoid future confusion on this point.

A title insurance policy is one of indemnity, not guaranty. It does not insure the value of the property itself. *First Federal Savings & Loan Ass'n v. Transamerica Title Ins. Co.*, 19 F.3d 528, 530 (10th Cir. 1994). It is merely the title to the property which is insured by the title policy, and title insurance is not intended to insure against the general diminution of a property's value. *See McLaughlin v. Attorneys' Title Guaranty Fund Inc.*, 61 Ill. App.3d 911, 378 N.E.2d 355 (1978) (explaining that "[a] title insurance policy does not insure the value of any particular property. In fact, it does not insure the property at all. If the value of the property appreciates or depreciates, the title policy is not affected. Instead, the [insurer] is insuring the title against defects which may damage the [insured's] interest in the property"). It has been specifically held that loss is not measured by the difference in the assessed value at the time of purchase versus the date on which the title defect is discovered. *See Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 667 (Va. 1994).

The Court of Appeals' consideration of diminution in value due to market conditions in awarding damages was without basis and misunderstands the purpose and operation of an owner's policy of title insurance. The Court of Appeals decision should be reversed and this Court must clarify that diminution in market value is not a valid consideration in determining loss under a title insurance policy.

C. The proper measure of loss when a title defect is cured by the insured is the cost incurred in curing the defect.

Although the Court of Appeals acknowledged that the cost to cure the defect was only $11,169 and that a sale was pursued following cure of the defect, the Court of Appeals applied a different measure of loss than that defined under the policy. Paragraph nine of the Conditions and Stipulations makes clear that no loss is payable under the policy when the insurer succeeds in curing a title defect in a reasonably diligent manner.

The Court of Appeals erred in determining that this provision has no applicability when the insured rather than the insurer cures the defect. *Mattson Ridge*, 2011 WL 2175832, at *4-5. Ticor declined to remove the alleged defect because it did not believe a defect existed. Mattson went forward on its own to change the legal description through a court action at a cost of $11,169. Consistent with the general principle that a title insurance policy is one of indemnity for actual loss sustained by an insured because of a title defect, where a title defect is cured in a timely fashion it should not matter who corrects the title so long as the insured does not sustain damages.

The measure of damages where the insured cures the title is the cost incurred by the insured in doing so. Other courts have adopted this approach as an alternative to the *Overholtzer* method discussed above, especially where, as here, the cost to cure is small. *See, e.g.*, *Aboussie v. Chicago Title Ins. Co.*, 949 S.W.2d 207 (Mo.App.E.D. 1997). A number of other cases likewise hold that the actual loss is the cost to remove the encumbrance. *See, e.g.*, *Arizona Title Ins. & Trust Co. v. Smith*, 21 Ariz.App. 371, 519 P.2d 860 (1974); *Stewart Title Guar. Co. v. Lunt Land Corp.*, 162 Tex. 435, 347 S.W.2d

584, 4 Tx. Sup. Ct. Jour. 530 (Tex. 1961); *Holly Hotel Co. v. Title Guar. & Trust Co.*, 147 Misc. 861, 264 N.Y.S. 3 (Sup. 1932), aff'd, 239 App.Div. 773, 264 N.Y.S. 7 (1993); *Lake Havasu Community Hospital, Inc. v. Arizona Title Ins. & Trust Co.*, 141 Ariz. 363, 687 P.2d 371 (App. 1984); *Brown's Tie & Lumber Co. v. Chicago Title Ins. Co.*, 764 P.2d 423 (Idaho 1988).

The Court of Appeals, however, seized on the fact that Ticor declined to undertake a curative action and in doing so the Court of Appeals turned an actual loss of $11,169 into a claim for $1.9 million. This contravenes the plain language of the policy which provides for payment of the loss sustained by the insured by reason of the title defect. Furthermore, the Court of Appeals' reasoning creates an unjust windfall for the insured. *See Breck v. Moore*, 910 P.2d 599 (Alaska 1996) (explaining that "if the property owner can be made whole by curing the defect, and this cost is less than the diminished value, the cure approach should be used. Using a higher measure would result in unjust enrichment, for the property owner could spend part of the award curing the defect and retain the rest of the award").

Under the policy, Ticor had the right to clear title assuming the cost of $11,169 to do so. Requiring Ticor to pay a greater sum grants Mattson not only what it would have received had Ticor accepted the claim and exercised its right to cure the defect, but also an additional sum in extraordinary excess of the cost to cure. Nonetheless, the Court of Appeals stated the following regarding cost to cure:

> But Ticor reads into the policy a requirement that, unless the property's value is permanently diminished by the title defect, the insurer's liability is limited to either correcting the detect

> or reimbursing the insured for correcting the defect. The policy actually provides that it insures "against loss or damage . . . incurred by the insured by reason of . . . [a]ny defect in . . . the title [or] . . . [u]nmarketability of the title," not just against the loss incurred in removing the defect or in making the title marketable.

Mattson Ridge, 2011 WL 2175832, at *5. Ticor seeks no such strange reading of the policy, only a determination of loss which is equal to the cost to cure. The Court of Appeals misreads the policy language stating what the policy insures. Mattson cured the title defect at a cost of $11,169 and thus this cost is the exact "loss or damage ... incurred by the insured by reason of . . . [a]ny defect in . . . the title."

If any loss is payable to Mattson it is the cost to cure. The plain language of the policy and the applicable case law supports this method as a determination of loss, especially when the difference in value caused by the defect is not easily determined. Under the policy's clear terms, Ticor had the right to cure the title defect and Ticor could not have performed the cure faster or cheaper than Mattson did. Requiring Ticor to pay an amount vastly exceeding this cost is contrary to the policy language, the applicable case law, and common sense. The title defect cost $11,169 to cure and that sum is the proper measure of loss.

III. THE LEGAL DESCRIPTION IN THE POLICY IS NOT AMBIGUOUS AND IS NOT UNMARKETABLE.[3]

The Court of Appeals erred in holding that the legal description was defective because it was vague. The Court of Appeals stated:

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[3] This portion of the brief is submitted by MLTA only. ALTA takes no position on this issue.

> The phrase, "the intersection of road leading from the county road at or near Charles Magnuson's place in Sunrise City," is ambiguous because it is susceptible of various meanings. A "place" could be a workplace, a farm, or a residence; Charles Magnuson could have more than one "place" in Sunrise City; and there could be, or have been, more than one Charles Magnuson. A potential purchaser could not ascertain the meaning of the legal description boundary of this property without first ascertaining when it was drafted; who, at that time, was the relevant Charles Magnuson; and where his "place"—whatever it was—could be found.

Mattson Ridge, 2011 WL 2175832, at *3. But the Court of Appeals ignores the portion of the legal description which immediately precedes the portion quoted by the Court in its decision: "Commencing at the Northwest corner of said Section 25; thence South 30 rods to [the intersection of road . . ." In other words, the "county road at or near Charles Magnuson's place in Sunrise City" is not an unknown road, it is the road that is 30 rods south of the northwest corner of Section 25. There can only be one such road because there is only one point on earth that is 30 rods south of the northwest corner of Section 25.

No mention was made by the Court of Appeals of any evidence whatsoever of a dispute between the insured and a neighbor as to the proper location of the boundary line. As it happened there was no dispute and the trial court in reforming the legal description merely substituted the new legal description for the equivalent prior description. This was perhaps a modernization of the description but it was not a cure to a defective legal description.

The Court of Appeals is correct in stating that a legal description is ambiguous if without resort to extrinsic evidence it is susceptible to more than one meaning. *Mattson*

Ridge, 2011 WL 2175832, at *3. However, the Court of Appeals was wrong in holding that the legal description at issue was ambiguous because of a reference to an adjoining landowner. *Clark on Surveying and Boundaries* has long been the authoritative national source on the law of surveying and boundaries and confirms that reference to an adjoining landowner is an acceptable call in a legal description:

> Many times parcels of land are described with reference to adjoining landowners or adjoining estates. The call for a line of a named parcel is similar to a call for a natural monument or boundary [footnote citing *Ullman v. Chicago & N.W. Ry.*, 112 Wis. 150, 88 N.W. 41 (1901)] When a deed makes reference to a named boundary, that boundary must be identified on the ground before the deed land can be located with certainty. Such a deed is not void for uncertainty of description.

Walter G. Robillard and Lane J. Bowman, *Clark on Surveying and Boundaries*, §18.07, p. 606 (7th ed. 1997).

Further, the Court of Appeals fails to consider the policy language defines "unmarketability of title" as:

> an alleged or apparent matter <u>affecting the title to the land</u>, not excluded from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

(Conditions and Stipulations; 1(g), emphasis added.) In this regard it bears repeating that there was never an attack on the title to the property insured in the Mattson Ridge policy. No third party ever claimed an interest in the insured property. No neighbor claimed that there was an encroachment, gap or overlap that needed to be dealt with.

This fact proved pivotal in the recent case *Dollinger v. Chicago Title Ins. Co.*, 2011 WL 4005915 (Cal. App. 6 Dist. Sept. 9, 2011) (unpublished). (ACA 1.) Construing an owner's policy with marketability coverage identical to that in the present policy, *Dollinger* upheld a trial court's summary determination that there was no marketability coverage because the claim in question did not affect the *title* to the land. *Id.* at 13 (explaining that "[t]he allegation that a notice of merger was recorded does not constitute an alleged or apparent matter affecting the title to the land, since a notice of merger does not represent a third person's claim to an interest in the property [citation omitted] or otherwise cast doubt on who owns the property [citation omitted]"). As in *Dollinger,* no one has ever questioned Mattson's ownership of its property, and the mere fact that a potential buyer would not close until a new legal description had been adopted is not an outside attack on the title that gives rise to a claim of unmarketability of title.

The Court of Appeals' determination that the legal description was ambiguous and the title unmarketable was without basis. Further, the reasoning adopted by the Court of Appeals would needlessly undermine untold numbers of existing legal descriptions even though they sufficiently describe a property that can be accurately located on the ground.

CONCLUSION

Title insurance policies, like all contracts, are to be construed according to their plain language. In awarding consequential damages that exceeded the policy limits rather than follow the method of determining loss provided in the policy, the Court of Appeals veered from the express terms of the policy and well-established case law nationwide concerning the proper measure of loss under owners' policies of title insurance. In doing so, the predictability needed by title insurers to assess and insure against potential losses and to provide property owners with cost effective policies of title insurance was compromised.

The holding that the legal description was ambiguous is contrary to long standing surveying practices and threatens to make the legal descriptions of thousands of properties statewide "ambiguous" for no legitimate reason. This will cause unwarranted claims of unmarketability along with untold confusion and wastes of resources for property owners, lenders, governments, and title insurers to alter otherwise acceptable legal descriptions.

The decision of the Court of Appeals must be reversed.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for a brief produced with a proportional 13 point Times New Roman font. The length of the brief is 6,987 words. This brief was prepared using Microsoft Word 2007 software.

Respectfully submitted,

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