
Is the Lender's Title Policy Coverage Triggered in the Underlying Battle Between the Lender and the Homeowners Association in a Super-Priority Lien State?

25 Nov 2019

David H. Cox

In *Wells Fargo Bank, NA, as Trustee v. Fidelity National Insurance Company*, Case No. 3:19-cv-00241-MMD-WGC in the United States District Court for the District of Nevada (decided October 29, 2019), the trial court was recently confronted with an issue which has been brewing over the past several years in those states that provide Homeowners Association (HOA)/condominium liens with a super-priority status.

The facts of this case are similar to those being litigated in Nevada, Washington, D.C., and in other HOA super-priority lien jurisdictions.

The borrower purchased the property within a HOA on February 27, 1998 and obtained a loan in the amount of \$140,000 secured by a first deed of trust. At the time of purchase, Fidelity issued a lender's title policy in favor of the then lender "...and/or its successors and assigns as the insured." Ultimately, Wells Fargo, as trustee, became the assigned beneficiary of the deed of trust sometime in November 2016.

As one would expect, the HOA recorded a notice of delinquent assessment lien against the borrower's property on June 14, 2014 and the HOA sold the property at a lien foreclosure sale to the buyer on December 17, 2014.

Wells Fargo then filed a complaint against both the buyer and the HOA challenging the sale and the Court granted summary judgment in favor of Wells Fargo.

On a related and parallel track, Wells Fargo's predecessor provided written notice to Fidelity that the buyer claimed an interest in the property superior to the deed of trust. Fidelity denied the claim on the basis that the claim did not fall within the insuring provisions of the title policy and that the HOA lien was created after the date the policy was issued.

In this separate litigation, Wells Fargo asserted a number of bases for why coverage – particularly the duty to provide a defense – should be implicated and triggered. The trial court agreed with Fidelity's defenses and concluded that the claim was not covered under the lender's policy. Although both Exclusion 3(d) and Exception 13 were cited by Fidelity as the basis for the denial of coverage, the trial court elected to focus exclusively on Exclusion 3(d). For this court, the analysis was quite straight forward: since Exclusion 3(d) bars coverage for loss or damage by reason of defects or liens created subsequent to the date of policy and the date of policy is February 1, 2007 and the claimed defect or lien here did not arise until 2014, there is no coverage for this lien.

For those readers who are actively involved in either title insurance or HOA matters (or both), you may want to review the entire opinion as there were other related issues discussed and addressed.

This summary is not intended to contain legal advice or to be an exhaustive review. If you have any questions about this summary, feel free to contact our [Real Estate Litigation and Transactions Practice Group](#).

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TAGGED: Wells Fargo Bank NA as Trustee v. Fidelity National Insurance Company, United States District Court for the District of Nevada, Homeowners Association, condominium liens super-priority status, HOA super-priority lien jurisdictions