

# Update on Recent Trends in Title and Policy Coverage Claims

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## Welcome!



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# What's New and What's Still the Same in Title and Policy Coverage Claims

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## GENERAL BACKGROUND AND POLICY FRAMEWORK

- Both the ALTA owner's and loan policies limit an insurer's indemnity obligations to specified types of losses. These specified losses are defined in the policies as "Covered Risks."
- The policies also specifically exclude certain matters that they do not cover. These are defined in the Policy as "Exclusions."

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## GENERAL BACKGROUND AND POLICY FRAMEWORK contd.

- Schedule A of the policies define the insured to whom coverage is owed, and identify the estate or interest in land which is insured.
- Schedule B of the policies provide specific exceptions from coverage.
- The policies contain standard conditions to coverage, defined as “Conditions.”

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## EXCLUSIONS FROM COVERAGE

The following are excluded from coverage under the standard policy language, and the insurer disclaims the obligation to pay loss or damage, costs, attorneys’ fees, or expenses that arise by reason of:

1. a. any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) that restricts, regulates, prohibits, or relates to:
  - i. the occupancy, use, or enjoyment of the Land;
  - ii. the character, dimensions, or location of any improvement on the Land;
  - iii. the subdivision of land; or
  - iv. environmental remediation or protection.
- b. any governmental forfeiture, police, regulatory, or national security power.
- c. the effect of a violation or enforcement of any matter excluded under Exclusion 1.a. or 1.b.

**Exclusion 1 does not modify or limit the coverage provided under Covered Risk 5 or 6.**

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## EXCLUSIONS FROM COVERAGE

2. Any power of eminent domain. Exclusion 2 does not modify or limit the coverage provided under Covered Risk 7.
3. Any defect, lien, encumbrance, adverse claim, or other matter:
  - a. created, suffered, assumed, or agreed to by the Insured Claimant;
  - b. not Known to the Insurer, not recorded in the Public Records at the Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Insurer by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
  - c. resulting in no loss or damage to the Insured Claimant. *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Company*, 58 F. Supp. 2d 503, 534 (D. NJ 1999); *Blackhawk Prod. Credit Assoc. v. Chicago Title Ins. Co.*, 423 N.W.2d 521, 525-26 (1988) (citing D. Barlow Burke, Law of Title Insurance, § 2.2 at 32-33 (1987)). *See also* 1 Title Ins. Law § 10:13, Paying the Insured's Loss - Under Lender's policies, at p. 4 (Title insurance covers only losses resulting from defects in the mortgagee's security or collateral for the loan).

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## EXCLUSIONS FROM COVERAGE

3. Any defect, lien, encumbrance, adverse claim, or other matter (continued):
  - d. attaching or created subsequent to the Date of Policy (Exclusion 3.d. does not modify or limit the coverage provided under Covered Risk 11, 13, or 14); or
  - e. resulting in loss or damage that would not have been sustained if consideration sufficient to qualify the Insured named in Schedule A as a bona fide purchaser or encumbrancer had been given for the Insured Mortgage at the Date of Policy. This exclusion overlaps with Exclusion 6.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business law.

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## EXCLUSIONS FROM COVERAGE

5. Invalidity or unenforceability of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury law or Consumer Protection Law.
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights law, that the transaction creating the lien of the Insured Mortgage is a:
  - a. fraudulent conveyance or fraudulent transfer;
  - b. voidable transfer under the Uniform Voidable Transactions Act; or
  - c. preferential transfer:
    - i. to the extent the Insured Mortgage is not a transfer made as a contemporaneous exchange for new value; or
    - ii. for any other reason not stated in Covered Risk 13.b.

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## EXCLUSIONS FROM COVERAGE

7. Any claim of a PACA-PSA Trust. Exclusion 7 does not modify or limit the coverage provided under Covered Risk 8.
8. Any lien on the Title for real estate taxes or assessments imposed by a governmental authority and created or attaching between the Date of Policy and the date of recording of the Insured Mortgage in the Public Records. Exclusion 8 does not modify or limit the coverage provided under Covered Risk 2.b. or 11.b.
9. Any discrepancy in the quantity of the area, square footage, or acreage of the Land or of any improvement to the Land.

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## CONDITIONS OF COVERAGE

### 1. DEFINITION OF TERMS

- Includes who is an “Insured Claimant,” and the “Insured Mortgage” for a loan policy. This limits claims from those who are not insureds. *Hooper v. Commonwealth Land Title Ins. Co.*, 285 Pa. Super. 265, 269, 427 A.2d 215, 217 (1981) (“The duty of the insurer runs only to its insured and not to third parties who are not a party to the contract”).
- Defines “Knowledge” or “Known” to be actual knowledge or actual notice, and not constructive notice imparted by the Public Records.

### 2. CONTINUATION OF COVERAGE

- Defines the duration of coverage.

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## CONDITIONS OF COVERAGE

### 3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured must notify the insurer promptly in writing once the insured has knowledge of:

- any litigation or other matter for which the insurer may be liable under the policy;
- any rejection of the Title as unmarketable; or
- any rejection of the Insured Mortgage as Unmarketable Title for a Loan Policy.

Based on the policy language the insurer can only deny coverage based on untimely notice if it is prejudiced by the failure of the Insured Claimant to provide prompt notice. In that event the insurer’s liability is reduced only to the extent of the prejudice.

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## CONDITIONS OF COVERAGE

### 4. PROOF OF LOSS

The insurer may require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, adverse claim, or other matter insured against by this policy that constitutes the basis of loss or damage and must state, to the extent possible, the basis of calculating the amount of the loss or damage.

### 5. DEFENSE AND PROSECUTION OF ACTIONS

- a. Upon written request by the Insured and subject to the options contained in Condition 7, the insurer must provide for the defense of an Insured in litigation in which any third party asserts a covered claim adverse to the Insured. The Insurer has the right to select counsel.
- b. The insurer has the right, in addition to the options contained in Condition 7, at its own cost, to institute and prosecute any action or proceeding to establish Title in the insured or the lien of the Insured Mortgage, or to prevent or mitigate loss to the Insured, whether or not the insurer is liable to the Insured.
- c. When the insurer brings an action or asserts a defense as required or permitted by this policy, the insurer may pursue the litigation to a final conclusion, including any appeal.

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## CONDITIONS OF COVERAGE

### 6. DUTY OF INSURED CLAIMANT TO COOPERATE

- a. When the policy permits or requires the insurer to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured will grant the insurer the right to prosecute or provide a defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose.

When requested by the Insurer, the Insured, at the Insurer's expense, must give the Insurer all reasonable aid in:

- i. securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement; and
- ii. any other lawful act that in the opinion of the Insurer may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter, as insured.

If the Insurer is prejudiced by any failure of the Insured to furnish the required cooperation, the insurer's liability and obligations to the Insured under the policy terminate, including any obligation to defend, prosecute, or continue any litigation, regarding the matter requiring such cooperation.

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## CONDITIONS OF COVERAGE

### 6. DUTY OF INSURED CLAIMANT TO COOPERATE

b. The insurer may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the insurer and to produce for examination, inspection, and copying all records that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the insurer, the Insured Claimant must grant its permission, in writing, for any authorized representative of the Insurer to examine, inspect, and copy all relevant records in the custody or control of a third party. Any failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in Condition 6.b., unless prohibited by law, terminates any liability of the insurer under the policy as to that claim.

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## CONDITIONS OF COVERAGE

### 7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the insurer has the following additional options:

- a. To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness
  - i. To pay or tender payment of the Amount of Insurance under this policy. In addition, the insurer will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the insurer up to the time of payment or tender of payment and that the Insurer is obligated to pay; or
  - ii. To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase. In addition, the insurer will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Insurer up to the time of purchase and that the Insurer is obligated to pay.

If the Insurer purchases the Indebtedness, the Insured must transfer, assign, and convey to the Insurer the Indebtedness and the Insured Mortgage, together with any collateral security. Upon the exercise by the Insurer of either option provided for in Condition 7.a., the Insurer's liability and obligations to the Insured under this policy terminate, including any obligation to defend, prosecute, or continue any litigation.

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## CONDITIONS OF COVERAGE

### 7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

#### b. To Pay or Otherwise Settle with Parties other than the Insured or with the Insured Claimant.

- i. To pay or otherwise settle with parties other than the Insured for or in the name of the Insured Claimant. In addition, the Insurer will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Insurer up to the time of payment and that the Insurer is obligated to pay; or
- ii. To pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy. In addition, the Insurer will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Insurer up to the time of payment and that the Insurer is obligated to pay.

Upon the exercise by the Insurer of either option provided for in Condition 7.b., the Insurer's liability and obligations to the Insured under this policy for the claimed loss or damage terminate, including any obligation to defend, prosecute, or continue any litigation.

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## CONDITIONS OF COVERAGE

### 8. CONTRACT OF INDEMNITY; DETERMINATION AND EXTENT OF LIABILITY

The policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by an Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

- a. The extent of liability of the insurer for loss or damage under the policy does not exceed the least of:
  - i. the Amount of Insurance;
  - ii. the Indebtedness;
  - iii. the difference between the fair market value of the Title, as insured, and the fair market value of the Title subject to the matter insured against by this policy; or
  - iv. if a Government Mortgage Agency or Instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage or in satisfaction of its insurance contract or guaranty relating to the Title or the Insured Mortgage.

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## CONDITIONS OF COVERAGE

### 8. CONTRACT OF INDEMNITY; DETERMINATION AND EXTENT OF LIABILITY

- b. Fair market value of the Title in Condition 8.a.iii. is calculated using either:
- i. the date the Insured acquires the Title as a result of a foreclosure or deed in lieu of foreclosure of the Insured Mortgage; or
  - ii. the date the lien of the Insured Mortgage or any assignment set forth in Item 4 of Schedule A is extinguished or rendered unenforceable by reason of a matter insured against by this policy.
- c. If the Insurer pursues its rights under Condition 5.b. and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured:
- i. the Amount of Insurance will be increased by 15%; and
  - ii. the Insured Claimant may, by written notice given to the Insurer, elect, as an alternative to the dates set forth in Condition 8.b., to use either the date the settlement, action, proceeding, or other act described in Condition 5.b. is concluded or the date the notice of claim required by Condition 3 is received by the Insurer as the date for calculating the fair market value of the Title in Condition 8.a.iii.
- d. In addition to the extent of liability for loss or damage under Conditions 8.a. and 8.c., the Insurer will also pay the costs, attorneys' fees, and expenses incurred in accordance with Conditions 5 and 7.

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## CONDITIONS OF COVERAGE

### 9. LIMITATION OF LIABILITY

- a. The Insurer fully performs its obligations and is not liable for any loss or damage caused to the Insured if the Insurer accomplishes any of the following in a reasonable manner:
- i. removes the alleged defect, lien, encumbrance, adverse claim, or other matter;
  - ii. cures the lack of a right of access to and from the Land;
  - iii. cures the claim of Unmarketable Title; or
  - iv. establishes the lien of the Insured Mortgage, all as insured. The Insurer may do so by any method, including litigation and the completion of any appeals.
- b. The Insurer is not liable for loss or damage arising out of any litigation, including litigation by the Insurer or with the Insurer's consent, until a State or federal court having jurisdiction makes a final, non appealable determination adverse to the Title or to the lien of the Insured Mortgage.
- c. The Insurer is not liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Insurer.
- d. An Insured Claimant must own the Indebtedness or have acquired the Title at the time that a claim under this policy is paid.
- e. The Insurer is not liable for the content of the Transaction Identification Data, if any.

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## CONDITIONS OF COVERAGE

### 10. REDUCTION OR TERMINATION OF INSURANCE

- a. All payments under this policy, except payments made for costs, attorneys' fees, and expenses, reduce the Amount of Insurance by the amount of the payment. However, any payment made by the Insurer prior to the acquisition of the Title as provided in Condition 2 does not reduce the Amount of Insurance afforded under this policy, except to the extent that the payment reduces the Indebtedness.
- b. When the Title is acquired by the Insured as a result of foreclosure or deed in lieu of foreclosure, the amount credited against the Indebtedness does not reduce the Amount of Insurance.
- c. The voluntary satisfaction or release of the Insured Mortgage terminates all liability of the Insurer, except as provided in Condition 2.

### 11. PAYMENT OF LOSS

When liability and the extent of loss or damage are determined in accordance with the Conditions, the Insurer will pay the loss or damage within 30 days.

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## CONDITIONS OF COVERAGE

### 12. COMPANY'S RECOVERY AND SUBROGATION RIGHTS UPON SETTLEMENT AND PAYMENT

#### a. Insurer's Right to Recover

- i. If the Insurer settles and pays a claim under this policy, it is subrogated and entitled to the rights and remedies of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person, entity, or property to the fullest extent permitted by law, but limited to the amount of any loss, costs, attorneys' fees, and expenses paid by the Insurer. If requested by the Insurer, the Insured Claimant must execute documents to transfer these rights and remedies to the Insurer. The Insured Claimant permits the Insurer to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

- ii. If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Insurer defers the exercise of its subrogation right until after the Insured Claimant fully recovers its loss.

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## CONDITIONS OF COVERAGE

### 12 b. Company's Subrogation Rights against Obligors

The Insurer's subrogation right includes the Insured's rights against Obligors including the Insured's rights to repayment under a note, indemnity, guaranty, warranty, insurance policy, or bond, despite any provision in those instruments that addresses recovery or subrogation rights. An Obligor cannot avoid the Insurer's subrogation right by acquiring the Indebtedness as a result of an indemnity, guaranty, warranty, insurance policy, or bond, or in any other manner. The Obligor is not an Insured under this policy. The Insurer may not exercise its rights under Condition 12.b. against a Government Mortgage Agency or Instrumentality.

### c. Insured's Rights and Limitations

i. The owner of the Indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the Indebtedness, if the action does not affect the enforceability or priority of the lien of the Insured Mortgage.

ii. If the Insured exercises a right provided in Condition 12.c.i. but has Knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Insurer is required to pay only that part of the loss insured against by this policy that exceeds the amount, if any, lost to the Insurer by reason of the impairment by the Insured Claimant of the Insurer's subrogation right.

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## CONDITIONS OF COVERAGE

### 13. POLICY ENTIRE CONTRACT

a. This policy together with all endorsements, if any, issued by the Insurer is the entire policy and contract between the Insured and the Insurer. In interpreting any provision of this policy, this policy will be construed as a whole. This policy and any endorsement to this policy may be evidenced by electronic means authorized by law. "The terms of the policy, so long as they are clear and unambiguous, express the contract between the parties and will be enforced by the courts unless they violate a statute or public policy." *Robinson v. Aetna Life Ins. Co.*, 288 A.2d 236, 238 (D.C. 1972).

b. Any amendment of this policy must be by a written endorsement issued by the Insurer. To the extent any term or provision of an endorsement is inconsistent with any term or provision of this policy, the term or provision of the endorsement controls. Unless the endorsement expressly states, it does not:

- i. modify any prior endorsement,
- ii. extend the Date of Policy,
- iii. insure against loss or damage exceeding the Amount of Insurance, or
- iv. increase the Amount of Insurance.

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## CONDITIONS OF COVERAGE

### 14. SEVERABILITY

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, this policy will be deemed not to include that provision or the part held to be invalid, but all other provisions will remain in full force and effect.

### 15. CHOICE OF LAW AND CHOICE OF FORUM

#### a. Choice of Law

The Insurer has underwritten the risks covered by this policy and determined the premium charged in reliance upon the State law affecting interests in real property and the State law applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the State where the Land is located.

The State law of the State where the Land is located, or to the extent it controls, federal law, will determine the validity of claims against the Title or the lien of the Insured Mortgage and the interpretation and enforcement of the terms of this policy, without regard to conflicts of law principles to determine the applicable law.

#### b. Choice of Forum

Any litigation or other proceeding brought by the Insured against the Insurer must be filed only in a State or federal court having jurisdiction.

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## CONDITIONS OF COVERAGE

### 16. NOTICES

Any notice of claim and any other notice or statement in writing required to be given to the Insurer under this policy must be given to the Insurer at:

### 17. CLASS ACTION

ALL CLAIMS AND DISPUTES ARISING OUT OF OR RELATING TO THIS POLICY, INCLUDING ANY SERVICE OR OTHER MATTER IN CONNECTION WITH ISSUING THIS POLICY, ANY BREACH OF A POLICY PROVISION, OR ANY OTHER CLAIM OR DISPUTE ARISING OUT OF OR RELATING TO THE TRANSACTION GIVING RISE TO THIS POLICY, MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS OR REPRESENTATIVE PROCEEDING.

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## CONDITIONS OF COVERAGE

### 18. ARBITRATION

a. All claims and disputes arising out of or relating to this policy, including any service or other matter in connection with issuing this policy, any breach of a policy provision, or any other claim or dispute arising out of or relating to the transaction giving rise to this policy, may be resolved by arbitration. If the Amount of Insurance is \$2,000,000 or less, any claim or dispute may be submitted to binding arbitration at the election of either the Insurer or the Insured. If the Amount of Insurance is greater than \$2,000,000, any claim or dispute may be submitted to binding arbitration only when agreed to by both the Insurer and the Insured. Arbitration must be conducted pursuant to the Title Insurance Arbitration Rules of the American Land Title Association (“ALTA Rules”). The ALTA Rules are available online at [www.alta.org/arbitration](http://www.alta.org/arbitration). The ALTA Rules incorporate, as appropriate to a particular dispute, the Consumer Arbitration Rules and Commercial Arbitration Rules of the American Arbitration Association (“AAA Rules”). The AAA Rules are available online at [www.adr.org](http://www.adr.org).

b. ALL CLAIMS AND DISPUTES MUST BE BROUGHT IN AN INDIVIDUAL CAPACITY. NO PARTY MAY SERVE AS PLAINTIFF, CLASS MEMBER, OR PARTICIPANT IN ANY CLASS OR REPRESENTATIVE PROCEEDING IN ANY ARBITRATION GOVERNED BY CONDITION 18. The arbitrator does not have authority to conduct any class action arbitration or arbitration involving joint or consolidated claims under any circumstance.

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## CONDITIONS OF COVERAGE

- c. If there is a final judicial determination that a request for particular relief cannot be arbitrated in accordance with this Condition 18, then only that request for particular relief may be brought in court. All other requests for relief remain subject to this Condition 18.
- d. [The Insurer will pay all AAA filing, administration, and arbitrator fees of the consumer when the arbitration seeks relief of \$100,000 or less. Other fees][Fees] will be allocated in accordance with the applicable AAA Rules. The results of arbitration will be binding upon the parties. The arbitrator may consider, but is not bound by, rulings in prior arbitrations involving different parties. The arbitrator is bound by rulings in prior arbitrations involving the same parties to the extent required by law. The arbitrator must issue a written decision sufficient to explain the findings and conclusions on which the award is based. Judgment upon the award rendered by the arbitrator may be entered in any State or federal court having jurisdiction.]

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## REPRESENTATIVE CASE

At issue were:

- Section 9 of the policy, which requires the insured to seek consent from the carrier before settling any claim or suit.
- Exclusion 3(c), which states that no coverage is owed for “Defects, liens, encumbrances, adverse claims, or other matters...resulting in no loss or damage to the Insured Claimant.”
- Exclusion 6, excluding coverage for “[a]ny claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors’ rights laws, that the transaction creating the lien of the Insured Mortgage is (a) a fraudulent conveyance or fraudulent transfer, or (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.”
- We withdrew a defense raised under exclusion 3(b) because of disputed facts.

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## Recent(ish) Cases

**Jericho State Cap. Corp. of Fla. v. Chicago Title Ins. Co., 431 S.C. 437 (Ct. App. 2020)**

- County ordinance designating and reserving certain land for roads and reserving future locations of highways created **reasonable probability of litigation concerning title** to insured owner’s property and rendered title to property **unmarketable**
- Ordinance made future condemnation reasonably probable
  - Insured did not seek recovery of loss for condemnation action but for loss ordinance caused to value of title.
- Ordinance constituted **encumbrance** within meaning of title insurance policy coverage
- Insurer did not act unreasonably in denying insured property owner's title insurance claims; unusual nature of ordinance presented close policy interpretation issues for which insurer had reasonable basis for denying claims.

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## Recent(ish) Cases

Columb v. Cox, 404 Wis.2d 50 (2022)

- That insured landowners did not receive title insurance policy until three years after commitment was issued and three months after neighbors' action did not preclude title insurer from asserting that policy did not cover nearby landowners' claim
- Commitment contained exceptions that insurer relied on to except coverage.

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## Recent(ish) Cases

Salas as Tr. of Salas Child. Tr. v. Commonwealth Land Title Ins. Co., No. 3:21-CV-890-MCR-HTC, 2022 WL 1630988, at \*1 (N.D. Fla. Apr. 5, 2022), report and recommendation adopted sub nom. Salas v. Commonwealth Land Title Ins. Co., No. 3:21CV890-MCR-HTC, 2022 WL 2104498 (N.D. Fla. June 9, 2022)

- General rule that title insurer's failure to identify an encumbrance or defect on title as an exception to coverage precludes the insurer from denying coverage for that encumbrance or defect is not without exception
- purpose of title insurance is to protect a purchaser of real estate against title surprises
- Neither Purchase Agreement, nor obligations therein requiring Trust to build on lot within 2 years of closing, were a surprise.

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## TIDELANDS CLAIMS

- Tidelands, also known as riparian lands, are all lands that are now or were formerly flowed by the mean high tide of a natural waterbody (such as the ocean, bays, and tidal sections of rivers and creeks, and also includes marshlands inundated by the tide).



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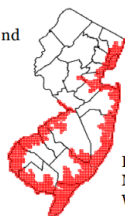
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## TIDELANDS (NJ)

### Claim is a Cloud on Title

#### TIDELANDS MAP COVERAGE

Tidelands Are Found  
in 17 Counties



Except Hunterdon,  
Morris, Sussex and  
Warren

- The State of New Jersey holds fee simple title to all lands now or formerly flowed by tidal waters.
- There are maps that delineate the lands in which the State of New Jersey claims an interest.
- *O’Neill v. State Highway Department*, 50 N.J. 307, 323 (1967) (effort to map all State-claimed tide-flowed lands).

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## Schedule B Part I Exceptions from Coverage

- 5. Terms and conditions, other than the requirement that the grantee must be the owner of the upland abutting the lands granted, as contained in Riparian Grants from the State of New Jersey recorded in Essex County in the following Deed Books: Deed Book N-80, Page 570; Deed Book X-24, Page 352; Deed Book P-32, Page 193; Deed Book 3205, Page 190 and Deed Book 4393, Page 246 and those filed in the New Jersey Bureau of Tidelands Management in Liber M-1, Page 44; Liber D-1, Page 259; Liber D-1, Page 251; Liber M, Page 608; Liber C-2, Page 22; Liber Z-2, Page 79; Liber D-6, Page 1; Liber L, Page 242; Liber W-1, Page 49; Liber T-1, Page 751; Liber U, Page 643 and Revocable License No. 0714-06-0006.4.
- 14. TERMS AND CONDITIONS as set forth in RIPARIAN GRANT between STATE OF NEW JERSEY and J. H. LADEW COMPANY, dated April 3, 1908 and recorded April 11, 1908 in Deed Book E-43, page 590 and Deed Book E-43, page 594 as filed in the Bureau of Tidelands Management in Liber R, page 731 and Liber R, page 736.
- 28. Terms and conditions, other than the requirement that the grantee must be the owner of the upland abutting the lands granted, as contained in Riparian Grants/Licenses from the State of New Jersey recorded in Essex County in the following Deed Books: Deed Book N-53, page 102; Deed Book Q78, page 598; Deed Book P-79, page 563; Deed Book Z-82, page 459; Deed Book 5206, page 656 and filed in the Tidelands Management Bureau in Liber O-8, page 119; File 0714-06-0006.4; Liber T-1, page 277; Liber T, page 739; Liber Q-1, page 71; Liber Q-1, page 223; File 91-0351-T and File 84-0585.

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## MORTGAGE FRAUD CLAIMS

Zachary W. Berk, Esquire  
Indira K. Sharma, Esquire

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## RECENT MORTGAGE FRAUD TRENDS

- Mortgage fraud is on the rise even with a slower real estate market.
- From 2021 to 2022, mortgage fraud increased in all areas of fraud except for undisclosed real estate debt fraud.

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## FRAUD TYPES:

### *Income Fraud*

- Misrepresentation by the loan applicant of the continuance, source, or amount of income needed to qualify for a loan.
- Increased by 27.3% from 2021 to 2022.

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## **FRAUD TYPES:**

### ***Property Fraud***

- When information about the property or its value is intentionally misrepresented.
- Increased by 22.6% from 2021 to 2022.

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## **FRAUD TYPES:**

### ***Identity Fraud***

- When the loan applicant's identity and/or credit history is altered, a synthetic identity is created, or a stolen identity is used to obtain a mortgage.
- Increased by 4.7% from 2021 to 2022.

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**FRAUD TYPES:*****Transaction Fraud***

- When the nature of the transaction is misrepresented, such as undisclosed agreements between the parties and falsified down payments. The risk includes third-party risk, non-arms-length transactions and straw buyers.
- Increased by 1.6% from 2021 to 2022

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**FRAUD TYPES:*****Occupancy Fraud***

- When the loan applicant misrepresents the intended use of the property (i.e., primary residence, secondary residence, investment, etc.). This impacts programs, pricing and underwriting guidelines.
- Increased by 0.8% from 2021 to 2022

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## FRAUD TYPES:

### *Undisclosed Real Estate Debt Fraud*

- When the loan applicant intentionally fails to disclose additional real estate debt or past foreclosures.
- Decreased by 12% from 2021 to 2022

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### States with the Highest Application Fraud Risk in 2022

1. **New York** (18.42% increase year over year)
2. **Florida** (-7.76% decrease)
3. **Rhode Island** (60.5% increase)
4. **Nevada** (-27.07% decrease)
5. **Connecticut** (15.92% increase)
6. **New Jersey** (3.9% increase)
7. **California** (-4.91% decrease)
8. **Texas** (3.62% increase)
9. **Maine** (-3.76% decrease)
10. **DC** (-9.91% decrease)

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### States with the Highest Application Fraud Risk in 2022



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### Mortgage Fraud Offender Stats

#### *United States Sentencing Commission 2021*

- 70.7% of mortgage fraud offenders were men.
- 82.8% had no prior criminal history.
- Average age was 49 years old.
- 98% were U.S. Citizens
- 43.1% were White, 27.6% Black, 20.7% Hispanic, 8.6% Other Races.
- Median loss was \$371,818
  - 37.7% involved losses of \$250,000 or less
  - 13.2% involves losses greater than \$3.5 million

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## LITIGATION CONSIDERATIONS

### *Common Types of Cases*

- Theft/Defalcation of Closing Funds
  - Closing agent or third-party actor (e.g., wire fraud)
  - Results in mortgage priority issue
- Misrepresentation of Existing Liens by Mortgagor
- Fraudulent Seller or Buyer
- Mortgagor Disclaims Mortgage Obligation
  - Claims that mortgage documents were fraudulently executed
  - Claims of non-receipt of closing funds

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## LITIGATION CONSIDERATIONS

### *Causes of Action to Consider*

- Claims for Equitable Remedies
  - Reformation
  - Declaratory Judgment
  - Equitable Lien
  - Equitable Subrogation
- Claims for Monetary Damages
  - Fraud/misrepresentation
  - Breach of contract
  - Conversion
  - Breach of fiduciary duty
  - Unfair trade practices statutes
- Bona Fide Purchaser Defense

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## LITIGATION CONSIDERATIONS

### *Unique Challenges*

- Remediating the mortgage/title issue
- Collectability
- Witnesses invoking the Fifth Amendment
  - Consider all available third-party subpoenas
- Authenticity of documents/signatures
  - Handwriting experts
  - Computer forensics experts
- Involvement of all necessary parties
- Coordinating with prosecutors
- Closing protection letter statute of limitations

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## LITIGATION CONSIDERATIONS

### *Remediating Mortgage/Title Issues*

- Determine at the outset:
  - Is the insured mortgage enforceable?
  - Can the insured mortgage's intended priority position be achieved?
- Focus initial discovery on these questions to inform strategy
  - Do not want to "throw good money after bad"
- Record a lis pendens!

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## LITIGATION CONSIDERATIONS

### *Collectability*

- Damages might be the only available remedy
  - Consider whether to pay the insured in exchange for an assignment of the insured's claim
- Are there any pre-judgment remedies available to help secure a potential judgment?
  - Trustee process attachments
  - Real estate attachments
  - Preliminary injunctions to maintain the status quo
  - Move quickly!

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## LITIGATION CONSIDERATIONS

### *Collectability (cont.)*

- Does the defendant have assets to satisfy a judgment?
  - Search public records for real estate
  - Perform a PeopleMap search on Westlaw
  - Conduct discovery of relevant documents with asset information (e.g., bank records might be relevant to proving fraud)
  - Consider hiring a private investigator and/or getting an appraisal
  - Determine if there is any insurance coverage available
- Does the defendant have other judgment creditors?
  - The offender may be a frequent flier in the legal system subject to millions of dollars in judgments
  - Most mortgage fraud offenders are first-timers (over 82% had no prior criminal history in 2021)
- Again, you don't want to "throw good money after bad"

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## LITIGATION CONSIDERATIONS

### *Proving Your Case*

- Defendant might plead the Fifth or invoke the “Act of Production Doctrine”
  - Assess the validity of the claim – Move to compel?
    - Act of Production Doctrine does not apply to an entity
  - Are there grounds to seek a default judgment?
- Subpoena numerous sources, even if documents could be duplicative
  - Banks, mortgage companies, insurance companies/brokers, employers, etc.

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## LITIGATION CONSIDERATIONS

### *Proving Your Case*

- Depose all relevant parties
  - Not only helps provide a full picture of the facts, but, the more witnesses, the more likely the defendant’s case will fall apart
- Get experts involved early
  - Handwriting expert
  - Computer forensic expert
  - Forensic accounting expert
- Join all necessary parties

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## LITIGATION

## Mortgage Fraud Fact Patterns

### ***Case No. 1 - Delay in recording deed due to COVID and Fraud by Borrower***

- Insured lender losing first lien position due to a two-month delay in recording a mortgage in the midst of Summer 2020 (due to COVID-related delays). Unbeknownst to the lender, the borrower had a judgment filed against him days after he signed the mortgage (which borrower likely knew was coming) that was recorded prior to the mortgage
- The judgment creditor commenced foreclosure and we filed a motion to intervene arguing that the sale of the property should be stayed.
- Complaint in equity filed against the prior bank/lender in first lien position for (1) declaratory judgment of equitable subrogation and (2) equitable mortgage/equitable lien
- Case is ongoing in Pennsylvania

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## LITIGATION

## Mortgage Fraud Fact Patterns

### **Equitable Subrogation**

- Permitting a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance. When a subsequent lender pays an existing debt. This situation arises typically in a refinancing scenario.
- The four criteria which must be met for equitable subrogation to apply:
  - (1) the claimant paid the creditor to protect his own interests;
  - (2) the claimant did not act as a volunteer;
  - (3) the claimant was not primarily liable for the debt; and
  - (4) allowing subrogation will not cause injustice to the rights of others.

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## LITIGATION

## Mortgage Fraud Fact Patterns

## Equitable Subrogation

- The courts of equity will not relieve a party from the consequences of an error due to his own ignorance or carelessness when there were available means which would have enabled him to avoid the mistake if reasonable care has been exercised.
- For example, if error was due to a closing agent then equitable subrogation will not apply and the appropriate claim is against the closing agent.

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## LITIGATION

## Mortgage Fraud Fact Patterns

***Case No. 2 – Fraud and Negligence by Closing Agent and Bank of Purchaser***

- Fraud where someone reversed a homeowner's first and last names, impersonated the owner, sold a vacant lot and absconded with the funds.
- Title search revealed owner of property at issue was actually different from the purported seller. Agent failed to disclose prior to closing.
- Purchaser's bank failed to recognize fraudulent activity with regard to the account where the purchase funds were wired. The fraudulent owner's name was added to the bank account to gain access to the wired funds.
- Case settled with contributions from the bank and the title agent.

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## LITIGATION

## Mortgage Fraud Fact Patterns

### *Case No. 2 (cont.) – Fraud and Negligence by Closing Agent and Bank of Purchaser*

- Prior to settlement of the litigation, there was contentious litigation by the bank about whether it should be liable.
- Discovery was focused on obtaining facts that the bank “should have known” that there was fraud involved with the bank account which ultimately resulted in a favorable settlement for the client.

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## LITIGATION

## Mortgage Fraud Fact Patterns

### *Case No. 3 – Forgery on Mortgage Documents*

- Husband forged wife’s name and/or wife unknowingly signed mortgage with JP Morgan in 2007
- Couple defaulted on the mortgage
- Federal National Mortgage Association became the holder of the mortgage after default in 2014
- Federal National initiated the action seeking mortgage foreclosure. LSF9 Trust became the current holder of the mortgage after assignment
- Complaint filed for equitable mortgage/equitable lien against the wife
- LSF9 argued for equitable mortgage and won on summary judgment

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## LITIGATION

## Mortgage Fraud Fact Patterns

### ***Case No. 3 (cont.) – Forgery on Mortgage Documents***

In the opinion granting summary judgment in favor of LSF9 on the equitable lien claim, the Pennsylvania Court held:

- Both husband and wife were unjustly enriched by having the mortgage proceeds pay off various debts for them including the mortgage and property taxes and from taking mortgage deductions each year.
- Under the precedent set by prior case law, the Court must impose an equitable lien where one spouse, acting alone, executed a refinance that satisfies a prior mortgage unless the other spouse demonstrates that (1) the mortgage was obtained fraudulently or (2) the re-finance lender has unclean hands.

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## LITIGATION

## Mortgage Fraud Fact Patterns

### ***Case No. 4 – Closing Attorney Absconds with Refinancing Funds***

- Real estate attorney pyramid-type scheme whereby he failed to pay off and obtain discharges of first mortgages when his client's refinanced their properties
- Attorney kept the funds, changed the borrowers' addresses for their monthly mortgage statements, and made the monthly payments
- When borrowers learned that their prior mortgages had not been paid off and discharged, the attorney claimed it was a mistake and used funds from subsequent closings to satisfy the outstanding balances
- Attorney was eventually caught and disbarred before title claim was made

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## LITIGATION

## Mortgage Fraud Fact Patterns

### ***Case No. 4 (cont.) – Closing Attorney Absconds with Refinancing Funds***

- We filed a Verified Complaint and immediately obtained pre-judgment security, which required showing of likelihood of success, based on the disbarment findings
- Defendant entered into agreed judgment to avoid spending money on litigation
- Collectability was an issue but the judgment is good for 20 years and litigation was not extensive

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## LITIGATION

## Mortgage Fraud Fact Patterns

### ***Case No. 5 – Family Misrepresents Existing Liens to Mortgage Lenders***

- Family owns a large, expensive oceanfront property
- Title is held in a trust and the property was encumbered by a multimillion dollars first mortgage
- One of the trust beneficiaries recorded a fraudulent partial discharge of the mortgage concerning a portion of the property containing an apartment unit
- Obtained two mortgages, each lender thought they were in first position, on the purportedly unencumbered portion of the property, which was given a different address and was conveyed from the trust to one of the beneficiaries
- The mortgages contained written property descriptions of the wrong parcel

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## LITIGATION

## Mortgage Fraud Fact Patterns

### ***Case No. 5 (cont.) – Family Misrepresents Existing Liens to Mortgage Lenders***

- We filed a reformation action to correct the descriptions and then learned that the mortgagor (one of the beneficiaries) claimed that she did not execute the mortgage (i.e., that it was void)
- Obtained and recorded a lis pendens to make sure that property wasn't conveyed or encumbered again without knowledge of our client's claims (the mortgagor attempted to give another mortgage to a family member)
- Discovery obtained from numerous sources, which revealed substantial evidence of the mortgagor's participation in the mortgage process, including bank statements, tax returns, employment verification documents, etc., that could not have been obtained without the mortgagor's participation
- Concurrent criminal prosecution of the family's ring leader so we monitored that case closely and recently obtained a witness statement of the mortgagor that was given to the FBI and contradicts her sworn testimony

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## 2022 MORTGAGE FRAUD CASES:

### ***Victor Santos and Fausto Simoes***

*(New Jersey)*

- On November 23, 2022, Victor Santos and Fausto Simoes, a New Jersey real estate developer and attorney each admitted to conspiring to orchestrate a mortgage fraud scheme that led to over \$3.5 million in losses.
- From September 2007 through November 2008, Santos and Simoes engaged in a scheme to fraudulently obtain mortgage loans with a total value of more than \$4 million. Santos orchestrated the scheme to recruit fake, or "straw" buyers to purchase 12 properties in Newark. Using the identity and credit of these straw buyers allowed Santos, Simoes, and their conspirators to conceal their identities from the lender as the actual purchasers of the properties.

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## 2022 MORTGAGE FRAUD CASES:

***Victor Santos and Fausto Simoes****(New Jersey)*

- Simoes conducted the closings of 10 of the fraudulent transactions and helped perpetuate the fraud by falsely reporting that the straw buyers were providing the cash required at closing when, in fact, Simoes received those funds from a shell company controlled by Santos and another conspirator. For several transactions, Simoes also failed to disclose to the lender that the shell company controlled by Santos and another conspirator would receive a substantial payout from the loan proceeds.
- Shortly after the properties were acquired, Santos and his conspirators broke their promises to pay the mortgages. The straw buyers, in whose names the mortgages were obtained and thus were responsible for the payments, did not have enough money to pay the fraudulently obtained mortgages and defaulted, which caused the lender, Fannie Mae, and insurers to lose more than \$3.5 million.

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## 2022 MORTGAGE FRAUD CASES:

***Victor Santos and Fausto Simoes****(New Jersey)*

- Sentencing for Santos and Simoes is scheduled for April 2023.
- Conspiracy to commit bank fraud carries a maximum penalty of 30 years in prison, a fine of \$1 million or twice the gain to the defendants or twice the gross loss to others whichever is greatest.

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**MORTGAGE FRAUD**  
**Conclusion**

**Any questions?**

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**Break**

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# Equitable Subrogation

Title Insurance Claims

March 29, 2023

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## Definition

When a new lender that pays off an existing senior lien “leapfrogs” ahead of earlier recorded intervening liens.

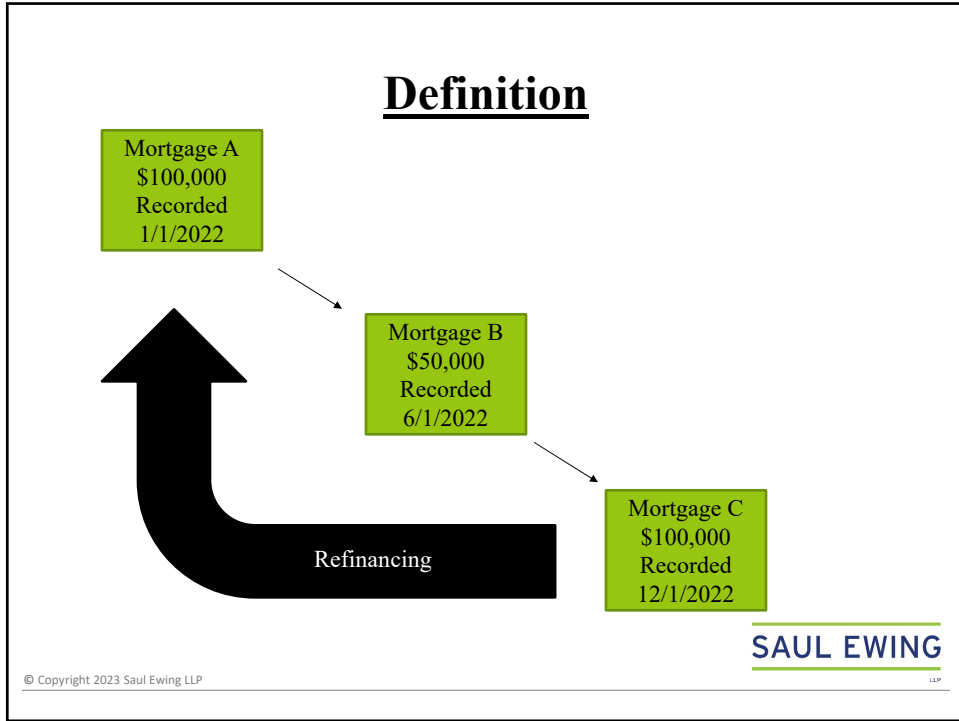


The doctrine of equitable subrogation is an equitable remedy used to reorder the lien priorities so that the junior lien remains subordinate and the new lien obtains the priority position of the lien it paid off.

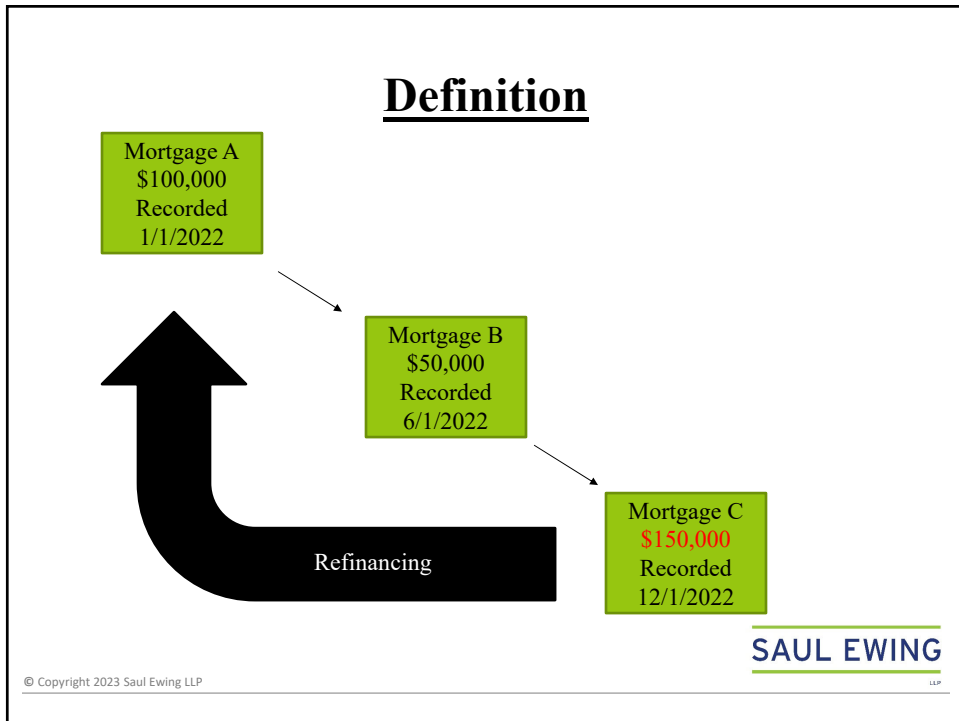
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## Definition

Equitable subrogation is generally appropriate where (1) the subrogee made the payment to protect his or her own interest, (2) the subrogee did not act as a volunteer, (3) the subrogee was not primarily liable for the debt paid, (4) the subrogee paid off the entire encumbrance, and (v) subrogation would not work any injustice to the rights of the junior lienholder. ... Equitable subrogation is a broad equitable remedy, and therefore it applies not only when these five factors are met, but also “whenever ‘one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter.’”

*Mort v. United States*, 86 F.3d 890 (9th Cir. 1996), quoting from *Han v. United States*, 944 F.2d 526 (9th Cir. 1991).

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## Three Approaches

- Knowledge of the intervening lien is irrelevant
  - *Restatement (Third) of Property (Mortgages) § 7.6 (1997)*
- A party with actual knowledge of the intervening lien cannot seek equitable subrogation (Majority View).
- A party with either actual or constructive knowledge of the intervening lien cannot seek equitable subrogation (Minority View).

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## Three Approaches

*By State*

Restatement	Majority View No Actual Knowledge	Minority View No Knowledge
Arizona	California	Michigan
Florida*	Illinois	
Nevada	New York	
Washington	Oregon	
	Utah	

The doctrine of **equitable subrogation** is designed to apply where the claimant satisfied an obligation of another and then stands in the shoes of the satisfied creditor. The doctrine is founded on established principles of equity to prevent an unjust forfeiture, on the one hand, and a windfall amounting to unjust enrichment, on the other.

*Suntrust Bank v. Riverside Nat. Bank of Florida*, 792 So. 2d 1222, citing *Federal Land Bank of Columbia v. Godwin*, 145 So. 883 (Fla. 1933)

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## Title Insurer Conundrum

- *Roth v. Porush*, 2001 N.Y. Slip Op. 02712 (N.Y.A.D. 2 Dept. 2001) (knowledge of title insurer bars use of doctrine).
- *Centreville Car Care, Inc. v. North American Mortgage Co.*, 263 Va. 339 (Va. 2002) (equitable subrogation denied because title searcher for new lender missed intervening lien)
- *Indymac Mortg. Holdings, Inc. v. Kauffman*, 2001 WL 1683779 (Tenn.App.) (unpublished) (negligent title search bars equitable subrogation).
- *Alegis Group L.P. v. Lerner*, 2004 WL 2647607 (Ohio App. 5 Dist. 2004) (unpublished) (equitable subrogation denied because lender was negligence in not discovering recorded intervening lien)
- *Community Trust Bank of Mississippi v. First Nat'l Bank of Clarksdale*, 150 So. 3d 683 (Miss. 2014): "Other courts have found that the principles of equity required consideration of the negligence of a title insurance company which bungled the transaction in the first place. After all, '[e]ither they insure or they don't. It is not the province of the court to relieve a title insurance company of its contractual obligation.' *Lawyers Title Ins. Corp. v. Capp*, 174 Ind.App. 633 (1977)."

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## **Knowledge of the Intervening Lien is Irrelevant**

*Restatement (Third) of Property (Mortgages) § 7.6 (1997)*

- (a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.
- (b) By way of illustration, subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs the obligation:
- (1) in order to protect his or her interest;
  - (2) under a legal duty to do so;
  - (3) on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition; or
  - (4) upon a request from the obligor or the obligor's successor to do so, if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holder of intervening interests in the real estate.

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## **Knowledge of the Intervening Lien is Irrelevant**

- The Washington Supreme Court held that a refinancing lender should be entitled to assert the remedy of equitable subrogation in order to avoid a windfall to the intervening lienholder, even if the refinancing lender has both constructive notice and actual knowledge of the existence of the intervening lien.

*Bank of America, N.A. v. Presence Corp.*, 2007 WL 1631420 (Wash. 2007)

- Overrides state recording laws that give priority to earlier recorded liens.

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## **Knowledge of the Intervening Lien is Irrelevant**

### *Policy Considerations*

- Cut the line.
- 
- Absent equitable subrogation, an intervening lienholder receives an unearned windfall.
  - Customer savings on the cost of title insurance.
  - Streamlined refinancing process
  - Lower risk of foreclosure

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## **Actual Knowledge ≠ Equitable Subrogation**

### *Majority View*

- Courts do not apply equitable subrogation where the refinance lender had actual knowledge of an intervening lien at the time it paid off the prior mortgage, but do apply equitable subrogation when the refinance lender had only constructive knowledge of an intervening lien.
  - For example, when an intervening lien was recorded in the public records but the refinance lender failed to discover it during its title search.
- Policy Considerations
  - Refinance lender = a negligent, sophisticated actor.

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## Any Knowledge ≠ Equitable Subrogation

### *Minority View*

- Policy Considerations
  - Refinance lender = a negligent, sophisticated actor.

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## Interplay With Other Concepts

Equitable Subrogation is most commonly applied to benefit refinancing lenders.

Equitable subrogation is also applied:

- To impose an equitable lien in place of a defective mortgage.
- To avoid unjust enrichment to a borrower whose debt was paid
- To avoid a windfall and protect a valid interest in the property.
- To permit a buyer or purchase money lender to stand in the shoes of a prior lienor.
- To impose a lien against the interest of an owner who did not sign the mortgage.

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## Case Study

*Palm Beach Savings & Loan Association v. Fishbein*, 619 So. 2d 267 (Fla. 1993)

- Husband forged his wife's signature.
- Husband used \$930,000 of the funds to pay off three existing mortgages and taxes on the property.
- Wife refused to pay the new mortgage the husband fraudulently obtained.
- Bank foreclosed.
- Trial court denied foreclosure. Allowed an equitable lien for the amount of the taxes paid on the property and that portion of the mortgage that was used to satisfy the pre-existing mortgage.
- Intermediate appellate court reversed the imposition of an equitable lien.
- Florida Supreme Court quashed the decision to deny the bank an equitable lien, noting that equitable liens can be imposed in the absence of fraud, even against homestead property, to prevent unjust enrichment. The Florida Supreme Court allowed a lien on the wife's homestead property to the extent that the bank's loan proceeds were used to pay the preexisting mortgage for which the wife would have been liable if the husband had not paid them.

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## Questions?

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## **Ethical Issues with Title Insurance: Bad Faith, Extracontractual Liability and Defense & Coverage Issues by the Insured**

Francis X. "Trip" Riley, III, Esq.  
Matthew M. Haar, Esq.

March 29, 2023

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## **Bad Faith: Why It Matters**

- Perhaps the most impactful *de facto* regulation of insurance practices
- Punitive and treble damages
- Interest (high rate)
- Attorney's Fees
- Compensatory damages (broadly defined)
- Consequential damages
- Institutional / class action exposure

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## Bad Faith: The Basics

- Common targets:
  - Claim evaluation, adjustment and resolution
  - Scope of agency - defining insured
  - Appropriate training and education
  - Company policies impacting claims
  - Performance and compensation criteria

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## Bad Faith Themes

- Insurer's motivation:
  - Pay covered claims, not uncovered claims
  - Combat fraud
  - Reduce exaggerated claims
  - Eliminate waste
  - Conserve resources
  - Profit ≠ bad faith

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## Bad Faith Challenges

- Policyholder's counsel will attack practices regardless of their intention or effect – focus on impact on plaintiff, not claims broadly
- People within insurance companies may not follow procedures appropriately, whether intentional or unintentional

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## Bad Faith & Institutional Control

- New/inexperienced agents
- Agents leaving company
- Roundtables
- Supervisory and management structure
- Getting it right v. finding additional reasons to deny or reduce a claim

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## Opportunities to Combat Bad Faith

- Review policies and procedures with an eye toward potential bad faith accusations
- Do policies just sound bad or onerous, i.e. “Colossus”
- Make sure policies and procedures are being followed as intended
- Periodic training
- Look for ways to improve

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## Opportunities to Combat Bad Faith

- Educate staff on issues in claims handling, including updates in the law and hot topics
- Expose staff to training outside of the company, including involvement in professional and community organizations
- Tech savvy in all aspects of claims handling is critical

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## Unfair Trade Practices

- Uniform Deceptive Trade Practices Act – 1964
- Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”) – 73 P.S. §§ 201-1 – 201-9.2

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## Unfair Claims Handling

- NAIC Unfair Trade Practices Model Act
- NAIC Unfair Claims Settlement Practices Model Act – 1990
- Pennsylvania Unfair Insurance Practices Act – 40 P.S. §§ 1171.1 – 1171.14

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## What is unfair or deceptive conduct?



“Mr. Simpson, this is the most blatant case of false advertising since my case against ‘The Never-Ending Story’”

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## What is unfair or deceptive conduct?

- 20 or more enumerated practices
- “fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding”
- “or deceptive” added in PA in 1996

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## What is unfair or deceptive conduct?

- Prior view was that proof of common law fraud was required (intentional conduct proven by clear & convincing evidence)
- Interpretation evolved - deceptive or misleading conduct suffices (negligent conduct proven by a preponderance of evidence)
- Bennett v. A.T. Masterpiece Homes at Broadsprings LLC, 40 A.3d 145 (Pa. Super. Ct. 2012)

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## Compare Actionable Conduct

- Under 42 Pa. C.S.A. § 8371, insured must prove subjective and objective unreasonableness
- Under UTPCPL, insured need only prove deceptive or misleading conduct

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## Compare Actionable Conduct

- Are UTPCPL claims an end run to claims for bad faith in the absence of coverage?
- Can deceptive or misleading replace or override standard industry practice?

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## But Wait, There's More!

- Gregg v. Ameriprise Financial Inc., 245 A.3d 637 (Pa. 2021)
- Jury returns defense verdict on common law claims
- Judge enters decision for plaintiff on UTPCPL claims

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## But Wait, There's More!

- Gregg v. Ameriprise Financial Inc., 245 A.3d 637 (Pa. 2021)
- PA Supreme Court holds that strict liability applies to “catchall” claims under the UTPCPL
- Standard is “a likelihood of confusion or misunderstanding by the consumer”

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## The Sometimes Unusual Relationship Between Assigned Counsel and Claims Counsel

- Accepted claim/defense tender under policy
  - Know the terms of policy related to claim and defense tender
  - Letter accepting tender and early communications with insured
  - Calibrate assigned counsel's understanding
  - Communicate expectations about reporting and management authority regarding pre-suit, lawsuit and settlement

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## The Sometimes Unusual Relationship Between Assigned Counsel and Claims Counsel

- No reservations of rights – but still issues?
  - Insured’s attempt to manage resolution and/or litigation efforts
    - Conflicts with claims counsel’s and/or assigned counsel’s established strategy
      - Prompt reaction
        - › Assigned counsel needs to report conflict to claims counsel
        - › Claims counsel communication with insured
        - › Claims counsel remind insured and assign counsel of boundaries
        - › Memo to file
  - Good faith defenses or other strategies

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## The Sometimes Unusual Relationship Between Assigned Counsel and Claims Counsel

- Reservation of Rights Letter Issued
  - Assigned Counsel made aware of letters. Understands implication
  - Notice of continued claims investigation?
  - Communication by Assigned Counsel that tends to evidence basis for revocation of coverage or defense – immediately or later.

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## The Sometimes Unusual Relationship Between Assigned Counsel and Claims Counsel

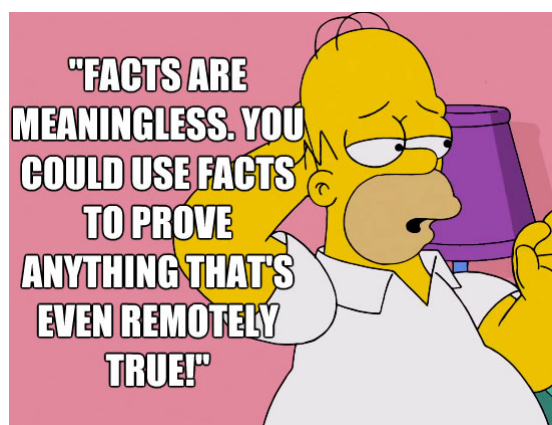
- Coverage/Defense for some but not all claims.
  - Advise assigned counsel of coverage limitations
  - Advise assigned counsel non-coverage claims should not be discussed with insured

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## Discovery



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## Discovery Issues

- Both bad faith and UTPCPL open door to significant discovery of insurer
- Does UTPCPL open greater door to discovery relative to plaintiff?
- Go on offense – “think ahead of the airplane”
- Undue burden / proportionality

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## Discovery Issues - Experts

- Expertise in what? What knowledge, skill, experience, training or education is relevant (R.E. 702)?
- What evidence is the expert trying to help the trier of fact understand?
- In what way is the expertise “generally accepted”?

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## Discovery Issues - Experts

- Help the judge and jury understand industry standards and practices in plain language
- Is the best expert within the company?
- Carefully review expert qualifications to match the issues in the case
- Involve the expert early

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## Issues with A/C Privilege

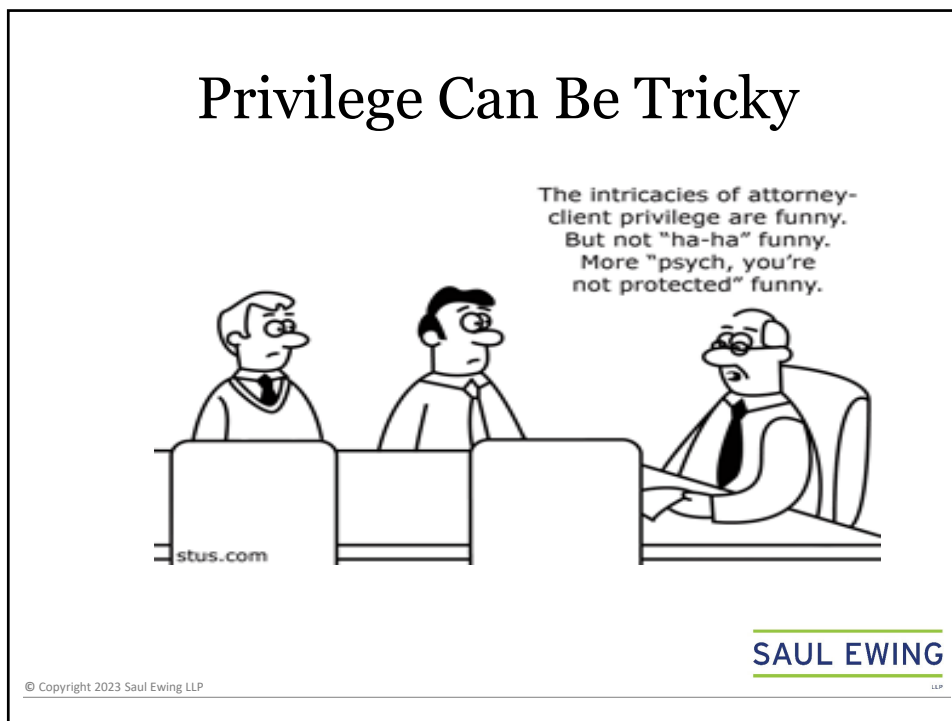
- Different definitions by jurisdiction
- Definitions are comprehensive
- Key elements
  - who is the client?
  - is legal advice being sought?
  - is the communication related to obtaining advice and made in confidence?

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## Impact of Technology on A/C Privilege, Discovery & Beyond

### Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

*Maintaining Competence*

(8) To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology....**

Pa. Rule of Professional Conduct 1.1

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## Takeaways

- Proactively addressing potential bad faith or deceptive conduct is smart business.
- This requires constant review of company policies and procedures based on an understanding of a dynamic marketplace.
- Policies and procedures are only as effective as the company's ability to have its people follow them.

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## Questions?

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