# Title policy doesn't cover mortgage suit

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A title insurer had no duty to defend a bank against a third-party suit brought by a residential borrower seeking to rescind her mortgage on grounds that it was obtained via a predatory lending scheme, the Supreme Judicial Court has ruled.

The insurer argued that because the borrower's action challenged the validity of the underlying debt rather than alleging defects in the execution of the mortgage lien, title insurance did not cover her claims.

The SJC agreed, rejecting the bank's argument that the court should apply the same broad standard for determining a title insurer's duty to defend as it does for general liability insurers.

"[A] title insurer does not have a duty to defend simply because the allegations in the underlying complaint are 'reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy terms,'" Justice Robert J. Cordy wrote for the court. "[W]e conclude that a title insurer's duty to defend is triggered only where the policy specifically envisions the type of loss alleged."

Additionally, Cordy said, "[w]here the substance of [the borrower's] complaint is concerned with the validity of the underlying loan … not whether the mortgage was improperly executed, improperly recorded or otherwise procured by fraud, we conclude that its claims were not specifically envisioned by the terms of the title insurance policy."

The 16-page decision is *Deutsche Bank National Association v. First American Title Insurance Company,* Lawyers Weekly No. 10-124-13. The full text of the ruling can be found by clicking here.

**Subjective standard?**

Richard E. Briansky of Prince, Lobel, Tye in Boston represented the bank. He called the ruling "generally disappointing," describing the standard the SJC adopted — namely that the duty to defend is not triggered unless a policy "specifically envisions" the type of loss alleged — as potentially problematic.

"Prospectively, there will be problems applying that formula," he predicted. "It involves some subjective elements to it, [and] it's going to limit title insurers' duty to defend. There will be practical problems with forcing insurers to recognize their obligations under the policy, and this certainly will lead to additional litigation."

Joel A. Stein of Norwell, co-chairman of the Real Estate Bar Association's Title Insurance and National Affairs Committee, said the decision reiterates that the "in for one, in for all" rule that applies to general liability insurance does not apply to title insurance.

Stein noted that the SJC found earlier this year in *GMAC Mortgage, LLC v. First American Title Insurance Company* that a title insurer had no obligation to defend claims against a policyholder that were unrelated to title issues but were part of the same lawsuit as title-related claims.

"[This case] cites the GMAC case and confirms the limited and unique nature of title insurance," Stein said.

In fact, Stein said *Deutsche Bank* seemed clearer to him in that the litigation was instituted by the mortgagor, and the complaint alleged a predatory lending scheme that was "totally unrelated to any title issue."

Lawrence P. Heffernan, who practices title insurance law at Robinson & Cole in Boston, agreed.

"The SJC has reinforced the concept that title insurance is unique and 'fundamentally different' from general liability insurance," he said. "Aside from following decisions on this issue by other state courts, the SJC's interpretation and application of the policy makes sense because the underlying challenge or lawsuit was not really a challenge to the mortgagee's title or lien … . It was a challenge to the validity of the underlying note and debt, and title policies do not insure the validity of the underlying debt."

Meanwhile, Boston attorney Kate Moran Carter, who handles title insurance coverage issues, said the decision shows how insureds "need to educate themselves on precisely what they are purchasing with their premium dollars, and, if there are options for expanded coverage, they will need to pay for it."

Carter, who practices at Brennan, Dain, Le Ray, Wiest, Torpy & Garner, added that suits like the one brought by the borrower in *Deutsche Bank* are becoming increasingly prevalent due to the subprime lending practices that arose during the residential lending boom prior to the recent housing collapse. Lenders should consider resolving such cases short of litigation since they will not be able to count on title insurers to pick up the tab for legal fees or any subsequent judgments, she said.

Jason A. Manekas of Bernkopf Goodman in Boston represented the insurer. He declined to discuss the ruling.

**Suit to rescind**

In June 2006, Accredited Home Lenders, Inc. issued a $374,400 loan, secured by a first mortgage, to borrower Karla Brown to purchase a home in Dorchester.

Before the closing, Accredited purchased a title insurance policy from defendant First American Title Insurance Co. The policy also covered Accredited's successors and assigns. It came to include Deutsche Bank, trustee of Morgan Stanley, which purchased Brown's loan and mortgage sometime after the closing.

In May 2009, Brown filed suit in Superior Court against Accredited, Deutsche Bank, a pair of loan servers, a mortgage broker's agent, and the closing attorney seeking to void her debt under the promissory note and to rescind the mortgage.

According to Brown, the defendants had schemed to underwrite predatory "stated income" loans to families in low-income neighborhoods, and she had been victimized by the scheme. She also claimed the defendants had unilaterally misrepresented her income to justify higher interest rates and monthly payments while coercing her into accepting loans she could not afford.

Deutsche Bank requested that First American provide a defense. The insurer refused coverage, maintaining that the claim did not trigger its duty to defend under the policy.

The bank then brought an action for statutory damages and a declaration that First American did indeed have a duty to defend Brown's suit. Superior Court Judge S. Jane Haggerty granted summary judgment to the insurer.

Deutsche Bank appealed, and the SJC took up the case on its own motion.

**Narrow standard**

Despite Deutsche Bank's arguments to the contrary, the SJC found that the standard for title insurers in terms of determining duty to defend should not be the same as it is for general liability insurers.

"Our analysis is guided by our recent decision in [*GMAC*]," Cordy said. "There we concluded that the 'in for one, in for all' rule applicable in the context of general liability insurance does not apply to title insurance."

Specifically, he said, a title insurer — unlike a general liability insurer — does not have a duty to defend claims outside the scope of its policy simply because it may have to defend a claim that is covered by the policy.

"[O]ur conclusion [in *GMAC*] was predicated on the unique purpose of title insurance," Cordy said, noting that a title insurance policy is merely an agreement to indemnify a policyholder against loss through title defects, not to guarantee the state of the title.

Application of the broad standard that applies to liability insurers to the title insurance context "threatens to sweep a whole host of uncontemplated risks into the ambit of title insurance," he said.

To avoid such a situation, a title insurer's duty to defend is only triggered if the policy "specifically envisions" the type of loss that has been alleged, Cordy said.

Applying that narrower standard, the SJC concluded that First American had no duty to defend Deutsche Bank against Brown's claims.

"Here, the pertinent provision of the title insurance policy provides coverage against 'loss or damage … sustained or incurred by the insured by reason of … [t]he invalidity or unenforceability of the lien of the insured mortgage upon the title,'" Cordy said.

Because Brown's allegations challenged the underlying mortgage debt itself rather than the defects in the execution of the mortgage lien, he said, the insurer's obligation to defend was not triggered under the policy.

The SJC did concede that if Brown prevails in the underlying litigation and her debt is extinguished, it would effectively dissolve Deutsche Bank's mortgage interest since there would be no debt to secure.

"However, given that Deutsche Bank and its predecessors in interest, rather than First American, were in the best position to ensure that the underlying debt was valid, it is for them to bear the burden of any loss," Cordy said, adding that it would be unreasonable to expect First American to insure a debt that it has only limited knowledge about and over which the lender has exclusive control.

Accordingly, the SJC affirmed Haggerty's summary judgment for the insurer.

**CASE:** *Deutsche Bank National Association v. First American Title Insurance Company*, Lawyers Weekly No. 10-124-13

**COURT:** Supreme Judicial Court

**ISSUE:** Did a title insurer have a duty to defend a bank against a third-party suit brought by a residential borrower seeking to rescind her mortgage on grounds that it was obtained via a predatory lending scheme?

**DECISION:** No, because the borrower was challenging the validity of the underlying debt rather than alleging defects in the execution of the mortgage lien