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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Karl A. Folkens, Special Referee
Fifteenth Judicial Circuit

Case Nos. 2015-CP-26-1084 / 2013-CP-26-5530 (combined)
Appellate Case No. 2026-000090

Jericho State Capital Corp. of Florida,..Appellant,

v.

Chicago Title Insurance Company, Respondent, AND Lynx Jericho Partners, LLC, Appellant, v. Chicago Title Insurance Company, ...Respondent

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FINAL BRIEF OF RESPONDENT

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II. Whether the lower court properly held that Section 2(c) of the Jericho State title insurance policy and the application of *Preservation Capital* reduces the amount of coverage for Jericho State in this case to $0.00?

III. Whether the lower court properly held that Lynx Jericho's release of its mortgage on all encumbered property terminated coverage under Section 9(c) of the Lynx Jericho title insurance policy?

STATEMENT OF THE CASE

On July 29, 2011, Appellant Jericho State Capital Corp. ("Jericho State") filed an action against Respondent Chicago Title Insurance Company ("Chicago Title") asserting causes of action entitled Breach of Contract-Recovery of Insurance Benefits; Breach of Contract-Breach of the Covenant of Good Faith and Fair Dealing; and Tortious Bad Faith Refusal to Pay Insurance Benefits and Bad Faith Failure to Investigate an Insurance Claim (the "Jericho State Action").

On February 16, 2012, Chicago Title filed its answer in the Jericho State Action denying the material allegations and asserting affirmative defenses.

On February 12, 2015, Lynx Jericho Partners, LLC ("Lynx Jericho") filed an action against Chicago Title asserting the same causes of action that Jericho State asserted (the "Lynx Jericho Action").

On May 13, 2015, Chicago Title filed its answer in the Lynx Jericho Action denying the material allegations and asserting affirmative defenses.

By orders of reference entered February 13, 2015, and November 13, 2015, the Jericho State Action and the Lynx Jericho Action were consolidated and referred to Karl A. Folkens as Special Referee.

Jericho State and Lynx Jericho (together, "Appellants") moved for summary judgment on May 19, 2016. Chicago Title moved for summary judgment on August 23, 2016. On January 28, 2017, Special Referee Folkens heard argument on the motions for summary judgment.

On July 10, 2017, Special Referee Folkens granted summary judgment in favor of Chicago Title, holding that certain policy exclusions barred coverage under the title policies. Appellants then appealed to this Court.

On June 10, 2020 (and in a final amended opinion issued on October 7, 2020), this Court affirmed in part, reversed in part, and remanded for further proceedings. *See Jericho State Cap. Corp. of Fla. v. Chicago Title Ins. Co.*, 431 S.C. 437, 848 S.E.2d 572 (Ct. App. 2020) ("*Jericho I*") (affirming on the lower court's dismissal of Appellants' bad faith causes of action but reversing the trial court on Appellants' breach of contract claims).

On June 7, 2022, the Supreme Court of South Carolina denied Chicago Title's petition for a writ of certiorari.

On January 23, 2024, after remand and additional discovery, Chicago Title moved for summary judgment. On April 2, 2024, Appellants filed a joint motion for summary judgment. On August 28, 2024, after the matter was fully briefed, Special Referee Folkens heard argument on the motions for summary judgment.

On July 14, 2025, Special Referee Folkens granted summary judgment in favor of Chicago Title and denied Appellants' motion for summary judgment, holding that certain terms and conditions of the title insurance policies either terminated coverage or reduced the available coverage to $0.

On July 17, 2025, Appellants filed timely motions to reconsider the order granting summary judgment in favor of Chicago Title and denying Appellants' motion for summary judgment, which the trial court denied by written order on December 15, 2025.

On January 13, 2026, Appellants timely filed their notice of appeal.

STATEMENT OF FACTS

A. The Property and the Ordinance.

This title insurance coverage case is about loan policies of title insurance related to approximately 131.40 acres of real property in Socastee Township in Horry County, South Carolina ("Property"). [R. p. 332–42, Peachtree Deed]. The Property borders the Intracoastal

Waterway. [R. pp. 339–40, Peachtree Deed Legal Description]. The McClam family owned the Property for decades until selling the Property in 2006. [R. p. 332–42, Peachtree Deed].

In 2002, the Horry County Council adopted Ordinance 88-202 ("the Ordinance"), which amended the official map of Horry County to show the future locations of a proposed highway. [R. p. 631–49, Ordinance]. The Ordinance added to the official map "the right-of-way identified as Alternative 1 for the proposed Carolina Bays Parkway from Highway 501 to Highway 17 By-pass as shown in the document entitled Carolina Bays Parkway, Phase V FEIS Conceptual Roadway Plans." The conceptual roadway plan is attached to the Ordinance. [R. pp. 633–49, Ordinance].

The Carolina Bays Parkway was depicted as crossing the Property in the roadway plan attached to the Ordinance. While recorded, the Ordinance was not indexed in the McClam title chain. [R. pp. 631–49, Ordinance].[1]

B. <u>The Sale of the Property to Peachtree, the Mortgages, and the Policies.</u>

In July 2006, Peachtree Properties of North Myrtle Beach, LLC ("Peachtree") purchased the Property from the McClam family for $22,500,000. [R. pp. 332–42, Peachtree Deed].

To finance its purchase of the Property, Peachtree obtained mortgage loans from R.E. Loans, LLC ("REL") and Jericho State. To secure repayment of the loan to REL, Peachtree gave REL an $18,520,000.00 first mortgage encumbering the Property ("REL Mortgage."). [R. p. 344–60, REL Mortgage]. To secure repayment of the loan to Jericho State, Peachtree gave a $4,263,888.00 second mortgage encumbering the Property to Jericho State ("Jericho State

[1] On July 9, 2002, the Ordinance, neither witnessed nor notarized, was recorded with the Horry County Register of Deeds and indexed under the name of "Horry County," not under the names of the then-owners of the Property, the McClams. [R. pp. 631–49, Ordinance]. The Ordinance was discussed in detail in *Jericho I*.

Mortgage"). [R. pp. 373–428, Jericho State Mortgage].

REL and Jericho each obtained a Chicago Title loan policy of title insurance. Chicago Title issued a $17,071,873.33 loan policy to REL, with a policy date of July 25, 2006, insuring the REL Mortgage ("REL Policy"). [R. pp. 362–71, REL Policy]. Chicago Title also issued a $4,263,888.00 loan policy to Jericho State, with a policy date of July 25, 2006, insuring the Jericho State Mortgage ("Jericho State Policy"). [R. pp. 430–43, Jericho State Policy].[2]

C. Foreclosure of the Jericho State Mortgage.

On June 8, 2007, Jericho State filed a foreclosure action seeking to foreclose its second-lien Jericho State Mortgage. [R. p. 445–61, Foreclosure Order]. The court entered a foreclosure order on November 7, 2007, ordering the sale of the Property subject to the REL Mortgage and finding $7,490,031.71 was due under the note secured by the Jericho State Mortgage ("Jericho State Note").

Jericho State was the successful bidder at the foreclosure sale with a credit bid of $9,000,000.00, which exceeded the amount due under the Jericho State Note. [R. pp. 466–75, Master's Deed]; [R. pp. 463–64, Answers to Chicago Title's First Requests for Admission]. Jericho State received a master's deed for the Property recorded February 26, 2008. [R. pp. 466–75, Master's Deed].

On February 26, 2008, Jericho State became the owner of the Property subject to the REL Mortgage.

D. The Condemnation Action.

On December 15, 2009, the South Carolina Department of Transportation ("SCDOT") filed

[2] The Jericho State Policy and the REL Policy are collectively referred to at times as "the Policies."

a condemnation action against Jericho State, REL, and Mortgage Fund ’08, LLC[3] (the “Condemnation Action”). [R. pp. 486–802, Condemnation Pleadings]. SCDOT alleged Jericho State was the owner of the Property and condemned 10.18 acres of the Property—the “Parkway Parcel”—for highway purposes as part of the Carolina Bays Parkway project. [R. pp. 803–807, Amended Condemnation Notice and Tender].

On November 19, 2014, the jury awarded $2,100,000.00 to Jericho State as just compensation for the taking of the Parkway Parcel. [R. pp. 477–79, Condemnation Judgment]. Jericho State released its interest in the judgment proceeds to Lynx Jericho. [R. p. 600, Appellants’ May 19, 2016 Memorandum in Support of Appellants’ Motion for Summary Judgment, 13]. The Condemnation Action caused the REL Mortgage to be discharged as a matter of law over the Parkway Parcel. However, the REL Mortgage remained as a valid first mortgage lien on the remainder of the Property.

E. <u>Assignment of the REL Mortgage to Lynx Jericho.</u>

REL assigned the REL Mortgage to Mortgage Fund ’08, LLC by an instrument recorded May 16, 2008. [R. pp. 486–88, Assignment to Lynx Jericho].

In 2011, Mortgage Fund ’08, LLC filed for bankruptcy. In 2012, with approval of the bankruptcy court, the REL Mortgage was assigned to Susan L. Uecker as trustee of the Mortgage Fund ’08 Liquidating Trust (the “Liquidating Trust”). The Bankruptcy Court approved the sale of the REL Mortgage to Lynx Jericho for $950,000.00 by Order entered April 3, 2013. [R. pp. 481–84, Bankruptcy Order]. The Liquidating Trust then assigned the REL Mortgage to Lynx Jericho by instrument recorded May 22, 2013. [R. pp. 486–88, Assignment to Lynx Jericho].

[3] REL assigned the REL Mortgage to Mortgage Fund ’08, LLC by an instrument recorded May 16, 2008, as discussed below. [R. pp. 486–88, Assignment to Lynx Jericho] (reciting history).

F. <u>Title Insurance Claims and the Ensuing Litigation.</u>

By letter dated February 26, 2009, Jericho State submitted a claim to Chicago Title based on the assertion that the Jericho State Policy protected against the Condemnation Action. [R. pp. 1106–07, Claim Letter]. Chicago Title denied that claim. [R. p. 1108–09, Claim Denial Letter].

On July 29, 2011, Jericho State filed the Jericho State Action against Chicago Title asserting causes of action for breach of contract and bad faith. [R. pp. 59–66, Complaint]. Chicago Title filed its answer on February 16, 2012, denying the material allegations of the complaint and asserting defenses. [R. pp. 67–80, Answer].

By letter dated June 21, 2013, (roughly a month after it acquired the REL Mortgage), Lynx Jericho submitted a claim on the Lynx Jericho Policy. [R. p. 1110–11, Claim Letter]. Chicago Title denied the claim. [R. p. 1113–20, Claim Denial Letter].

On February 12, 2015, Lynx Jericho filed the Lynx Jericho Action against Chicago Title asserting the same causes of action asserted by Jericho State in the Jericho State Action. [R. pp. 81–89, Complaint]. Chicago Title filed its answer on May 13, 2015, denying the material allegations of the complaint and asserting defenses, including the necessity for Lynx Jericho to foreclose to establish damages under the loan policy of title insurance. [R. pp. 90–105, Answer].

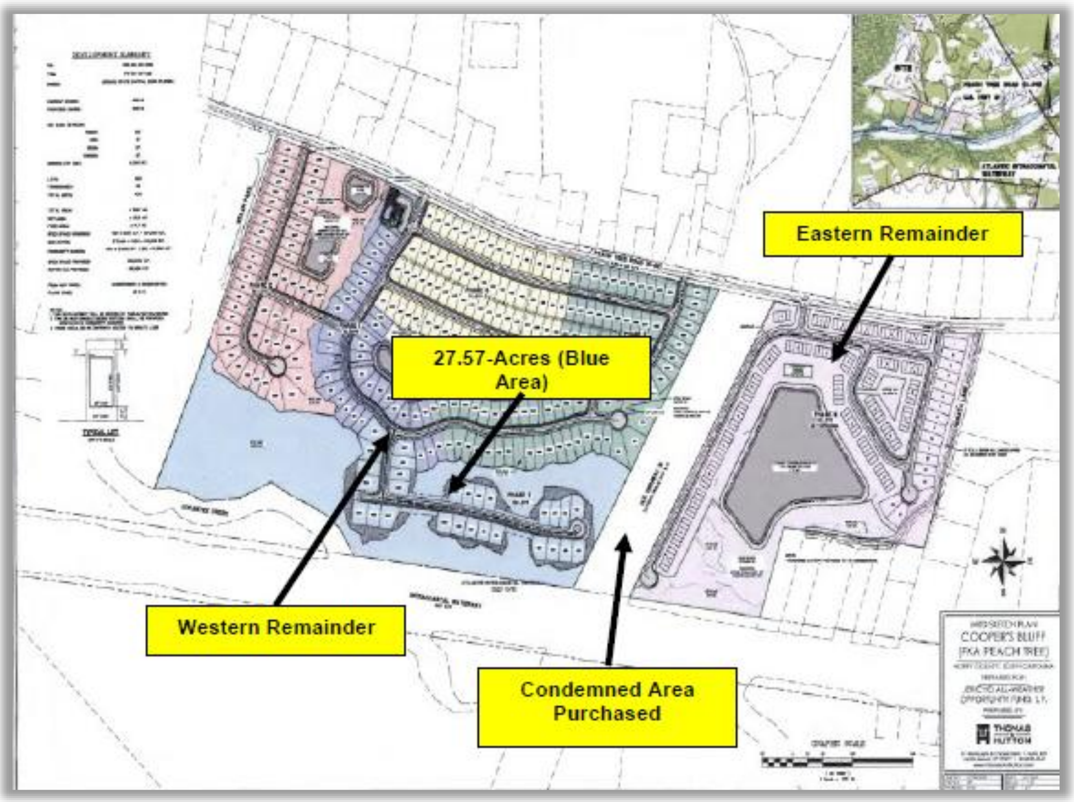
These cases were consolidated and referred to Special Referee Karl A. Folkens, who, pursuant to an Order entered July 10, 2017, granted summary judgment in favor of Chicago Title, holding that the Ordinance was excluded from coverage under certain exclusions in the Policies. [R. pp. 40–58, 2017 Summary Judgment Order].

G. <u>***Jericho I.***</u>

Lynx Jericho and Jericho State appealed. On June 10, 2020, this Court affirmed in part and reversed in part, reversing summary judgment for Chicago Title on the Appellants' breach of contract claims but affirming the dismissal of the bad faith/tort causes of action asserted against Chicago Title by both Lynx Jericho and Jericho State.[4] *See Jericho I* (affirming the trial court's dismissal of Appellants' bad faith cause of action).

H. <u>Jericho State Sold All Remaining Property, and Lynx Jericho Voluntarily Released the REL Mortgage.</u>

After the condemnation of the Parkway Parcel, the remaining portion of the Property was subdivided into three parcels: the "Western Remainder" containing 58.12 acres on the west side of the bridge that sits on the condemned Parkway Parcel, the "Eastern Remainder" containing 35.27 acres on the east side of the bridge, and the "Southern Remainder" containing 27.57 acres on the south part of the Property and fronts the Intracoastal Waterway. These parcels are depicted below:



[4] This Court later issued a slightly amended opinion on October 7, 2020, following a petition for rehearing by Chicago Title. *See Jericho I*.

58.12-Acre Parcel – Western Remainder

After this Court issued its opinion in *Jericho I*, Jericho State conveyed the Western Remainder to Lennar Carolinas, LLC ("Lennar") for $4,700,000.00 by Limited Warranty Deed dated July 13, 2020. [R. pp. 490–96, Western Remainder Deed]. Lennar developed the Western Remainder into the Cooper's Bluff Subdivision.

By Partial Release of Mortgage Lien dated August 5, 2022, and recorded on August 8, 2022, Lynx Jericho voluntarily released the lien of the REL Mortgage from the Western Remainder. [R. pp. 498–99, Western Remainder and Eastern Remainder release].

35.27-Acre Parcel – Eastern Remainder

After this Court ruled in *Jericho I*, on September 14, 2020, the Eastern Remainder was conveyed by quitclaim deed from Jericho State to Lynx Jericho Peachtree Phase III, LLC. By Limited Warranty Deed dated January 11, 2022, and recorded on March 14, 2022, Lynx Jericho Peachtree Phase III, LLC conveyed the Eastern Remainder to Lennar for $2,102,500.00. [R. pp. 501–06, Eastern Remainder Deed]. On April 28, 2022, Lennar conveyed this property to AG EHC II Multi State 1, LLC for $2,057,675.00.

By Partial Release of Mortgage Lien dated August 5, 2022, and recorded on August 8, 2022, Lynx Jericho voluntarily released the lien of the REL Mortgage from the Eastern Remainder. [R. pp. 498–99, Western Remainder and Eastern Remainder release].The Western Remainder and Eastern Remainder release provided in pertinent part:

> The real property described in **Exhibit A** attached hereto, which is incorporated herein by reference (the "**Real Property"**), is hereby released and forever discharged from the lien, operation and effect of the [REL] Mortgage and all claims and interests of the Mortgagee in and to the Real Property are forever terminated.

See [R. pp. 498–99, Western Remainder and Eastern Remainder release] (emphasis original).

27.57-Acre Parcel – Southern Remainder

After this Court ruled in *Jericho I*, Lynx Jericho Peachtree Phase II, LLC, having received title by quit claim deed from Jericho State, conveyed it to Beverly Homes, LLC, a local builder, by Limited Warranty Deed dated August 24, 2023, recorded on August 25, 2023. [R. pp. 508–15, Southern Remainder Deed]. The consideration stated on the deed is $1,100,000.00.

By Partial Release of Mortgage Lien dated and recorded on December 22, 2023, Lynx Jericho voluntarily released the lien of the REL Mortgage from the Southern Remainder, stating in pertinent part:

> The real property described in **Exhibit A** attached hereto, which is incorporated herein by reference (the "**Real Property"**), is hereby released and forever discharged from the lien, operation and effect of the [REL] Mortgage and all claims and interest of the Mortgagee in and to the Real Property are forever terminated.

See [R. p. 517–18, Southern Remainder release] (emphasis original).

The release of the Southern Remainder (following the Condemnation Action and the prior release of the Western and Eastern Remainders) completely released the REL Mortgage from the Property.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ARGUMENT

A. THE TRIAL COURT PROPERLY HELD THAT THE POLICIES ARE UNAMBIGUOUS AND THE DATE OF LOSS UNDER THE POLICIES IS THE DATE OF FORECLOSURE.

Appellants assert that the REL Policy and the Jericho State Policy, both loan policies of title insurance, are ambiguous as to date of loss because they do not contain an explicit date of loss provision and do not define "actual monetary loss or damage." Appellants therefore assert that the date of loss under the Policies is the date of policy, relying on *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012) (addressing a residential owner's policy).

Appellants' argument, however, disregards material distinctions between the unambiguous plain language of the Policies and the ambiguous *Whitlock* policy, contradicts South Carolina law, fails to recognize the distinction between the property interest insured by an owner's policy and a loan policy, and would render meaningless other provisions in the Policies.

"Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Pres. Cap. Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013). "The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions [and] [t]hat construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). "The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous." *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 151, 533 S.E.2d 597, 601 (Ct. App. 2000) (citing *S.S. Newell & Co. v. American Mutual Liability Ins. Co*., 199 S.C. 325, 19 S.E.2d 463, 466 (1942)); *see also Torrington Co. v. Aetna Cas. & Sur. Co*., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975) ("At the same time, the parties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties.").

"A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). While "[a]mbiguous or conflicting terms . . . must be construed liberally in favor of the insured and strictly against the insurer," *Pres. Cap. Consultants, LLC*, 406 S.C. at 316, 751 S.E.2d at 259, "[a] contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause," *see McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction." *S.S. Newell & Co. v. American Mutual Liability Ins. Co*., 199 S.C. 325, 19 S.E.2d 463, 466 (1942). "Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." *Id.*

1. The Policies unambiguously set forth a method of calculating "actual monetary loss or damage" that can only occur for a lender at foreclosure.

The REL Policy and the Jericho State Policy are loan policies of title insurance and unambiguously provide a detailed method of calculating loss in Section 7 of the Policies:

> 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.

See [R. p. 364 (REL Policy)]; [R. p. 432 (Jericho State Policy)] (emphasis added). In other words, for the insurer's payment obligation to arise under this "contract of indemnity," the insured lender must actually lose money because its collateral lost value from a covered title defect. *See generally First Fed. Sav. Bank of Brunswick v. Stewart Title Guar. Co.*, 317 S.C. 131, 140, 451 S.E.2d 916, 921 (Ct. App. 1994) ("a title policy indemnifies rather than guarantees the state of the insured title.").[5]

A lender—unlike an owner—does not hold title to the real estate in the loan policy of title

[5] *First Federal Savings Bank of Brunswick* relied on *Falmouth National Bank v. Ticor Title Insurance Company*, a loan title insurance policy case, for the proposition that ". . . the loss must be actual; the mere existence of a defect covered by the policy in and of itself is not sufficient to justify recovery." *First Fed. Sav. Bank of Brunswick*, 317 S.C. at 140, 451 S.E.2d at 921 (citing *Falmouth Nat'l Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058, 1062–63 (1st Cir. 1990)). *Falmouth National Bank* in turn recognized that a loss under a loan policy of title insurance was not determinable until "the note is not repaid and the security for the mortgage proves inadequate." *Falmouth Nat'l Bank*, 920 F.2d at 1063 ("Put another way, it is not the mortgage note that is insured, but rather, what is insured is the loss resulting from a defect in the security.").

insurance and cannot suffer "actual monetary loss or damage" from a "defect, lien or encumbrance insured against" until it attempts to realize on its collateral. Prior to foreclosure, the lender is a mere lienholder, not a titleholder. *See Jaffe-Spindler Co. v. Genesco, Inc*., 747 F.2d 253, 257 (4th Cir. 1984) ("Under South Carolina law a mortgagee is deemed to have only a lien on real property as opposed to actual title."); *see also Glover v. U.S.*, 164 U.S. 294, 296 (1896) (construing S.C. Code Ann. § 29-3-10 as making the position of a mortgagee merely that of a creditor with security, and not that of a legal owner); *Bartles v. Livingston*, 282 S.C. 448, 455, 319 S.E.2d 707, 711 (Ct. App. 1984) (describing the equity of redemption and its history in South Carolina, which allows the mortgagor the right to satisfy the debt and redeem the property until the right is foreclosed); *see generally Falmouth Nat'l Bank*, 920 F.2d at 1063 (cited by *First Fed. Sav. Bank of Brunswick*, 317 S.C. at 140, 451 S.E.2d at 921). A lender, who holds only a security interest, cannot suffer an actual monetary loss or damage prior to realizing on its collateral or taking title. Thus, a reduction in the value of loan collateral does not cause a lender to suffer "actual monetary loss or damage"—until the reduced value of the collateral fails to satisfy the debt when the lender tries to realize on the collateral.

Because an owner holds title at the time of purchase, an owner may suffer a loss due to a title defect at the time of its purchase. In comparison, because a lender only has a security interest, a lender cannot suffer a loss from a reduction in the value of its collateral until it attempts to realize upon the collateral at foreclosure. Accordingly, "actual monetary loss or damage" does not occur for the lender until foreclosure. *Cf. Stewart*, 341 S.C. at 151, 533 S.E.2d at 601 ("The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.").

2. *Whitlock* (an owner's policy case) is distinguishable and does not control the outcome here where the loan policy provides an unambiguous valuation method at the time of "actual monetary loss or damage."

Whitlock v. Stewart Title, heavily relied upon by Appellants, addressed an owner's title policy case with no method for valuation and no date for valuation, only coverage for undefined "actual loss." *See Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 732 S.E.2d 626 (2012). *Whitlock* held the date of loss was ambiguous in an owner's title policy and therefore used the date of the policy (the date advocated by the insured) to calculate the insured's loss. *Id.* at 613, 732 S.E.2d at 627. *Whitlock* confirmed, however, that "[w]here the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or *otherwise unambiguously provides for the method of valuation* as a result of the title defect, *such date or method is controlling*." *Id.* (emphasis added). An explicit date of loss is not required if the method of valuation makes clear the date of loss. *Id.* at 616, 732 S.E.2d at 628–29 (recognizing the ambiguous *Whitlock* policy failed to "identify the valuation date as the date of discovery of the title *or otherwise provide clear language that would require a valuation date in line with [the insurer's] position*.") (emphasis added).

As set forth above, the Policies "provide clear language that would require a valuation date in line with [the insurer's] position." *Id.* Section 7(a) establishes a clear method of valuation. To calculate the loss under Section 7 there must be "actual monetary loss or damage," which for a lender, cannot occur until it realizes upon the value of its collateral.

While South Carolina appellate courts have not interpreted the language of Section 7(a) or considered the appropriate date of loss under a loan policy of title insurance, the Georgia Court of Appeals persuasively addressed this issue. *See Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC*, 788 S.E.2d 542 (Ga. Ct. App. 2016). Applying similar rules of insurance contract interpretation,[6] *RM Kids* held that the date of foreclosure is the appropriate date of loss under the loan policy "because the foreclosure is when the insured actually incurs a covered loss." *RM Kids, LLC*, 788 S.E.2d at 548. This Court should follow this persuasive authority from a sister state as South Carolina appellate courts have done before in title insurance cases. *Cf. Pres. Cap. Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013) (adopting the reasoning of *Hodas v. First Am. Title Ins. Co*., 696 A.2d 1095 (Me. 1997), when interpreting coverage under a loan policy of title insurance); *First Fed. Sav. Bank of Brunswick*, 317 S.C. at 140, 451 S.E.2d at 921 (citing *Falmouth Nat'l Bank*, 920 F.2d at 1062–63)).

In *RM Kids*, Peachtree Bank, after a series of transactions, loaned BBC $11,400,000.00, secured by two tracts of land. *RM Kids, LLC*, 788 S.E.2d at 547. In connection with the Peachtree Bank loan, Old Republic issued a loan policy that failed to take exception to recorded environmental issues and restrictions in the title chain. *Id.* The *RM Kids* loan policy (like the Policies at issue here) "provided that it '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.'" *Id.* at 548.

RM Kids, LLC subsequently acquired the loan and then sued Old Republic seeking coverage under the title policy. *Id.* at 547. Before trial, the court denied Old Republic's motion to set the date of loss at the time of the foreclosure. *Id.* The jury rendered a verdict in favor of RM

[6] In Georgia, like South Carolina, "insurance policies are construed in favor of the insured and against the insurance company." *See Collier v. State Farm Mut. Auto. Ins. Co.*, 549 S.E.2d 810, 812 (Ga. Ct. App. 2001). *Cf. Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 ("Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer."). Applying this similar rule of construction for insurance policies under Georgia law, the Georgia court still held that no actual loss could occur under a loan policy of title insurance until foreclosure.

Kids on its breach of contract claim and awarded $7,130,370.00 in damages. *Id*. Old Republic appealed, arguing the trial court erred in ruling that the date of loss was the date of the loan closing[7] rather than the date RM Kids foreclosed on the subject property. *Id.*

Reversing the trial court, the Georgia Court of Appeals held the foreclosure date is the appropriate date of loss "because the foreclosure is when the insured actually incurs a covered loss." *Id.* at 548. The court discussed the difference between a loan policy and an owner's policy and distinguished Georgia's version of *Whitlock*,[8] which held that the date of loss under an owner's policy was the date of policy. *Id.* at 549. Specifically, the Court stated:

> … In determining "actual" loss or damage, it is generally held that "for purposes of title insurance, a mortgagee's loss is measured by the extent to which the insured debt is not repaid because the value of the security property is diminished or impaired by outstanding lien encumbrances or title defects covered by title insurance." And although Georgia's appellate courts do not appear to have specifically addressed *when* such loss to a mortgagee or lender *actually occurs*, "a majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer's liability to a mortgagee should be measured using the foreclosure date," reasoning that the foreclosure date is "appropriate because the foreclosure is when the insured actually incurs a covered loss."
>
> Upon consideration of this authority, we find the majority view to be persuasive and applicable here in Georgia. Indeed, while not explicitly adopted, this Court *has* previously acknowledged that "[c]onsideration of the amount obtained by a mortgagee through foreclosure of collateral is a recognized method for determining whether the mortgagee has suffered an actual monetary loss covered by the policy." Furthermore, as noted *supra*, the policy issued by Old Republic in this matter is one of indemnity, and as a result, it "provides for indemnity only to the extent that the insured's security is impaired and to the extent of the resulting loss that it sustains."

[7] While *RM Kids* does not explicitly state the date of the loan closing was the date of the title policy, the loan closing date appears to be the date the title insurer issued the policy. *See RM Kids, LLC*, 788 S.E.2d at 548 ("the title insurance policy issued by Old Republic to Peachtree Bank at the time the subject property was acquired by BBC insured . . . .").

[8] *See U.S. Life Title Ins. Co. of Dallas v. Hutsell*, 164 Ga. App. 443, 446, 296 S.E.2d 760, 764 (1982) ("the measure of damage for a breach by an insurer under a policy insuring the title against encumbrances or encroachments is the difference between the value of the property when purchased with the encumbrance or encroachment thereon, and the value of the property as it would have been if there had been no such encumbrance or encroachment.") (citing *Beaullieu v. Atlanta Title & Trust Co*., 60 Ga. App. 400, 402, 4 S.E.2d 78 (1939)).

> It does not, however, "guarantee either that the mortgaged premises are worth the amount of the mortgage or that the mortgage debt will be paid."
>
> Nevertheless, citing *U.S. Life Title Ins. Co. of Dallas v. Hutsell*, RM Kids argues that Georgia law has established that a loss under a title-insurance policy is measured as of the closing date. But as RM Kids concedes in its appellate brief, this case involved determining the date of loss under an *owner's* title-insurance policy rather than a *lender's* policy. Critically, defining and measuring actual loss "under a title insurance policy is not the same for the owner who has title to property, and a mortgagee who holds only a security interest in the borrower's title." This is because "[t]he fee interest of an owner is immediately diminished by the presence of lien since resale value will always reflect the cost of removing the lien[,]" but, as noted *supra*, "[a] mortgagee's loss cannot be measured *unless the underlying debt is not repaid and the security for the mortgage proves inadequate*." RM Kids attempts to blur this distinction by asserting that, under Georgia law, a deed to secure debt conveys outright legal title to a lender until the secured debt is repaid, and, thus, a lender and an owner's interests are identical. But belying this conflation, our Supreme Court has held "[a] security deed, although conveying the legal title, does so for the purpose of security only, and, upon the satisfaction of the obligation which it is given to secure, is automatically extinguished in effect...." Consequently, we do not find RM Kids's argument persuasive, and given the particular circumstances before us, we hold that RM Kids's loss in this matter occurred at the time it foreclosed on the subject property. Accordingly, we reverse the trial court's ruling in this regard, and remand the case for retrial.

Id. at 548–49 (footnotes and internal citations omitted) (emphasis original). Unlike the owner's policy in *Whitlock* (and in Georgia's *U.S. Life Title Ins. Co. of Dallas v. Hutsell*), the *RM Kids* policy and the Policies are loan policies. As confirmed in *RM Kids*, because loan policies indemnify against "actual monetary loss or damage," the date of loss under a loan policy is the foreclosure date—when the "actual monetary loss" occurs.

Accordingly, this Court should adopt the persuasive reasoning of *RM Kids* and affirm the lower court's holding that the date of loss under Section 7(a) in the Policies is the date of foreclosure.

3. *Preservation Capital*, and *Hodas* upon which *Preservation Capital* relies, already recognized this distinction in a loan policy.

The South Carolina Supreme Court implicitly recognized in *Preservation Capital* that actual monetary loss or damage to a lender occurs at foreclosure.[9] *Preservation Capital Consultants, LLC*, 406 S.C. at 317–18, 751 S.E.2d at 260. The *Preservation Capital* lender—whose mortgage did not attach to one of three collateral parcels as insured—incurred damages *after it foreclosed* and in the amount of equity that the lender could not recover from the parcel to which its lien did not attach. *Id.* The *Preservation Capital* lender obtained a $3,075,000.00 mortgage secured by three properties insured by a loan policy with a face amount of $3,075,000.00. *Id.* at 312, 751 S.E.2d at 257. One parcel was sold and partially released from the mortgage by agreement. *Id.* Following default by the borrower, the mortgage on the second parcel was found to be defective, with the parcel having been sold to a third party in a sale that would have provided $345,335.00 to the insured lender had the mortgage attached to the second parcel. *Id.* The insured lender foreclosed and purchased the remaining parcel (which was encumbered by the mortgage) with a credit bid of $3,250,000.00 when the total debt outstanding was $3,641,190.00. *Id.* The insured lender then filed a title insurance claim for the $345,335.00 that it was unable to recover due to the title defect on the second parcel. *Id.* Accordingly, the *Preservation Capital* loss was not a hypothetical loss in collateral value as of the date of the policy. While *Preservation Capital* addressed reduction in the amount of coverage under Section 2 of the policy, the facts are clear that the lender's "actual monetary loss or damages" was only determined after foreclosure left the debt unsatisfied.

Moreover, *Preservation Capital* followed the analysis from *Hodas v. First Am. Title Ins. Co.*, 696 A.2d 1095 (Me. 1997), in considering the application of Sections 2 and 9 of a loan policy. *Hodas*, also construing Section 2 and an insured's loss after foreclosure, recognized the distinction

[9] *Preservation Capital*, which addressed the application of Sections 2 and 9 of a loan policy of title insurance, is discussed in further detail below, *see infra* § B, with respect to the Jericho State Policy.

between a loan policy and an owner's policy:

> [T]he presence of a title defect immediately results in a loss to the holder of a fee interest since resale value will always reflect the cost of removing the defect. In contrast, *the holder of a loan policy incurs a loss only if the security for the loan proves inadequate to pay off the underlying insured debt* due to the presence of undisclosed defects.

Hodas, 696 A.2d at 1097 (emphasis added). The same analysis is true in South Carolina, where it cannot be known whether the underlying security is sufficient to satisfy the debt until the foreclosure is completed and the debt is determined because the mortgagor, until then, retains an equity of redemption in the property or the sale may satisfy the debt. *See generally Bartles*, 282 S.C. at 455, 319 S.E.2d at 711. The property may be redeemed in full at foreclosure or sold for more or less than the amount of the debt. *Id.* (considering a deficiency judgment).

Hodas follows what many other courts have noted around the country—there is no determinable loss for a lender under a loan policy of title insurance until foreclosure. *See Karl v. Commonwealth Land Title Ins. Co*., 24 Cal.Rptr.2d 912, 920 (Ct. App. 1993) ("At [the foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure . . . . It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time."); *see also Blackhawk Prod. Credit Ass'n v. Chicago Title Ins. Co*., 423 N.W.2d 521, 525 (Wis. 1988) (holding a mortgagee's insured loss is sustained only if the "mortgagee's debt is not repaid and the security for the mortgage proves inadequate," so the loss must be measured as of that date); *First American Bank v. First American Transp. Title Ins. Co*., 759 F.3d 427, 432 (5th Cir. 2014) ("a majority of courts from other jurisdictions have held that, in the absence of specific policy language, a title insurer's liability to a mortgagee should be measured using the foreclosure date"); *Associated Bank, N.A. v. Stewart Title Guar. Co*., 881 F. Supp. 2d 1058, 1066 (D. Minn. 2012) ("[T]he majority of courts considering the [date of valuation] issue have held that such loss cannot be measured until the note has been repaid and the security for the mortgage is shown to be inadequate ... The majority view comports with the nature of a title insurance policy."); *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F. Supp. 1252 (E.D.N.C. 1996) ("Since a lender suffers loss only if the note is not repaid, the discovery of an insured-against lien does not trigger recognition of that loss. Further, even though the lender's note is in default, an anticipated loss cannot be measured until completion of foreclosure because only then is there certainty the lender will not be paid in full. Consequently, it is clear that in the typical case the earliest a loss can be claimed on a lender's policy is at the time of completion of foreclosure."); *Falmouth Nat'l Bank*, 920 F.2d at 1063.

To be sure, Appellants read *Preservation Capital* differently and point to the lost equity from the failure of the lien to attach to one of the three parcels as support for their argument that foreclosure is not required to measure "lost security." *See Appellants'* Brief, § A(3), p. 17 (*Preservation Capital* "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.") (emphasis added). *Preservation Capital*, however, says no such thing. Rather than determining a loss without foreclosure, the *Preservation Capital* lender obtained a significant reduction in the amount of the debt (and in coverage under the title policy) because of the lender's bid at the foreclosure sale. With the debt unsatisfied but reduced by foreclosure, the *Preservation Capital* lender's loss became determinable. In other words, the failure of title to one third of the collateral did not result in "actual monetary loss" until the lender realized on the remaining collateral at foreclosure and that collateral was not sufficient to satisfy the lender's debt. In the hypothetical case where the mortgage collateral *did* satisfy the debt, the lender would have had no claim for the loss under the title policy, because the lender would not have suffered "actual monetary loss or damage" from a reduction in the value of collateral.

Moreover, Appellants' interpretation of *Preservation Capital* would mean the insured *Preservation Capital* lender suffered a loss (as of date of policy) before it ever realized on the remaining collateral, entitling the lender to payments from the title company for the undetermined loss in the value of the collateral *and* the right to realize on the collateral in the future. Such an interpretation plainly disregards the policy language in Section 7 (and Section 2, discussed below) stating, "[t]his 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." [R. 432 (Jericho State Policy)]. Applying Appellants' interpretation would effectively overrule *Preservation Capital* because none of the analysis in *Preservation Capital* could ever apply—if the date of loss is the date of the policy, there would never be an application of Section 2, which addresses continuation of coverage and the amount of coverage after an insured obtains title, because foreclosure can never occur on the date of the policy.

Moreover, a title defect alone does not trigger a loss for the lender. Under Appellants' interpretation of *Preservation Capital*, a title defect that rendered the collateral worthless, but where the borrower fully repaid the note, would cause a loss under a loan policy of title insurance for the full insured amount—where the lender never lost a dime. This Court already rejected such an argument—"Absent a finding adverse to the title or to the lien, as the case may be, no claim arose or loss occurred for which Stewart Title could be held responsible under its policies." *See First Fed. Sav. Bank of Brunswick*, 317 S.C. at 139, 451 S.E.2d at 920 (citing *Falmouth Nat'l Bank,* 920 F.2d at 1062–63) ("[T]he loss must be actual; the mere existence of a defect covered by the policy in and of itself is not sufficient to justify recovery.").

Accordingly, adopting Appellants' interpretation to construe the date of loss under the

Policies as the date of policy would implicitly overrule *Preservation Capital*.

4. Appellants' remaining arguments that the Policies are ambiguous as to date of loss are unavailing.

Appellants' assert Section 7(a)(iii) is ambiguous and that date of loss should be date of policy, but they fail to offer a reasonable alternative construction for when "actual monetary loss or damage" can occur for a lender. *Cf. Williams*, 409 S.C. at 595, 762 S.E.2d at 710 ("A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."). Without a reasonable alternative construction, Appellants' various ambiguity arguments are unavailing.

i. Appellants are incorrect, "actual loss or damage" is not ambiguous, and "loss" and "damage" are synonymous.

Appellants first assert that "loss" and "damage" are distinguishable, such that Section 7(a)(iii) is ambiguous as to when "actual monetary loss or damage" occurs. *See Appellants' Brief*, pp. 9–11. Specifically, Appellants assert "loss" and "damage" must have separate meanings and in any event are ambiguous. *Id.* at 11 (addressing "the distinction between an insured suffering an actual monetary loss and an insured suffering damage"). Appellants' suggested interpretation, however, disregards the language of Section 7(a) of the Policies, Appellants' own cited definitions from Black's Law Dictionary, and the plain meaning of "actual monetary loss" and "monetary damage" used by South Carolina courts.

The Policies do not distinguish between "loss" or "damage." The Policies establish the various methods to determining the amount of "actual monetary loss or damage" in Section 7(a) without a distinction for calculating "loss" one way and "damage" another. Accordingly, there is no basis to suggest a reasonable interpretation that "loss" and "damage" mean anything other than an actual loss of money.

Moreover, the cited definitions from Black's Law Dictionary do not draw the distinction suggested by Appellants, who quote the 1983 edition in their brief:

> 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."

See Appellants' Brief, p. 11 (quoting *Damage*, *Damages*, Black's Law Dictionary (5th ed. 1983)). "Damage" means "loss," and "damages" means compensation for "loss or damage"—Black's, like the Policies, is not drawing a distinction between "loss" and "damage." The Policies and Black's both use "or" not to suggest difference, but to suggest that two different words have similar meaning. *See Martin v. Carolina Water Serv., Inc.,* 280 S.C. 235, 238, 312 S.E.2d 556, 558 (Ct. App. 1984) ("the word 'or' may also be employed as a coordinate conjunction introducing a synonymous word or phrase or it may join different terms expressing the same idea or thing and it may be used as a particle to connect two words meaning the same thing.").

The Policies and Black's follow the usage of South Carolina's courts, which use the phrases "actual monetary loss" and "actual monetary damage" synonymously. *See Brummer v. Bankers Tr. of S.C.*, 268 S.C. 21, 25, 231 S.E.2d 298, 299 (1977) ("the bank knew it would be expected to pay its obligation under the letter of credit if the loan were not closed due to any reason other than Manhattan's breach of its commitment. The letter does not refer to '***actual monetary loss***.'") (emphasis added); *Johnson v. Williams*, 238 S.C. 623, 636, 121 S.E.2d 223, 230 (1961) ("The Court held that there was no evidence of monetary loss to respondent but submitted the issues to the jury, with an instruction that any verdict for respondent for actual damages would be limited to a nominal amount, holding, in effect, that the respondent was not required to show ***actual monetary loss*** in order to maintain her action.") (emphasis added); *Drew v. Waffle House, Inc.*, 351 S.C. 544, 548, 571 S.E.2d 89, 91 (2002) (quoting the federal Family and Medical Leave Act) ("in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any ***actual monetary losses*** ...") (emphasis added); *Hardee v. Penn Mut. Life Ins. Co. of Philadelphia*, 215 S.C. 1, 10, 53 S.E.2d 861, 864 (1949) ("We are, of course, not attempting to herein limit all of the contingencies to be submitted for the consideration of the jury, as for example, that it is conceivable that the insured may not suffer any ***actual monetary loss***. But the actual damages suffered by the insured cannot be declared as a matter of law to be only nominal, and the amount thereof, if any, should have been left to a finding by the jury.") (emphasis added);[10] *Houck v. Rivers*, 316 S.C. 414, 419, 450 S.E.2d 106, 109 (Ct. App. 1994) (*overruled on other grounds by Buffington v. T.O.E. Enters.*, 383 S.C. 388, 680 S.E.2d 289 (2009)) (A covenant may be enforced irrespective of the amount of ***actual monetary damage*** which results from its breach. The mere breach alone is grounds for injunctive relief") (citing 5 Powell On Real Property *Covenants Respecting the Use of Land* § 676) (emphasis added); *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814, 829 (1937) ("As aforementioned herein, Miss Blackmon had not suffered any discernible physical damages and no ***actual monetary damage*** from the alleged assault made upon her by Kirven."). To the South Carolina courts, "actual monetary loss" and "actual monetary damage" mean the same—and require an actual loss of money.

Contrary to Appellants' assertion, "actual monetary loss or damage" is not ambiguous. "Loss" or "damage" are synonymous, as the Policies, Black's, and South Carolina cases all show.

ii. Appellants are incorrect, and* Whitlock *does not control the outcome here.

Appellants also assert *Whitlock* controls the outcome here because the Policy lacks an

[10] *Hardee*, it is worth noting, equates "actual monetary loss" and "actual damages" in describing a loss of money.

explicit provision titled "date of loss." As set forth above, *Whitlock* is distinguishable because the Policies are loan policies, not owner's policies, and contain an unambiguous loss calculation formula. *See supra*, §§ A(1), (2). *Whitlock* does not require a "date of loss" provision if there is an unambiguous method to calculate the loss that requires a certain valuation date. *Whitlock*, 399 S.C. at 616, 732 S.E.2d at 628–29 (recognizing the need for the ambiguous policy to "identify the valuation date as the date of discovery of the title *or otherwise provide clear language that would require a valuation date in line with [the insurer's] position*.") (emphasis added). Section 7(a) sets forth a loss valuation method that can only be determined—for the lender under a loan policy of title insurance—at the time of foreclosure. *See supra*, §§ A(1), (2).

Moreover, the additional cases cited by Appellants do not support applying *Whitlock* to loan policies of title insurance. *See Appellants' Brief*, p. 11 (citing *Citicorp Svgs. of Illinois v. Stewart Title Guar. Co*., 840 F.2d 526 (7th Cir. 1988), *CitiMortgage, Inc. v. Absolute Title Servs., Inc.*, No. CIV.A. 11 C 1529, 2012 WL 1108249, at *3 (N.D. Ill. Apr. 2, 2012); *Equity Income Partners, Ltd. P'ship v. Chicago Title Ins. Co.*, No. CV-11-01614-PHX-GMS, 2012 WL 3871505 (D. Ariz., Sept. 6, 2012); and *Equity Income Partners, Ltd. P'ship v. Chicago Title Ins. Co.*, No. CV-11-01614-PHX-GMS, 2012 WL 12941133, at *3 (D. Ariz. Nov. 13, 2012)).[11] This line of cases is based on *Citicorp*, which applies a policy analysis that conflates policy language and an

[11] Notably, *Equity Income Partners* held the date of loss under the loan policy at issue was date of policy; however, it also held that a loss is not determinable until foreclosure occurs:

> As explained in the September 6th Order, ***the fact that loss cannot be calculated until foreclosure*** does not mean that the amount lost ... should be determined by the value of the property at the time of the foreclosure. . . . Rather, the purpose of waiting until foreclosure to measure loss is to determine the amount made from the sale so that it may be deducted from the original amount owed.

Equity Income Partners, 2012 WL 12941133, at *3 (Rule 59 Order) (emphasis added; internal quotation omitted).

insured’s reliance on the title policy to accurately state the status of title. *CitiMortgage, Inc.* and *Equity Income Partners* follow *Citicorp*’s reasoning. A reliance/expectations analysis about the status of title as represented in the policy does not apply in South Carolina, rendering the whole line of cases inapposite. *Cf. Citicorp Sav. of Illinois*, 840 F.2d at 531 (“As a practical matter, Stewart Title failed in its duty to check the lien's validity. It now seeks to have us stretch the policy's language so that Citicorp bears the costs of sale plus any decline in the property's value, even though without Stewart Title's mistake Citicorp never would have loaned any money to Charles Robinson.”).

The title company cannot represent the status of title to the insured in South Carolina because of South Carolina’s unauthorized practice of law rules, which require an attorney to opine on the status of title. *See State v. Buyers Service Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987) (holding a title company engaged in the unauthorized practice of law when it provided title information, prepared loan documents, and conducted closings); *see also Boone v. Quicken Loans, Inc*., 420 S.C. 452, 466, 803 S.E.2d 707, 714 (2017) (“We do not believe the effectiveness of the title certificates is altered by the fact that a non-lawyer created the abstract reviewed by the attorney, for we have held that ‘if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency by signing the report, title abstractors would not be engaged in the unauthorized practice of law.’”) (internal quotation omitted); *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 139, 714 S.E.2d 532, 534 (2011) (“Performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law.”); *Doe v. McMaster*, 355 S.C. 306, 313, 585 S.E.2d 773, 776 (2003) (“The title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process.”). *Buyers Service* addressed the following actions related to title by a commercial title agency:

> When a title search is necessary, Buyers Service sends an employee to the courthouse to abstract the title. The purchaser pays $50 for this service. The abstract is reviewed by a non-attorney employee who determines if the seller has fee simple title to the property. Buyers Service gives purchasers a fact sheet describing three ways to hold fee simple title in South Carolina. If a purchaser has questions, an employee of Buyers Service elaborates. The purchasers then tell Buyers Service how they wish to hold title.

Buyers Serv. Co., 292 S.C. at 428–29, 357 S.E.2d at 16. The trial court enjoined Buyers Service from "[p]roviding reports, opinions or certificates as to the status of real estate titles to persons other than attorneys licensed to practice law in the State of South Carolina," and the South Carolina Supreme Court went on to hold:

> We affirm the circuit court's injunction which provides Buyers Service may conduct title examinations and prepare abstracts only for the benefit of attorneys. The examination of titles requires expert legal knowledge and skill. For the protection of the public such activities, if conducted by lay persons, must be under the supervision of a licensed attorney.

Id. at 432–33, 357 S.E.2d at 18–19. Appellants have cited no evidence that Chicago Title provided an opinion on the status of title here, where an attorney supervised the closing. *Cf.* [R. pp. 332, 338, Peachtree Deed] (listing attorney in top left of first page under "Prepared By and Return to:" and on the affidavit of consideration).

Under a South Carolina title policy, the question is how and when to calculate the insured's loss under the insurance contract based on the defects at issue and the terms of the policy, not whether the insured relied on the title policy in any manner. *See, e.g., First Fed. Sav. Bank of Brunswick*, 317 S.C. at 140, 451 S.E.2d at 921 ("a title policy indemnifies rather than guarantees the state of the insured title."); *see also Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628 ("Insurance policies are subject to the general rules of contract construction" and "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions *as determined by the contract language*.") (internal citations omitted; emphasis added). *Citicorp, CitiMortgage, Inc.,* and *Equity Income Partners*—in contrast to *RM Kids*, noted above—all rely on considerations not present in South Carolina law.

Appellants also make a "public policy" argument along the same or similar basis as *Citicorp*. *See Appellants' Brief*, § A(2), pp. 14–16 (stating, among other things, that "[h]ad 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."). In South Carolina, however, considerations beyond the language of the title insurance policy, as Appellants assert here, are all beyond the contract, improper, and irrelevant. *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628 ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions *as determined by the contract language*.") (internal citations omitted; emphasis added).

Finally, Lynx Jericho would still be unable to prove "actual damage or loss" even if this Court were inclined to adopt date of policy as the date of loss. *Equity Income Partners*, cited by Appellants, adopted Appellants' preferred date of loss (not applicable under South Carolina as discussed above); however, it also recognized that foreclosure was necessary. "***[T]he fact that loss cannot be calculated until foreclosure*** does not mean that the amount lost ... should be determined by the value of the property at the time of the foreclosure." *Equity Income Partners*, 2012 WL 12941133, at *3 (Rule 59 Order) (emphasis added; internal quotation omitted). Lynx Jericho's loss is indeterminable even with the date of policy as the date of loss because it can no longer foreclose. The collateral has been released. *See* Section C below. Accordingly, applying Appellants' preferred date of loss would not relieve Lynx Jericho of the obligation to foreclose to establish "actual monetary loss or damage."

iii. Accepting Appellants' argument on date of policy as the date of loss would make other provisions in the Policies meaningless.

Appellants' argument that loss occurs as of the date of the policy for a lender is not supported in the language of the Policies. Any defect that could encumber the title must have existed as of the date of the Policies, as defined in the Policies. However, Sections 2 and 9 both apply in certain circumstances after the date of policy to reduce coverage: foreclosure (Section 2) or partial or full payment of the loan (Section 9). Appellants' interpretation would mean a loss is suffered immediately on the date of a policy—before any loan payment is made and when the loan is current, but the collateral is (arguably) reduced in value. If this were so, an indemnity payment would be owed under a lender's title policy *before* the loan was in default and *before* a lender could ever suffer any "actual monetary loss or damage."

Additionally, Section 9, which reduces coverage as loan payments are made, could never apply. Under Appellants' theory, even where a borrower repays the entire indebtedness, there is a recoverable loss under a loan policy if the loan collateral is reduced in value because of an insured title defect. Likewise, if the date of loss is the date of the policy, long before any foreclosure, then Section 2 could never apply for a lender taking title following foreclosure. Courts construe insurance policies as a whole and avoid an unreasonable interpretation reading out other provisions as Appellants ask this Court to do. *See, e.g., Yarborough*, 266 S.C. at 592, 225 S.E.2d at 349 ("As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions [and] [t]hat construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so.").

Contrary to Appellants' assertions, the only reasonable interpretation of the Policies, as a whole, is to determine the diminution under Section 7(a) at the time an "actual monetary loss or damage" actually occurs—which for a lender is at foreclosure.

Appellants' claims are resolved because loss is determined at foreclosure, with Appellants either having terminated coverage or reduced coverage to $0.00. Lynx Jericho, who has not and now cannot foreclose, cannot establish a loss under the REL Policy and in any event has terminated coverage under Section 9(c), as discussed below.

Jericho State, which did foreclose, satisfied its debt at the foreclosure sale with a bid above the amount due on its note, which under Section 2(c) of the Jericho State Policy and *Preservation Capital*, reduces coverage to $0.00 as discussed below.

B. THE TRIAL COURT PROPERLY HELD COVERAGE UNDER THE JERICHO STATE POLICY WAS REDUCED TO $0 PURSUANT TO SECTION 2(c) AND *PRESERVATION CAPITAL* BECAUSE THE FORECLOSURE SALES PRICE EXCEEDED THE AMOUNT DUE UNDER THE JERICHO STATE NOTE.

Jericho State's claim fails because the foreclosure sale brought more ($9,000,000.00—Jericho States's own successful bid) than the amount due under the note ($7,490,031.71).[12] Under *Preservation Capital*, a South Carolina Supreme Court case that squarely controls the outcome in this case, coverage is reduced to $0.00 under the Jericho State Policy when more than the amount of the note is paid through the foreclosure sale. Accordingly, this Court should affirm the trial court's ruling that no loss payment is due under the Jericho State Policy.

Preservation Capital considered the precise issue presented here—how coverage is determined under a loan policy of title insurance when a note is paid through a foreclosure sale. *See Pres. Cap. Consultants, LLC*, 406 S.C. at 309, 751 S.E.2d at 256. As noted above, the insured lender in *Preservation Capital* obtained a $3,075,000.00 mortgage secured by three properties and insured with a $3,075,000.00 loan policy. *Id.* at 312, 751 S.E.2d at 257. One parcel was sold and partially released from the mortgage by agreement. *Id.* Following default by the borrower, the

[12] *See* [R. pp. 455–56 (Foreclosure Order)] (finding that $7,490,031.71 was due under the note secured by the Jericho State Mortgage).

mortgage on the second parcel was found to be defective, with the parcel having been sold to a third party in a sale that would have provided $345,335.00 to the insured lender if the mortgage encumbered the second parcel. *Id.* The insured lender foreclosed and purchased the remaining parcel with a credit bid of $3,250,000.00 when the total debt outstanding was $3,641,190.00. *Id.*

The insured lender then filed a title insurance claim for the $345,335.00 that it was unable to recover due to the title defect on the second parcel. *Id.* Section 2(a) of the *Preservation Capital* title policy[13] controlled and governed "situations in which the insured lender, after default, acquires all or part of the collateral via foreclosure." *Id.* Section 2(c) of the *Preservation Capital* title policy identified the amount of insurance:

> (c) *Amount of Insurance:* The amount of insurance after the acquisition [shall not] exceed the least of:
>
> > (i) the amount of insurance stated in Schedule A; [or]
> >
> > (ii) the amount of 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 of 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*** . . . .[14]

Id. at 313, 751 S.E.2d at 258 (emphasis added). Applying these provisions, the South Carolina Supreme Court recognized that the amount of coverage was reduced under Section 2(c) by the winning bid amount at the foreclosure sale but also that more remained due under the *Preservation*

[13] Section 2(a) of the *Preservation Capital* title policy provided, "(a) *After Acquisition of Title:* The coverage of this policy shall continue in force . . . in favor of . . . an insured who acquires ***all or any part of the estate or interest in the land by foreclosure*** . . . ." *Pres. Cap. Consultants, LLC*, 406 S.C. at 313, 751 S.E.2d at 257. Section 2(a) of the Jericho State Policy is identical to Section 2(a) of the *Preservation Capital* title policy. *Cf.* [R. p. 431 (Jericho State Policy)].

[14] Section 2(c) of the Jericho State Policy is identical to Section 2(c) of the *Preservation Capital* title policy. *Cf.* [R. pp. 431–32 (Jericho State Policy)].

Capital note after the foreclosure sale—\$391,190.00.[15] Because the note was not paid in full through foreclosure, coverage remained for the insured lender's loss. *See id.* at 318, 751 S.E.2d at 261 ("coverage would be limited to \$452,731.48, as that amount is less than the \$3,075,000 policy limit.").

Preservation Capital also rejected an argument that payment of more than the *face amount* of the title policy under Section 9(b) reduced the coverage to zero. *Id*. In rejecting this argument, the court noted, "an insured mortgagee's coverage should continue after he purchases the mortgaged property at foreclosure ***provided there remains unpaid principal indebtedness***." *Id.* at 319, 751 S.E.2d at 261 (citing *Hodas*, 696 A.2d at 1097–98) (emphasis added).[16] Accordingly, the Court determined the insured lender's loss was covered where some unpaid principal indebtedness remained.

Section 2(c) in the Jericho State Policy mirrors Section 2(c) in the *Preservation Capital* policy. Applying the *Preservation Capital* analysis to the Jericho State Policy reduces the coverage amount under the Jericho State Policy to \$0.00 because, unlike the *Preservation Capital* foreclosure sale, the Jericho State foreclosure sale satisfied the debt in full. *Cf. Pres. Cap. Consultants, LLC*, 406 S.C. at 319, 751 S.E.2d at 261 ("an insured mortgagee's coverage should continue after he purchases the mortgaged property at foreclosure ***provided there remains unpaid***

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[15] The Court noted this amount "appreciated to \$452,731.48 by gaining interest from the date of foreclosure until the entry of judgment in this action." *Pres. Cap. Consultants, LLC*, 406 S.C. at 318, 751 S.E.2d at 260–61.

[16] *Hodas* reached the same conclusion with respect to Section 2(c):

> After an insured mortgagee purchases the mortgaged premises at foreclosure, coverage continues ***provided there remains unpaid principal indebtedness***. Coverage is limited, however, to the lesser of the outstanding indebtedness or the stated policy limit.

Hodas, 696 A.2d at 1097–98 (emphasis added).

principal indebtedness.") (emphasis added). In this case, Section 2(c) of the Jericho State Policy states the amount of insurance after acquiring the Property via foreclosure shall not exceed the lesser of the $4,263,888.00 policy limit or the amount of unpaid principal indebtedness secured by the Jericho State Mortgage, coupled with interest and expenses, but reduced by the amount of all payments made. After Jericho State acquired the Property, the borrower no longer owed anything under the Jericho State Note, which was paid in full ($9,000,000.00 foreclosure sale price *vs.* $7,490,031.71 due under the note). Jericho State's coverage thus was reduced to $0.00 under Section 2(c) of the Jericho State Policy and *Preservation Capital*.

South Carolina public policy also supports the application of *Preservation Capital*. In South Carolina, "a plaintiff can have but one satisfaction of his debt." *Ayers v. Guess*, 217 S.C. 233, 235, 60 S.E.2d 315, 315 (1950). Allowing Jericho State a recovery beyond the satisfaction of its note at foreclosure would violate this principle.

Additionally, South Carolina disfavors any activities or practices that have the effect of "chilling" the bidding at a foreclosure sale. *Ex parte Keller*, 185 S.C. 283, 292, 194 S.E. 15, 19 (1937) (courts should be "particularly jealous of the integrity of judicial sales" and all such judicial sales "must be made on free, fair and competitive bidding."). Allowing Jericho State to bid more than the amount due on the Jericho State Note and still claim a loss under the Jericho State Policy would allow a hypothetical insured lender to bid one dollar more than a third party whose bid would otherwise satisfy the note in full and still claim a complete loss under a loan policy of title insurance. *Preservation Capital*, *Ayers*, and *Ex parte Keller* do not allow such an outcome.

Conversely, Jericho State asserts the coverage reduction under Section 2(c) of the Jericho State Policy should not apply because Jericho State did not actually receive any equity after it bid over the amount of its debt at the foreclosure sale of the Property. Specifically, Jericho State asserts that it made a $9,000,000.00 bid on the Property subject to an $18,000,000.00 first lien but without knowledge of the later-discovered Ordinance; therefore, Jericho State did not realize any value from property because the property value was actually less than the amount of the first lien (according to Jericho State).

Hodas—followed by the South Carolina Supreme Court in *Preservation Capital Associates*—implicitly rejects this argument because the remaining indebtedness, not equity received, is the measure of the coverage reduction. *Hodas* considered a claim on a loan policy[17] where the defect was discovered *after* the foreclosure sale. *Hodas*, 696 A.2d at 1098. *Hodas* still applied a reduction in coverage for the amount of the lender's credit bid. *Id.* Interpreting the same policy provisions at issue here, *Hodas* reduced coverage in the full amount of the lender's credit bid as required by the *Hodas* policy because the partial credit bid reduced the amount owed on the underlying indebtedness. *Id. Hodas* did not consider what amount of equity the lender acquired—as Jericho State asserts—but instead reduced the amount of coverage by the amount of the lender's partial credit bid. *Id. Hodas* followed the plain policy language—"[i]n this case the continued coverage would indemnify [the lender] for any loss caused by undisclosed defects in the title of the formerly mortgaged premises, *but only to the extent of any unpaid indebtedness*." *See Hodas*, 696 A.2d at 1098 (emphasis added). Accordingly, whether Jericho State received equity is not the measure of the coverage reduction under the Jericho State Policy—what matters is whether there remained any unpaid indebtedness. Indisputably, the Jericho State debt was extinguished when Jericho State successfully bid an amount exceeding its debt at the foreclosure sale.

Moreover, Jericho State's position that equity received is the measure of "payment" under

[17] As set forth above, *Hodas* interpreted substantially similar policy language to Section 2(c) at issue in the Jericho State Policy and in *Preservation Capital*. *See Hodas*, 696 A.2d at 1097.

the Jericho State Policy would disregard the plain policy language and effectively re-writes Section 7(c) to reduce the amount of insurance to the "equity received" rather than the "payments made." *Cf. Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628 ("Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning.") (internal citation omitted). The South Carolina Supreme Court has already determined that a lender's bid at the foreclosure sale reduces the amount of coverage by the amount of the successful bid. *Pres. Cap. Consultants, LLC*, 406 S.C. at 319, 751 S.E.2d at 261. *Hodas* addressed a defect discovered post-foreclosure and reached the same conclusion. This Court should follow *Hodas*, *Preservation Capital*, and the plain language of the Jericho State Policy, and reject Jericho State's "no equity" argument.

Accordingly, the amount of insurance under the Jericho State Policy was reduced to $0.00, and this Court should affirm summary judgment in favor of Chicago Title on Jericho State's claim.

C. THE TRIAL COURT PROPERLY HELD THAT LYNX JERICHO TERMINATED COVERAGE UNDER SECTION 9(c) OF THE REL POLICY BY FULLY AND VOLUNTARILY RELEASING THE INSURED MORTGAGE.

By December 22, 2023, Lynx Jericho completely released the insured REL Mortgage. As a result, the REL Mortgage no longer encumbered any of the Property. *See* [R. pp. 498–99 (Eastern and Western Remainder Release); [R. pp. 517–18 (Southern Remainder Release); [R. pp. 477–79 (Condemnation Action judgment)]. With the complete release of the REL Mortgage, coverage under the REL Policy was terminated under Section 9(c). Accordingly, this Court should affirm the trial court's holding in favor of Chicago Title on the claims by Lynx Jericho.

Section 9(c) in the REL Policy provides:

> 9. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY
>
> ****

> (c) Payment in full by any person ***or the voluntary satisfaction or release*** of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations.

[R. pp. 362–71 (REL Policy)] (emphasis added).[18]

"[I]f the intention of the parties is clear, courts have no authority to torture the meaning of policy language to extend coverage that was never intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Wilson*, 344 S.C. 525, 544 S.E.2d 848, 850 (Ct. App. 2001). "The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists." *S.S. Newell & Co. v. American Mutual Liability Ins. Co.*, 199 S.C. 325, 19 S.E.2d 463, 466 (1942).

The plain language of Section 9(c) applies here because Lynx Jericho has executed, with respect to three separate transactions, a "voluntary satisfaction or release of the insured mortgage," which "terminate[d] all liability of the Company" under the REL Policy. The release of the

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[18] Section 2(a) in the REL Policy, which does not apply to the Lynx Jerico transfers here, provides:

> 2. CONTINUATION OF INSURANCE
>
> (a) After Acquisition of Title This coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly-owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject to any rights or defenses the Company may have against any predecessor insurers; and (iii) any governmental agency or governmental instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage.

Id.

Western Remainder, Eastern Remainder, and Southern Remainder (coupled with the prior condemnation of the Parkway Parcel) function as a complete release of the REL Mortgage. Accordingly, Chicago Title's liability under the REL Policy is terminated.

The Section 2(a) exception in Section 9(c) does not apply to Lynx Jericho. Prior to the release of the REL Mortgage, Lynx Jericho never foreclosed and therefore cannot be "an insured who acquires all or any part of the estate or interest in the land by foreclosure, [etc.]" or "a transferee of the estate or interest so acquired." *Cf.* [R. p. 363 (REL Policy)] at Section 2(a)(i), (ii). Lynx Jericho acquired no other interest in the Property. Thus, with the release of the REL Mortgage, Lynx Jericho has no interest in the Property at all. Section 2(a)(iii) does not apply because Lynx Jericho is not a "governmental agency or governmental instrumentality."

While South Carolina courts do not appear to have addressed this issue, several cases have addressed termination of coverage under a loan policy of title insurance after a voluntary, complete satisfaction or release of an insured mortgage. *See Joglor, LLC v. First Am. Title Ins. Co.*, 261 F. Supp. 3d 224, 233 (D.P.R. 2016) (construing an identical Section 9(c)); *RNT Holdings, LLC v. United Gen. Title Ins. Co.*, 179 Cal. Rptr. 3d 175, 184 (Ct. App. 2014) (construing materially similar policy language to Section 9(c) of the Policies); *Morrison v. Wells Fargo Bank, N.A.*, 711 F. Supp. 2d 369, 389 (M.D. Pa. 2010) (construing an identical Section 9(c)); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E.2d 168, 175 (Ill. App. Ct. 2005) (construing an identical Section 9(c)).

First Midwest Bank addressed the satisfaction and release of an insured $300,000.00 mortgage where the insured mortgage and another mortgage were satisfied as part of a "wrap around" refinance with a new $752,000.00 mortgage loan. The insured mortgage was satisfied and released in the refinance. The court held that an identical Section 9(c) terminated coverage under the lender's title policy because the insured mortgage was satisfied and the mortgage was released as part of the refinance. *First Midwest Bank*, 823 N.E.2d at 176 ("Once payment in full occurred, or the satisfaction or release of the insured mortgage occurred, both of which happened in this matter, all liability of the title company terminated.").

Morrison addressed an insured mortgage that encumbered the wrong property where two separate properties were owned by separate individuals in the same town with the same name (James E. Morrison). The *Morrison* plaintiff, who owned the improperly encumbered property, filed an action against the bank, which then added the title company as a third-party defendant. The bank separately filed an action against the correct owner to whom the loan was made and upon whose property the mortgage should have attached. The bank's separate action against the correct owner triggered the correct owner's father to pay the outstanding loan in full. The bank then asserted breach of contract claims against the title company under the title policy for failing to defend it against the *Morrison* plaintiff. The title company asserted that an identical Section 9(c) applied—"[p]ayment in full by any person or the voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in Section 2(a) of these Conditions and Stipulations." *See Morrison*, 711 F. Supp. 2d at 388. The court agreed, holding that the loan secured by the insured mortgage was paid in full and that "once the mortgage was paid [the title company's] obligations under the policy ended." *Id. at* 389.

RNT Holdings, LLC considered an insured trust deed recorded before the property owner received the vesting deed. The owner later sold the property, and the insured lender agreed to release the trust deed from the encumbered property—the reconveyed trust deed provided that "all sums secured by that deed have been fully paid" and that the insured lender released "all the estate, title and interest acquired and now held by [the insured lender] in [that deed]." *RNT Holdings,* *LLC*, 179 Cal. Rptr. 3d at 184 (internal citation omitted). The insured lender sued the title company for breach of contract asserting the mortgage never attached. The title company asserted that the mortgage did attach and that coverage was barred by Section 10(b) of that title policy, which provided "[t]he voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of [the title company] except as provided in Section 2 of these Conditions." *Id.* at 182 (same material provision at issue in the REL Policy). The court held that the insured lender had released the mortgage, which terminated coverage under the nearly identical title policy provision. Moreover, the court noted that even if the lien had not attached, then the full release would still have terminated the insurer's liability. *See id.* at 184, n. 6 ("a full release of the insured's interests in the pertinent property, by itself, terminates the insurer's liability.") (citing *First Midwest Bank*, 823 N.E.2d at 176–77).

Finally, *Joglor* considered coverage under a loan policy of title insurance after a settlement agreement and release fully satisfied two lines of credit where the mortgages securing the lines of credit were insured. *Joglor*, 261 F. Supp. 3d at 224. The debts secured by the mortgages were satisfied and released, but the mortgages and notes were assigned to a new lender. *Id.* at 229–30 Under Puerto Rican law, "the mortgage notes and mortgage liens were discharged when the Settlement Agreement was executed." *Id.* at 233–34. Accordingly, "Section 9(c) terminated [the title company's] two title insurance policies when the Settlement Agreement was executed." *Id*. at 235.

The plain language of the REL Policy and the cases are clear— Section 9(c) terminates the title insurer's liability when the insured's property interest is fully released. Indisputably, the REL Mortgage has been completely released as a lien against the Property. *See* [R. pp. 498–99 (Eastern and Western Remainder Release); [R. pp. 517–18 (Southern Remainder Release); [R. pp. 477–79 (Condemnation Action judgment)].

Conversely, Appellants point to *Chicago Title Ins. Co. v. 100 Inv. Ltd. P'ship*, 355 F.3d 759 (4th Cir. 2004), which held that a title insurer had a duty to defend an insured against a trespass claim made regarding the then-insured's conduct after the date of policy but before coverage terminated when the insured sold the property. Unlike *100 Investment*, Appellants are not seeking a defense for a lawsuit filed by a third party, which makes *100 Investment* factually inapposite. *100 Investment* actually *rejected* an analogous claim by the insured for indemnity because the insured sold the property at issue without a general warranty—terminating coverage—even though there was a complete failure of title on 1.45 acres. *Cf. 100 Inv. Ltd. P'ship*, 355 F.3d at 765 ("100 Investment's conveyance of the 1.145–acre Miller tract in July 1995 terminated any insurance coverage as to defects in title to that tract because the conveyance ended 100 Investment's 'estate or interest' in that tract and because 100 Investment did not give a general warranty of title."). Under Appellants' theory, the failure of title for the *100 Investment* insured existed as of the date of policy long before coverage terminated such that coverage for the indemnity claim should have been provided—in contrast to what *100 Investment* actually held. *100 Investment* does not address Section 9(c) or similar title insurance provisions.

Appellants also argue the Lynx Jericho claim was made before its voluntary release such that coverage does not terminate. This distinction is without a difference under the REL Policy (Section 9(c) is silent regarding pre-claim or post-claim releases as it does not have a time limitation) and under the case law both pre-claim and post-claim releases terminated coverage, as set forth above. *Cf. Stewart*, 341 S.C. at 151, 533 S.E.2d at 601 ("The judicial function of a court of law is to enforce an insurance contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.").

Appellants also argue that Lynx Jericho should not have been required to maintain its interest in the Property indefinitely through years of litigation, but it did not have to do so. However, it did have to foreclose on its interests rather than release them to avoid termination of the REL Policy. As a result, this case presents the unique circumstance where the lender *never* sought to realize on its collateral. Lynx Jericho, who acquired the REL Mortgage in 2013 and filed this action in 2015, was fully aware of Chicago Title's position that foreclosure was required to establish a loss under the REL Policy. *See* [R. pp. 259–61 (Chicago Title's May 1, 2024 Response to Appellants' MSJ) (reciting dates on which Chicago Title asserted foreclosure was necessary to determine loss)].[19] While Lynx Jericho made a claim before it voluntarily released its mortgage,

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[19] Specifically, Chicago Title asserted that foreclosure was necessary on the following dates, before briefing the same argument in its 2024 motion for summary judgment:

- **February 12, 2015**—Lynx Jericho filed its complaint [R. p. 81 Jericho Complaint];
- **May 13, 2015**—Chicago Title filed its answer, asserting Lynx Jericho must foreclose [R. pp. 102–03 Chicago Title Answer];
- **July 11, 2016**—Chicago Title raised the need to foreclose in its memorandum opposing Appellants' first motion for summary judgment [R. pp. 581–84];
- **August 23, 2016**—Chicago Title raised the need to foreclose in its memorandum in support of its motion for summary judgment [R. p. 545–49];
- **January 6, 2017**—Chicago Title argued the need to foreclose at the first summary judgment hearing before the special referee [R. pp. 207–12, 2017 Hearing Transcript]; and
- **August 7, 2023**—Chicago Title stated multiple times in responses to supplemental Interrogatories that without foreclosure, a loss has not occurred because the value of the collateral and the extent of the impairment is determined as of the foreclosure date. These responses were served after Lynx Jericho had partially released the REL Mortgage but before it fully released the REL Mortgage. [R. pp. 268–75 (Exhibit 1 to Chicago Title's Response in Opposition and Memorandum in Support of Summary Judgment)].

any actual loss or damage was not yet determinable because Lynx Jericho never foreclosed. As the Special Referee noted in the order on appeal, and as set forth in Section A above, an insured lender that has not yet realized on its collateral cannot prove that any defect in the title will cause it to suffer a loss, and a claim is not ripe until the lender has realized on the collateral. *See, e.g., Karl*, 24 Cal.Rptr.2d at 920 ("At [the foreclosure sale], the lender's note is extinguished and replaced by assets recovered on foreclosure . . . . It is now possible to measure the value of the recovery by the lender, and we believe the loss which is insured by the title policy should be recognized as of that time."); *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co*., 320 P.3d 406 (Colo. Ct. App. 2014) ("An insured mortgagee has not suffered an identifiable loss unless and until it forecloses its insured deed of trust and a title defect reduces the value of the property, thereby preventing the mortgagee from recouping its loan amount upon resale. If a title defect exists, but the value of the property is nevertheless sufficient to pay the mortgagee the loan amount, then there is no damage compensable under the loan policy."); *Marble Bank*, 914 F. Supp. at 1254 (it is clear that in the typical case the earliest a loss can be claimed on a lender's policy is at the time of completion of foreclosure). Lynx Jericho for its own reasons refused to foreclose on its collateral and released its mortgage interest before a loss could be determined. This decision by Lynx Jericho terminates coverage under Section 9(c), and this Court should affirm summary judgment for Chicago Title on this basis.

CONCLUSION

For these reasons, this Court should affirm the Special Referee's order granting summary judgment for Chicago Title on the claims by Lynx Jericho and Jericho State.

[Signatures on Following Page]

Respectfully submitted,

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August 26, 2026

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

RECEIVED
Aug 26 2026
SC Court of Appeals

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August 26, 2026