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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Appellate Case No: 2026-000090

Jericho State Capital Corp. of Florida …… Appellant,

v.

Chicago Title Insurance Company……. Respondent

AND

And Lynx Jericho Partners, LLC …… Appellant,

v.

Chicago Title Insurance Company ……. Respondent.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE SPECIAL REFEREE ERR IN FINDING THAT SECTION 7(a) OF THE POLICIES UNAMBIGUOUSLY SETS FORTH THE DATE OF FORECLOSURE AS THE DATE TO MEASURE DAMAGES AND THAT THERE IS NO AMBIGUITY TO THE PHRASE "ACTUAL MONETARY LOSS OR DAMAGE"?

2. DID THE SPECIAL REFEREE ERR IN FINDING THAT JERICHO STATE'S FORECLOSURE BID WAS A PAYMENT UNDER SECTION 2(c) OF THE POLICIES AND REDUCED ITS COVERAGE TO ZERO?

3. DID THE SPECIAL REFEREE ERR IN FINDING THAT LYNX JERICHO'S RELEASE OF THE FIRST MORTGAGE TERMINATED COVERAGE UNDER SECTION 9(c)?

STATEMENT OF THE CASE

This appeal concerns the interpretation of a lender's title insurance policy. Appellants Jericho State Capital Corp. of Florida ("Jericho State") and Lynx Jericho Partners, LLC ("Lynx Jericho") are insureds under two loan policies issued by Respondent Chicago Title Insurance Company. Appellants initiated litigation asserting they suffered a covered loss and damage due to an official county map that reserved a highway right-of-way through the middle of the property that secured their loans. [Jericho State Complaint, Lynx Jericho Complaint]. Chicago Title answered denying liability and the cases were later consolidated for trial and referred to Special Referee Karl A. Folkens. [Answer to Jericho State Complaint, Answer to Lynx Jericho Complaint].

By Order dated July 27, 2017, the Special Referee rules that the policies no coverage. [First Order on Summary Judgment]. On appeal, the Court of Appeals reversed the Special Referee on this issue, concluding the Ordinance encumbered the property and rendered title unmarketable. *Jericho State Capital Corp., v. Chi. Title Ins. Co.*, 431 S.C. 437 (Ct. App. 2020). [Decision]. On June 7, 2022, the Supreme Court of South Carolina denied Respondent's petition for a writ of certiorari, and this matter was remanded for further proceedings. [6/7/22 Order].

Chicago Title moved for summary judgment on January 23, 2024, this time on the issue of damages. [Chicago Title Motion]. The Appellants made a reciprocal motion for summary judgment on April 2, 2024, and each submitted responses to the other's motions. [Appellants' Motion and Response; Chicago Title Response and Reply; Appellants' Reply]. On August 28, 2024, the Special Referee heard the motions for summary judgment. [Transcript of Hearing]. By Order Considering Defendant's Second Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment filed July 14, 2025, the Special Referee granted summary judgment to the Respondent and denied the Appellants' motion, finding that the date of loss under the title polices is the date of foreclosure, that Jericho State's coverage was reduced to zero because its credit bid

at the foreclosure sale operated as a payment, and that Lynx Jericho's coverage was terminated because it released its mortgage ("Order"). [7/14/25 Order].

On July 17, 2025, Appellants filed a Motion for Reconsideration and to Alter or Amend Order, which the Special Referee denied by Order filed December 15, 2025. [Motion for Reconsideration and 12/15/25 Order].

STATEMENT OF FACTS

The property in this case is known as Peachtree Plantation ("Property") and originally consisted of 131 acres of raw land adjacent to the Intracoastal Waterway near Myrtle Beach.

In 1999, Horry County enacted its Official Map Ordinance and created an index map to reserve future locations of streets and highways ("Ordinance"). [Ordinance, Index Map Ordinance]. In 2002, Horry County amended the ordinance to show the future location of S.C. Highway 31, also known as the Carolina Bays Parkway. [Amended Index Map Ordinance]. This amendment showed the highway running through the middle of the Property, essentially cutting it in half and measurably reducing its acreage.

In 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree Properties"), purchased the Property for $22,520,000.00 with plans to develop a large, upscale residential subdivision along the waterway. [Deed]. Peachtree Properties financed the purchase through two loans. First, R.E. Loans, LLC ("REL") loaned the company $18,520,000.00, which was secured by a first mortgage on the Property ("First Mortgage"). [REL Mortgage]. The second loan was from Appellant Jericho State for $4,263,888.00, which was secured by a second mortgage on the Property ("Second Mortgage"). [Jericho State Mortgage].

At closing, Respondent Chicago Title issued a loan policy to each lender, insuring REL's interest in the Property as holder of the First Mortgage and Jericho State's interest in the Property as holder of the Second Mortgage (collectively, the "Policies"). [REL Policy; Jericho State Policy].

Before consummating the $4.2 million loan, Jericho State performed its own due diligence. It reviewed documents from Peachtree Properties that included environmental, geologic and engineering reports, as well as two appraisals showing the Property valued at around $40 million. [Chwatt Depo p. 45, p. 49]. It visited the Property 3 or 4 times, contacted local real estate professionals and analyzed comparables before committing to make the $4.2 million loan. [Chwatt Depo. p. 45]. Moreover, Jericho State relied on Chicago Title's loan policy "to make sure that everything is clean and above board" and to note "any possible encumbrances". [Chwatt Depo. p. 136, line 6-25 through p. 137, line 5].

At the time of closing, Jericho State did not know of the Ordinance or that the highway and its large bridge over the waterway would sever the Property. Notably, Chicago Title did not know of the highway either, as the Policies did not reference the Ordinance, or otherwise specifically except it from coverage.

If Jericho State had known about the Ordinance and highway, it would never have made the $4.2 million loan because a highway running through the Property would "destroy" its value and cause it to lose almost all its value. [Chwatt Depo. p. 63, 70, 73, 92, 117, 119, 133, 134, 140].

Shortly after the purchase, Peachtree Properties defaulted on both loans. Jericho State still did not know about the highway, and therefore it made cure payments to REL totaling over $2 million to protect its interest in the Property. [Chwatt Depo. p. 133, 134; 2007 Order and Decree of Foreclosure]. Had Jericho State known of the Ordinance and highway, it would never have paid paid this $2 million to REL. [Chwatt Depo. p. 134].

In 2007, Jericho State still did not know of the highway and filed to foreclose its Second Mortgage. [Foreclosure Complaint; Chwatt Depo., p. 133]. At that time, it thought the Property could have been worth close to $40 million. [Chwatt Depo., p. 132, lines 22-25]. The Order granting foreclosure noted the total amount due to Jericho State was $7,490.031.71 and concluded

that Jericho State's second mortgage was a good and valid lien on the Peachtree Property, subject only to the First Mortgage and past due taxes. [Foreclosure Order]. At the foreclosure sale, Jericho State was the highest bidder at $9 million, and thereafter the Master deeded the Property to Jericho State, subject to the $18 million First Mortgage. [Master's Deed]. At that time, Jericho State still believed it enjoyed the position it had when the Policy was issued and enjoyed equity in the Property that met or exceeded the debt it previously secured.

If Jericho had known about the highway, it would never have made the loan and foreclosed on the Property, made a bid of $9 million or taken title to the Property. [Chwatt Depo. p. 63, 70, 73, 92, 117, 119, 133, 134, 140].

In 2008, Jericho State learned for the first time that a highway was going to be built through the middle of the Property. [Chwatt Depo., p. 64, 65]. It believed the highway would cause "immense" damage and "destroy" to the Property's value – it would lose almost all of its value and be worth less than the appraised value and less than the loan amounts that it secured. [Chwatt Depo., p. 70, 117, 119, 123, 138]. In February of 2009, Jericho State submitted a title insurance claim with Chicago Title asserting the Ordinance created an encumbrance and rendered title to the Property unmarketable, which Chicago Title denied. [2/26/2009 claim; 12/9/09 denial].

Later in 2009, the SCDOT filed a condemnation action against Jericho State to take 10.18 acres of the Property so that it could begin construction of the highway. [Condemnation lawsuit]. This litigation lasted for 5 years.

In 2013, the First Mortgage was assigned to Lynx Jericho.[1] [Assignment]. Later that year, Lynx Jericho, submitted a title insurance claim with Chicago Title, which Chicago Title denied. [claim & denial].

[1] For context, REL assigned the First Mortgage to an entity that later filed for bankruptcy. Lynx Jericho was formed to purchase the REL loan from the bankruptcy trustee, to obtain the mortgagee's rights under the First Mortgage and to protect Jericho State's interest in the Property under the Second Mortgage. [Svirsky Depo., p. ___].

In 2014, the condemnation case finally concluded. The jury awarded Jericho State $2,100,000.00, which was paid to Lynx Jericho net of attorney fees and costs. [Verdict Form].

In 2017, the Special Referee granted Chicago Title's first motion for summary judgment, concluding the Ordinance was not a covered loss, did not render title to the Property unmarketable, and was otherwise excluded from coverage under the Policies. [Order]. Given his coverage decision, the Special Referee did not reach the issue of damages. Jericho State and Lynx Jericho appealed.

While the appeal was pending, the SCDOT completed construction of the highway, and soon thereafter, the remaining Property was divided into three parcels, known as the Western Tract (58.12 acres), the Eastern Tract (35.27 acres), and the Southern Tract (27.57 acres).

Also while the appeal was pending, Jericho State found purchasers for the Property. On July 17, 2020, Jericho State sold the Western Tract to Lennar Carolinas, LLC, for $4,700,000.00 [7/17/20 Deed from Jericho State to Lennar]. On September 18, 2020, Jericho State deeded Eastern Tract to Lynx Jericho Peachtree Phase III, LLC, who subsequently sold it to Lennar Carolinas, LLC, for $2,102,500.00. [9/18/20 Deed from Jericho State; 3/14/22 Deed to Lennar]. Also on September 18, 2020, Jericho State deeded the Southern Tract to Lynx Jericho Peachtree Phase II, LLC, who subsequently sold it to Beverly Homes for $1,100,00.00. [9/18/20 Deed from Jericho State, 8/25/23 Deed to Beverly].

On October 7, 2020, the Court of Appeals reversed the Special Referee in part, concluding the Ordinance created a title defect that was not excluded by the Policies and that the Policies therefore afforded coverage to the Appellants. *Jericho State Capital Corp., v. Chi. Title Ins. Co.*, 431 S.C. 437 (Ct. App. 2020). [Decision].

On June 7, 2022, the Supreme Court denied Chicago Title's Petition for Writ of Certiorari, and the matter was remanded to the Special Referee to determine damages. [6/7/22 Order].

On August 8, 2022, Lynx Jericho released its First Mortgage lien on the Western and Eastern parcels. [8/8/22 Mortgage Release]. On December 28, 2023, it released its First Mortgage lien on the Southern Parcel. [12/28/23 Mortgage Release].

Thus, as of December 28, 2023, Jericho State no longer owned the Property and Lynx Jericho no longer held a mortgage lien on the Property.

In 2024, the parties filed reciprocal motions for summary judgment as to whether the Policies covered the Appellants' claims for damages arising from the title defect. The Special Referee ruled in favor of Chicago Title, concluding (i) Section 7 of the Policies unambiguously sets forth the foreclosure date as the only date used to measure and calculate a lender's damages, (ii) Section 2(c) reduces coverage for Jericho State's claim to $0 because it took title to the Property through foreclosure with a credit bid exceeding the amount owed under its note, and (iii) Section 9(c) terminates Lynx Jericho coverage because it released the First Mortgage. Thereafter, the Special Referee denied the Appellants' Motion to Reconsider and/or Amend.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607 (1976). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320 (2000).

ARGUMENT

Generally, a title insurance claim considers the following: (1) whether the insured has suffered a covered loss, (2) if there is covered loss, whether that loss is subject to a policy exclusion, and (3) if there is a covered loss that is not subject to an exclusion, whether the insured's damages are limited by the policy's conditions and stipulations. This appeal concerns the final step of the claim process and the interpretation of the Policies' provisions that calculate and limit damages.

A. THE POLICY DATE, NOT THE DATE OF FORECLOSURE, IS THE PROPER DATE TO CALCULATE DAMAGES UNDER SECTION 7(a) OF THE POLICIES.

Both Policies' Conditions and Stipulations contain an identical Section 7, which sets forth a formula to calculate damages resulting from a covered loss, but it does not specify a date to apply the formula. Section 7 states:

> **7. DETERMINATION AND EXTENT OF LIABILITY**
>
> **This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.**
>
> **(a) The liability of the Company under this policy shall not exceed the least of:**
> **….**
>
> **(iii) 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.**

[Loan Policies]

Under this section, a lender's "estate or interest" is its security interest in the subject property and extent to which the property secures the loan. Thus, this section calculates a lender's loss or damage to be the difference between the value of the property securing the loan as insured

and its value subject to the defect, lien or encumbrance. In other words, the lender's loss or damage is the amount of lost security due to the property's reduced value caused by the defect.

To apply the damage calculation, however, the date of loss must be established, as the value of the property serving as loan security may go up or down over time. For example, the Property in this case was purchased for $22.5 million in 2006, and there is no dispute that the Great Recession a few years later caused its value to measurably diminish; at the same time, the amount of debt secured by the Second Mortgage was $4.2 million at the time of purchase, but the amount of debt had increased to $7.5 million in 2008.

"The rubric of loss valuation is not limited only to mathematical consideration … The specific matter of timing is an inherent part of the task of measuring damages." *Whitlock v. Steward Title*, 399 S.C. 619 (2012). On its face, Section 7 plainly fails to specify any date to calculate damages. Nonetheless, the Special Referee interprets this section to say that the date of loss is the date upon which the lender forecloses on the property securing its loan. In effect, the Special Referee interprets this section to also impose a mandatory condition precedent – the lender's foreclosure - when no such words exist. The Appellants contend that the Special Referee erred in his interpretation of Section 7 and that the date of loss should be the date the Polices were issued (the "Policy date"), not the foreclosure date.

1. <u>The Policy Terms are Ambiguous.</u>

"The terms of individual insurance agreements can control the method of valuation, but the purpose of title insurance has been stated as seeking to place the insured in the position that he thought he occupied when the policy was issued." *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405 (2008); *Jericho State Capital v. Chicago Title*, 431 S.C. 437 (S.C. App. 2020). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179 (2009).

"A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation." *Pee Dee Stores, Inc., v. Doyle*, 381 S.C. 234 (Ct. App. 2009). The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe. *Hann v. Carolina Cas. Inc. Co*., 252 S.C. 518, (1969). Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement. *Farr v. Duke Power Co*., 265 S.C. 356 (1975). "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Whitlock v. Steward Title*, 399 S.C. 619 (2012).

Section 7(a) either sets forth the date to calculate damages or it does not. While the Order concludes the date of loss is the foreclosure date, this date is nowhere to be found in the Policies. On the other hand, each Policy does say, at the top of page one, that Chicago Title "insures, ***as of Date of Policy*** …, against loss or damage, … sustained or incurred by the insured …." (emphasis added). Moreover, as described below, the purpose of title insurance is to place the insured in the position he thought he occupied "when the policy was issued." *Jericho State Capital v. Chicago Title*, 431 S.C. 437 (S.C.App. 2020).

No doubt, if Chicago Title wanted the date of loss to be the date of foreclosure, or otherwise make foreclosure mandatory if the insured seeks damages under Section 7, it could have easily placed this language in its Policy. It did not do so, and the omission is glaring and causes ambiguity. Indeed, if the Policy really says the date to measure damages is the foreclosure date, and not the Policy date, then Chicago Title would most surely point it out, quote it, highlight it, and boldly emphasize the specific Policy language that says so, and the Order would have likely done the same.

But because the Policies do not say that damages are measured as of the foreclosure date, Chicago Title and the Special Referee instead rely on Section 7's introductory language stating the

Policies indemnify against "actual monetary loss or damage" sustained or incurred by the insured claimant. The Order says this "phrase is not ambiguous", and as a result, based on case law from foreign jurisdictions, foreclosure is mandatory because "until an actual monetary loss is incurred under a lender's policy, the extent of Defendant's liability to Plaintiffs cannot be determined under the plain, unambiguous terms of the policy."

This interpretation misses the distinction between an insured suffering an actual monetary loss and an insured suffering damage. The Policies' plain language clearly sets forth alternate sources of liability under Section 7 (…loss **or** damage). Not only do the Policies fail to set forth the date of loss and fail to define "actual monetary loss", the Policies also fail to define "damage". No doubt, the term "damage" has a very broad meaning. Black's Law Dictionary defines damage to mean 'Loss, injury, or deterioration," and the term is to be distinguished from its plural, damages, which means a "compensation in money for a loss or damage." *Blacks Law Dictionary*, 5th Edition, 1983. See also, *United States v. James*, 478 U.S. 597 (1986)("It might be noted here that there is distinction between damage and damages").

Also, the Order's pronouncement that calculating damages under Section 7(a)(iii) is possible only after foreclosure is at odds with other parts of that section. Section 7(a)(i) caps liability at "the Amount of Insurance stated in Schedule A, **or, if applicable**, the amount of Insurance as defined in Section 2 (c) of these Conditions and Stipulations". (emphasis added). Section 2(c) is applicable only after acquisition by foreclosure or conveyance. This suggests liability may also exist when Section 2(c) is *not* applicable. Similarly, Section 7(b) states that "in the event" the lender obtains title via foreclosure, then liability continues as set forth in Section 7(a)." Again, this suggests that in the event no foreclosure occurs, liability still exists under 7(a). Thus, the terms "if applicable" and "in the event" add to the ambiguity because each suggests foreclosure is not mandatory to trigger liability and calculate damages under Section 7.

Whether the Policies are ambiguous should be analyzed using the blueprint provided by our Supreme Court in *Whitlock v. Stewart Title*, 399 S.C. 619 (2012). In *Whitlock*, an owner's title insurance policy did not set forth a valuation date to calculate damages and the parties disputed the date when the owner suffered an "actual loss". The owner argued the date of policy should be used as the date to calculate damages, while the insurance company pressed the Court to accept the "majority rule" to conclude the term "actual loss" compels use of a later date - the date of discovery.

The *Whitlock* Court first looked to well established South Carolina contract law to interpret the subject policy, rather than equity or case law from other jurisdictions:

> While we are aware of differing approaches to the certified question, we are guided by the contract principle that parties may contract as they see fit, provided the contract terms do not offend public policy. In the context of establishing a method of valuation in a title policy, as noted above, "[t]he terms of individual insurance agreements can control the method of valuation." *Stanley, 377 S.C. at 411, 661 S.E.2d at 65*."

To this end, the Court noted that the title policy merely referenced "actual loss" but the policy did not define the term or provide any guidance for determining the "valuation date." The Court concluded the absence of these critical contractual terms rendered the policy ambiguous, and because of this ambiguity, the insured's damages should be measured in a manner most favorable to the insured, which is the date of policy.

Most certainly, the *Whitlock* Court appreciated, and did not dispute, the equity and logic set forth in the volumes of case law from foreign jurisdictions submitted by the insurance company, but in the end, the insurance company's failure to define critical terms guided the Court under South Carolina law:

> We conceptually agree with Defendant, but we are construing a contract of insurance, not attempting to fashion an equitable remedy. The insurance policy here simply fails to identify the valuation date as the date of discovery of the title defect or otherwise provide clear language that would require a valuation date in line with Defendant's position. The well-established rule

> concerning construction of ambiguous terms in insurance contracts compels a result adverse to Defendant's position.

In the Order, the Special Referee distinguishes *Whitlock* because it involved an owner's policy rather than a lender's policy, but this distinction misses the point of *Whitlock*. Step one, according to our Supreme Court, is evaluating whether the policy unambiguously sets forth a valuation date and defines critical terms. It appears the Special Referee skipped this step and instead moved straight to the "majority rule" and then tried to make that fit into the policy language and reach an equitable result. This puts the cart before the horse. The *Whitlock* policy failed to identify a date of loss or valuation date; Chicago Title's Policy also fails to identify a date of loss or valuation date. The *Whitlock* policy used the term "actual loss" but did not define it; Chicago Title's Policy uses the term "actual monetary loss" but does not define it. In fact, by including the term "damage", which is a broad term that is also not defined, the Policies in this case are even more ambiguous than the *Whitlock* policy. Indeed, it is hard to say that "damage" is only measurable after foreclosure.

Just as in *Whitlock*, this is a matter of contract interpretation, not fashioning an equitable remedy. The Appellants are not seeking to establish a new or novel legal argument in this case, and instead they simply seek application of South Carolina's long-standing law on contract interpretation. The Court of Appeals has already noted that the purpose of title insurance is to put a mortgagee in the position it thought it held when the policy was issued, and our Supreme Court has already decided that a title insurance policy is ambiguous for failure to set forth a valuation date or define key terms, such as actual loss. While Appellants do not believe that the law of foreign jurisdictions should be determinative on this issue, it was noted to the Special Referee that other states have found that a loan policy is ambiguous for failing to set forth a valuation date: *Citicorp Sav. v. Stewart Title Guar. Co*., 840 F.2d 526 (1988), *CitiMortgage, Inc. v. Absolute Title Servs.*, U.S. Dist. WL 1108249 (2012), and *Equity Income Partners LP v. Chicago Title Ins. Co*.,

2012 U.S. Dist, LEXIS 126495 (D. Ariz., Sept. 6, 2012) and 2012 U.S. Dist. LEXIS 198059 (D. Ariz. November 13, 2013).

In sum, the Special Referee erred in concluding the Policies unambiguously set forth the date of foreclosure as the date to measure damages and that there is no ambiguity to the phrase "actual monetary loss or damage". Due to the ambiguities, the Policies should be interpreted "liberally in favor of the insured and strictly against the insurer", and this matter should be remanded to determine the Appellants' damages as of the Policy date.

2. Using the Policy Date is Consistent with the Purpose of Title Insurance.

Not only should the ambiguous terms of the Policy be interpreted strictly against the insurer and in a manner most favorable to the insured, a finding that the Policy date should serve as the date to measure damages is consistent with South Carolina's frequent declaration that the purpose of title insurance is to place both owners and lenders in the position they thought they occupied when the policy was issued.

"Title insurance is designed to protect a real estate purchaser **or mortgagee** against defects in or encumbrances on the title; the purpose of title insurance is to place the insured in the position he thought he occupied **when the policy was issued**." *Jericho State Capital v. Chicago Title*, 431 S.C. 437 (S.C. App. 2020)(emphasis added); See also, *Firstland Vill. Assocs. v. Lawyer's Title Ins. Co.*, 277 S.C. 184 (1981); *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, (2013); *Lyons v. Fid. Nat'l Title Ins. Co*., 415 S.C. 115 (Ct. App. 2015); *Loflin v. BMP Dev. LP*, 427 S.C. 580 (Ct. App. 2019). This is consistent with the first page of the subject Policies where it states the Company "insures, ***as of Date of Policy*** …, against loss or damage, … sustained or incurred by the insured …." (emphasis added).

Instead of evaluating the purpose of title insurance similarly for owners and lenders, the Order effectively assigns differing purposes for an insured under an owner's policy versus a

lender's policy. For an insured owner, the Order acknowledges the insured should be placed in the position he thought he occupied when the policy was issued, but for an insured lender who thought it was fully secured when the loan was made, the Order does not do so.

When the Policies were issued and the loans were made, the Appellants thought the position they occupied were as lenders *fully secured* by the 131 acres of waterfront Property, subject only to their own mortgages and a utility easement – but not the encumbrance created by the Ordinance and its proposed highway running through the middle of the Property. The significance of the title defect cannot be overstated – it was of such an effect that it rendered the title to the property unmarketable and would entitle a purchaser to rescind the sale. See, *Jericho State Capital v. Chicago Title*, 431 S.C. 437 (S.C. App. 2020).

Before Jericho State loaned $4.2 million to the borrower, it confirmed the loan would be fully secured based on its experience, appraisals, site visits, development plans, and most importantly, the Policy itself, which failed to disclose the Ordinance. Had Jericho State known of the massive highway, and had the Policy disclosed this very significant title defect, it would have never made the loan because it materially decreased the property's value, and therefore, failed to provide adequate security for the loan. When the borrower defaulted shortly thereafter, Jericho State still did not know of the highway, and had it known of it then, it would not have paid several million dollars to the first mortgage holder as cure payments. A short time after that, when it foreclosed on the property, Jericho State still did not know of the planned highway, and had it known at that time that the Property didn't secure its loan, it would not have made the $9 million bid and taken ownership of the Property subject to an $18 million first mortgage.

The Order evaluates the Appellants' position at future date that was unknown when the Policy was issued. By ignoring the Appellant's position when the Policy was issued, the Order suggests that even if the defect devalued the Property to a measly $1.00 as of the closing date, the

lost loan security suffered by the Appellants is wholly immaterial. This ignores common sense and how lenders and banks actually conduct business - they will make such a loan only if the property values in an amount sufficient to secure the loan amount. The borrower may default or may not default in the future - no one knows at the time the loan is made - but lenders want to be *fully secured* when making such a loan in the event the borrower does default. After all, the loan policies do not insure that the borrower will pay the loan. Thus, the property's value and the amount of safety and security it provides at the time the loan is absolutely critical to consummate the transaction.

Here, the Appellants' safety, security and basis for making the loans had evaporated due to the title defect, but they didn't know it when the loans were made. Wholly ignorant of the defect, Jericho State paid millions of dollars and took title to the Property subject to an enormous first mortgage that left Jericho State naked with no security. Due to the title defect, the position in which Appellants found themselves is nowhere near where they thought they were when they made the loan and when the Policies were issued. The Order fails to place the Appellants in the position they thought they occupied when the Policies were issued and it should therefore be reversed and the case remanded to determine damages as of the Policy Date.

3. Foreclosure is Not Necessary to Measure the Damage or Lost Value of the Appellants' Security Interest on the Policy Date.

"It may be said, generally, that anyone has an insurable interest in property who derives a benefit from its existence or would suffer loss from its destruction." *Benton & Rhodes v. Boden*, 310 S.C. 400 (Ct. App. 1993). An insurable interest is a right or benefit arising from the property or any relation to the property that results in harm to the insured if the property is affected by peril. *Id*.

The Order attempts to distinguish the nature of the loss an owner suffers due to a defect compared to that of a lender, explaining that an owner incurs an "actual monetary loss" on the

policy date due to the immediate reduction in its fee simple interest in the property, while a lender is protected only as to the priority and enforceability of its mortgage, which according to the Order, has no measurable value when the policy is issued. This misunderstands the nature of the lender's insured interest and ignores the "damage" to the lender when the property loses value due to a title defect. When the loan is made (and the title policy is issued), the only thing the lender has to secure payment in the event of default is the property value itself, and if that is destroyed due to a defect, then the lender' interest has suffered a loss, injury or deterioration.

In either scenario, a future transaction is not required to measure that loss – the owner is not required to sell the property to actualize his loss due to the defect and the lender does not have to foreclose to measure the amount of lost security due to a title defect. The values of both interests can be measured on the policy date by the purchase price, appraisal or otherwise.

This is illustrated in *Preservation Capital v. First American Title*, 406 S.C. 309 (2013), in which the S.C. Supreme Court recognized that lost security is a valid measure of a lender's loss or damage under a title insurance policy and that foreclosure is not required to calculate that loss. In *Preservation Capital*, the lender made a $3,075,000 loan, securing the loan with a mortgage on three parcels of land. The lender's title insurance policy insured that the borrower owned all three parcels. Two of the parcels were free of any title defect. However, the third parcel, known as the "King Street Parcel", was not actually owned by the borrower but instead by a company called Monarch Holdings.

The borrower sold one parcel for $250,000 and paid that amount to the lender. Thereafter, the borrower defaulted on the loan. The lender foreclosed on the remaining parcel owned by the borrower, and at that time, the loan balance had increased to $3,641.190. The lender made a credit bid of $3,250,000 and took title free and clear of any lien, leaving a loan balance of $391,190.

In the meantime, Monarch Holdings transferred the King Street Parcel to a third party. At the time of this transfer, the King Street Parcel was valued at $590,000 and subject to a $244,665 mortgage to a different bank. The lender claimed damages for the amount of equity in the King Street parcel ($345,335) that existed at the time it was transferred from Monarch Holdings to the third party. The Supreme Court concluded that the lender's damages were $345,335 – the amount of equity in the King Street Parcel that would have otherwise served to secure the balance of the loan. In other words, the King Street Parcel, as insured, secured the loan up to $345,335, but the lender lost that security due to the defect, and the Court measured the lender's damage under the title policy by its lost security for the loan without the need of foreclosure to calculate that number..

The Order fails to properly account for the damage suffered by the Appellants' due to their lost security resulting from the title defect, and it should therefore be reversed and the case remanded to determine damages as of the Policy Date.

B. JERICHO STATE'S SUCCESSFUL FORECLOSURE BID IS NOT A PAYMENT UNDER SECTION 2(c).

Chicago Title contends, and the Special Referee agreed, that Jericho State's foreclosure bid of $9 million was a "payment" on the loan balance that reduced coverage to zero pursuant to Section 2(c). This misapplies the meaning of "payment" and punishes Jericho State for not knowing that the Property was subject to a title defect.

Section 2(c) of the Policy's Conditions and Stipulations limits the available insurance as follows:

> **2. CONTINUATION OF INSURANCE**
>
> **(c) Amount of Insurance. The amount of insurance after the acquisition or after the conveyance shall in neither event exceed the least of:**
>
> **(i) the Amount of Insurance stated in Schedule A;**
>
> **(ii) the amount of the principal of the indebtedness secured by the insured mortgage as of Date of Policy, interest thereon, expenses of**

> **foreclosure amounts advanced pursuant to the insured mortgage to assure compliance with laws or to protect the lien of the insured mortgage prior to the time of acquisition the estate or interest in the land and secured thereby and reasonable amounts expended to prevent deterioration of improvements, but reduced by the amount of all payments made;**
> **(emphasis added)**
>
> [Jericho State Policy]

At foreclosure, the amount due to Jericho State under the second loan and mortgage was $7,490,031071. The Special Referee determined that because Jericho State took title to the Property by its successful bid of $9 million, it made a "payment" that extinguished the debt. However, this finding does not account for the combined effects of the first mortgage and the fact that Jericho State bid this amount without knowledge of the title defect. The Order fails to properly recognize that Jericho State received zero, or minimal, equity in the Property.

Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Koon v. Fares*, 379 S.C. 150 (2008). An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided. *Id*.

Under Section 2(c), it is far more reasonable, fair and just that a lender's successful foreclosure bid serves as a "payment" and satisfies the debt only if the lender receives equity in the amount of the debt. In other words, by making the payment, the lender is made whole because there has been a meaningful exchange whereby the debt cancellation and equity in the property effectively cancel each other out. This makes sense, as the term "payment" suggests something of value was given or received, and the term would logically exclude something that is valueless or meaningless.

On this point, the Order again relies on *Preservation Capital v. First American Title Ins. Co*., 406 S.C. 309 (2013). However, *Preservation Captial* actually supports a finding that a payment under Section 2(c) occurs when the lender actually receives equity in the subject property. As described above, the *Preservation Capital* lender foreclosed on a property that had no title defect and no higher priority mortgage. It purchased the property by way of a credit bid for $3,250,000. Since the property had no defect and no higher priority mortgage, the lender received property with an equity value of $3,250,000, thus allowing the Court to conclude that this value served as a "payment" toward the outstanding debt under Section 2(c).

When Jericho State made $9 million bid and took title at foreclosure, it knew of the $18 million first mortgage and made the bid believing the Property enjoyed full, unencumbered value. This makes sense, as a proper measure of a property's value at foreclosure is the foreclosure sale price plus the amount of existing mortgages and liens. *Arrow Bonding v. Warren*, 399 S.C. 603 (2012). Similarly, when evaluating whether a foreclosure bid is grossly inadequate, South Carolina recognizes the use of the "debt method", which adds the bid plus mortgages and liens assumed. *Winrose Homeowners' Ass'n v. Hale*, 428 S.C. 563 (2019). Thus, in this case, a fair measurement of the property's unencumbered value at foreclosure is $9 million plus $18 million, or $27 million. In such a case, Jericho State would have received $9 million in equity and its bid would fairly act as "payment" on the underlying debt under Section 2(c).

However, when Jericho State made its bid, it did not know of the title defect. It was not made whole by taking title to the Property at foreclosure; instead, its financial interests worsened. According to Jericho State, the title defect caused "immense" damage to the Property's value, it "destroyed" the Property's value, and otherwise caused the value of the Property to sink well below the loan amounts it secured. As a result, Jericho State did not receive $9 million in equity. In fact,

it contends it received zero equity because the $18 million first mortgage exceeded the diminished value of the property. Really, its bid purchased little more than ongoing carrying costs.

Unlike the lender in *Preservation Capital* who took ownership free and clear of any encumbrance or higher priority lien, Jericho State's bid cannot be used to establish a "payment" under Section 2(c). The bid was based on missing information and is an inherently unreliable measure of payment. Had the Policy disclosed the title defect, Jericho State would not have made any bid on the Property. As it stands, the bid did not pay the debt because there was no equity available to pay the debt.

The Order also attempts to find support in South Carolina's public policy, citing to *Ayers v. Fuess*, 217 S.C. 233 (1950) and *Ex parte Keller*, 185 S.C. (1937). *Ayers* permitted a lender to have multiple causes of action to collect one debt but cautioned that total recovery cannot exceed the total debt amount. Because Jericho State did not collect any equity from the Property and has not collected anything from Chicago Title, *Ayers* is inapplicable. Likewise, *Keller* is also inapplicable, as that case found that a bid in an indefinite sum that merely states that it is one dollar higher than the other bids is unfair and serves as grounds to set it aside. Jericho State's bid was not unfair to any other bidder, but it is unfair to treat its bid as a payment in full.

Jericho State is being penalized for not knowing the property suffered a defect. The Order treats the bid as a true bid, but the bid amount was premised on facts that proved to be false. The "payment" was essentially a bounced check that the Order now says serves as payment in full. The Order's interpretation of "payment" is unreasonable and leads to an unfair and absurd result. Because Jericho State received no equity at foreclosure and did not know of the defect, its bid should not be considered a "payment" as contemplated by Section 2(c) or as applied by the Supreme Court in *Preservation Capital*. Instead, "payment" should be construed in a reasonable, fair, and just manner. As such, the Order should be reversed, and the matter remanded for a

calculation of Jericho State's damages as of the Policy date. Alternatively, should this Court determine that the foreclosure date is the date to measure damages under the Policy, the matter should be remanded to determine the value of the Property as insured on that date, its value subject to the defect on that date, and the effect, if any, of Jericho State's credit bid.

C. LYNX JERICHO'S RELEASE OF THE FIRST MORTGAGE DOES NOT TERMINATE COVERAGE UNDER SECTION 9(c) OF THE POLICY.

Section 9(c) of the Policy's Conditions and Stipulations terminates Chicago Title's liability under the Policy if there is "Payment in full by any person or the voluntary satisfaction or release of the insured mortgage." Chicago Title contends, and the Special Referee agreed, that Lynx Jericho's release of the 1st Mortgage on December 22, 2023 terminates liability under the Policy.[2] This ignores, however, the fact that Lynx Jericho had already timely made its claim in 2013, and the claim has now been pending for over 12 years.

Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Koon v. Fares*, 379 S.C. 150 (2008); *Farr v. Duke Power Co*., 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided. *Id*. The law strictly construes insurance policies against the drafter and in favor of coverage for the insured. *General Acc. Ins. Co. v. Safeco Ins. Companies*, 314 S.C. 63 (Ct. App. 1994).

It is unreasonable to interpret Section 9(c) in a way that requires insureds to maintain their interest in the Property indefinitely and for as long as a timely made claim remains pending, even if that is for more than a decade of ongoing litigation and appeals. A more reasonable interpretation

[2] The Order notes that because the First Mortgage is released, Lynx Jericho cannot foreclosure on the Property, and therefore, it is forever ineligible to pursue damages under Section 7. For the reasons discussed above, Section 7 is ambiguous and the proper date to calculate damages is the date of policy, which remains applicable to Lynx Jericho.

of this section, and one that would avoid an absurd result, would be that once a claim is timely made for a loss or damage sustained during the policy period, that claim exists and is preserved until resolved, while Section 9(c) terminates liability for claims made and/or damages incurred *after* the mortgage is released. This avoids the unreasonable and absurd result of forcing an insured to maintain its interest indefinitely, while also providing certainty and protection to the insurer from claims for damages arising after the mortgage is released.

This reasonable interpretation is consistent with *Chicago Title Ins. Co. v. 100 Inv. Ltd. Partnership*, 355 F.3d 759 (4th Cir. 2004), in which the Court interpreted a similar provision in an owner's policy that terminated coverage upon the insured's transfer/sale of the property. The Court allowed coverage on the insured's claim for a defense that related to a loss that occurred *during* the policy period despite the subsequent transfer, but rejected an indemnification claim for damage suffered *after* it transferred ownership in the property.

This reasonable interpretation is also consistent with other parts of the Policy. As stated previously, the first page of the Policy states that Chicago Title "insures, **as of the Date of Policy**…against loss or damage…" (emphasis added). Similarly, in Section 7, the Policy states that it insures against "actual monetary loss or damage by reasons of matters insured against by this policy…." Lynx Jericho suffered its loss or damage as of the Policy date. This is exactly what the Policy insures.

The Order interprets Section 9(c) backwards: more favorably for Chicago Title, and strictly against Lynx Jericho, and by constructing a "heads I win, tails you lose scenario", which leads to unreasonable and absurd results for the insured who has made a timely claim. The insurer pays nothing, has deep pockets, and can wait out extended litigation, and it "wins" if the insured, whose lien is saddled with a defect on the collateral and doesn't have the resources of a large insurance company or must finally move on from the financially problematic situation. The insured "loses"

if it is forced to maintain its interest for years and years during litigation, incurring costs and forgoing opportunities to improve its situation, just to maintain a claim that was already timely made.

The Order concludes Section 9(c) is not ambiguous. However, Section 9(c) is silent as to its effect on *pending* claims and this creates an ambiguity. "Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Whitlock v. Steward Title*, 399 S.C. 619 (2012). Again, when reasonably interpreting Section 9(c) and with an effort to avoid absurd results, and in a manner liberally in favor of the insured and strictly against the insured, it makes sense that this Section only bars claims made and/or damages incurred after the mortgage is released, but not claims that are timely made.

Finally, the Order finds support for its conclusion in four cases from other jurisdictions. Three of those cases, *Joglor v. First Am. Title Ins. Co*, 261 F.Supp. 3d 224 (D.P.R. 2016)*, Morrison v. Wells Fargo Bank, N.A.,* 711 F. Supp. 2d 369 (M.D. Pa. 2010), and *First Midwest Bank v. Stewart Title Guar. Co.,* 823 N.E.2d 168 (Ill. App.Ct. 2005), are inapplicable because the insureds' claims were made *after* the insured released its mortgage, while only *RNT Holdings, LLC v. United Gen. Title Ins. Co., 179 Cal. Rptr. 3d 175 (Ct. App. 2014)* barred a claim made prior to the release. The *RNT* case conflicts with South Carolina's requirement that courts must interpret contracts reasonably and in a manner that avoids absurd results, construe exclusions most strongly against the insurer, and construe ambiguous provisions liberally in favor of the insured and strictly against the insurer.

As such, the Order should be reversed, and the matter remanded for a calculation of Lynx Jericho's damages as of the Policy date.

CONCLUSION

The Special Referee erred by concluding Section 7 is unambiguous and identifies the date of foreclosure as the date to measure damages. This section is ambiguous should be interpreted as described in *Whitlock* and in a manner favorable to the Appellants and consistent with South Carolina law. Moreover, the Special Referee erred in concluding Jericho State's bid acted as a "payment" under Section 2(c), as the bid was made without knowledge of the title defect and did not result in Jericho State obtaining equity in the Property. Finally, the Special Referee erred in concluding that Lynx Jericho's release of the First Mortgage terminated coverage, as the reasonable interpretation of Section 9(c) contemplates that it terminates coverage for claims made or damages incurred after such a release, not claims that were timely made. For these reasons, the Order should be reversed and the matter remanded to calculate the Appellant's damages as of the Policy date.

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