IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,712

PIONEER NATIONAL TITLE INSURANCE COMPANY, a foreign corporation,

Petitioner,

vs.

FOURTH COMMERCE PROPERTIES CORPORATION,

Respondent.

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# BRIEF OF AMICUS CURIAE FLORIDA LAND TITLE ASSOCIATION, INC.

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## INTRODUCTION

In this brief, the parties will be referred to as follow:

PIONEER NATIONAL TITLE INSURANCE COMPANY, as Petitioner; FOURTH COMMERCE PROPERTIES CORPORATION, as Respondent; and FLORIDA LAND TITLE ASSOCIATION, INC., as "association" or Amicus Curiae.

## STATEMENT OF THE CASE

The statement of the case and facts as set forth by Petitioner herein is adopted by this Amicus Curiae as an accurate summation of the facts and progress of the case in the Fifteenth Judicial Circuit, in and for Palm Beach County, appeal to the District Court of Appeal of Florida, Fourth District, and this review.

## JURISDICTION

This Court has jurisdiction to hear this cause pursuant to Art. V, Sec. 3 (b) (4), Fla. Constitution, as amended in 1980, in that the District Court of Appeal of the State of Florida, Fourth District, expressly certified two questions to this Court as a matter of great public importance.

## ISSUES INVOLVED

The following questions were certified to this Court by the District Court of Appeal of the State of Florida, Fourth District:

I

> Is an insurer under a mortgagee insurance policy that insures against loss or damage sustained or incurred by the insured by reason of the invalidity or unenforceability of the lien of the insured mortgage upon the estate or interest involved obligated, in a foreclosure of said mortgage, to provide a defense to the insured against the claim of a defendant raised by general denial that the insured mortgage was executed by the fee simple owner of the mortgaged property?

II

> Was the claim asserted in this case by way of a general denial that the insured mortgage was executed by the fee simple owner of the property subject to the insured mortgage litigation founded upon an alleged defect, lien, encumbrance, or other matter insured against by the policy in question obligating the insurer to provide a defense to the insured?

## ARGUMENT

The Florida Land Title Association, Inc. is a Florida incorporated trade association, and includes in its membership title insurance companies, their branch offices, agents, and abstractors doing business throughout the State of Florida.

The ultimate decision of this Court on the two questions certified to this Court by the District Court of Appeal of the State of Florida, Fourth District, will directly and substantially effect the interest of the association and its members, and will have a serious consequence for its members throughout the State of Florida.

The two questions which must necessarily be determined by this Court in these proceedings is a matter of paramount and judicial importance involving prime interpretation in certain particulars that could adversely affect hundreds of millions of dollars of real property on which members of the association, for the past several decades, have issued mortgagee title insurance policies relative to real property interests therein throughout the State of Florida. Such questions involved in these proceedings are of general and vital interest to each and every one of the members of the association.

Members of the association, collectively, have issued mortgagee title insurance policies relative to real

property and interests therein throughout the State of Florida pursuant to the mortgagee title insurance policy form filed with and approved by the Florida Department of Insurance, as required by Section 627.777, Florida Statutes.

Section 627.777, Florida Statutes, 18B Fla. Stat. Ann. 709, reads as follows:

> **627.777. Approval of forms**
>
> No title insurer shall issue or agree to issue any form of title insurance binder, title insurance commitment, preliminary report, title insurance policy, other contract of title insurance, or related form unless the same has first been filed with and approved by the department. No title guarantee or policy form shall be disapproved on the ground that it has on it a blank form for an attorney's opinion on the title. (Emphasis added.)

The premium rate structure for title insurance charged by insurers is promulgated by the Department of Insurance of this State, pursuant to Section 627.782, Florida Statutes.

Section 627.782, Florida Statutes, 18B Fla. Stat. Ann. 713, reads as follows:

> **627.782. Promulgation of rates**
>
> (1) The department shall have the power, and it shall be its duty, subject to the applicable rating section of this code, to promulgate the risk premium rates to be charged in this state by insurers for the respective types of title insurance contracts and services incident thereto and in connection therewith to promulgate rules incident to the applicability of such rates. Rates shall be made in accordance with the following:

(a) Due consideration shall be given to past loss experience and prospective loss experience, to a reasonable margin for underwriting profit and contingencies, to past expenses and prospective expenses for administration and handling of risks, and to other relevant factors.

(b) Rates may be grouped by classification or schedule and may differ as to class of risk assumed.

(c) Rates shall not be excessive, inadequate, or unfairly discriminatory.

(2) The risk premium shall apply to each $100 of insurance issued to an insured.

(3) The risk premium rates promulgated for title insurance shall apply throughout this state.

(4) The department shall, in accordance with the standards provided in subsection (1), review the risk premium as needed, but not less frequently than once every 3 years, and shall, based upon such review, revise the risk premium if results of the review so warrant. (Emphasis added)

The title insurers authorized to do business in this state, from the largest to the smallest, have relied upon the policy or guarantee form approved, and the rate promulgated, by the Department of Insurance. The policy or guarantee form used by all title insurers doing business in this state was developed by the American Land Title Association (American Land Title Association Loan Policy, as amended in 1970). Issuance of such policy or guarantee form is required by all Florida and national lenders.

Question I, certified by the District Court of Appeal of the State of Florida, Fourth District, must be answered in the negative.

The American Land Title Association Loan Policy form (as amended in 1970), approved by the Florida Department of Insurance, Conditions and Stipulations, in part, reads as follows:

> **3. Defense and prosecution of Actions--Notice of Claim to be Given by an Insured Claimant**
>
> (a) The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured, or defenses, restraining orders or injunctions interposed against a foreclosure of the insured mortgage or a defense interposed against an insured in an action to enforce a contract for a sale of the indebtedness secured by the insured mortgage, or a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy. (Emphasis added.)

It is clear that the meaning of this provision of the policy is that the insurer is only required to indemnify the insured for legal costs arising from defenses interposed in litigation upon an alleged defect, lien, encumbrance, or other matter insured against by the policy.

A mortgagee in a foreclosure action has the burden of proving the allegations in the Complaint.

In Hart Properties, Inc. v. Slack 159 So2d 236 (Fla., 1964), the Court held that the issues in a cause are made solely by the pleadings.

Pursuant to the Rules of Civil Procedure, litigants may reach issues of law and fact by an affirmative

and a defensive pleading.

A general denial simply puts the allegations at issue.

The filing of a general denial puts at issue the allegations that the fee simple owner executed the mortgage; and, thereafter, the mortgagee has the burden of proving the allegations with sufficient evidence to support the allegations.

A general denial by the insured mortgagee does not cause any addition or increase in costs for the mortgagee.

A litigant such as a mortgagee, in this case, obligates itself to pay attorney's fees and costs; however, the mortgagor has the burden of costs and attorney's fees pursuant to the provisions of the mortgage or note.

In Ferris v. Nichols, 245 So2d 660 (Fla. 4th DCA, 1971), the plaintiff, in a five-paragraph Complaint, alleged that defendant had executed and delivered to the plaintiff a promissory note; that the note was due; that defendant had made no payments on the note, and was, therefore, obligated to the plaintiff in the face amount of the note. The defendant answered the complaint as follows: "Defendant denies each and every allegation of paragraphs 1, 2, 3, 4, and 5 of Plaintiff's Complaint." No affirmative defenses were asserted by the defendant in the answer. A summary judgment was entered in favor of the plaintiff. On appeal, one of the primary issues was whether the defendant's denial

of all five paragraphs of the plaintiff's complaint raised a factual issue in regard to the execution of the note. The Court held that no such factual issues had been raised, stating:

> In our opinion, the answer of the defendant was simply a general denial of the assertions in the complaint. As such it had the legal effect of admitting that the defendant did sign the note and eliminating from the action any issue as to signature. Had the defendant desired to deny that he signed the note, he should have done so by a specific denial addressed to the appropriate allegations in the complaint. This burden is placed on the defendant by the Uniform Commercial Code which provides in F.S. 1967, section 673.3-307(1), F.S.A.:
>
> > "Unless specifically denied in the pleadings each signature on an instrument is admitted. * * *"

In Goode v. Federal Title and Insurance Corporation, 162 So2d 269 (Fla. 2nd DCA, 1964), the Court held that it was necessary for an insured to prove damages in a foreclosure action before it is entitled to a recovery of costs and attorney's fees.

If evidence is sufficient to prove insured's allegations in a foreclosure action, the insured has not sustained a loss.

Rule 1.110(c), Florida Rules of Civil Procedure, reads as follows:

> **Rule 1.110. General Rules of Pleading**
>
> **(c) The Answer.** In his answer a pleader shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the

> averments on which the adverse party relies. If the defendant is without knowledge, he shall so state and such statement shall operate as a denial. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, he shall specify so much of it as is true and shall deny the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, he may make his denials as specific denials of designated averments or he may generally deny all of the averments except such designated averments as he expressly admits, but when he does so intend to controvert all of its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial.

In Louisville Title Insurance Company v. Guerard 409 So2d 514 (Fla. 5th DCA, 1982), the Court held that if an insurer is not liable under the policy to pay the insured for a judgment arising out of a claim, the insurer has no duty to defend the action for the insured.

Under the title insurance policy, there is no language which imposes upon a title insurer the costs and attorney's fees of the burden of proof incurred by insured in the prosecution of a mortgage foreclosure action.

The defense to be provided under the policy provisions are not the general denials or denials under Rule 1.110 (c) of the Florida Rules of Civil Procedure, but defenses against the foreclosure action interposed by the defendant.

Question II, certified by the District Court of Appeal of the State of Florida, Fourth District, must be answered in the negative.

No claim resulted under the policy simply by general denial, as stated in Answer to Question I, certified by the Court of Appeal to this Court. Since the general denial made pursuant to Rule 1.110 (c), Florida Rules of Civil Procedure, was only for the purpose of reaching the issues, is not a defense interposed by a defendant in a foreclosure action that obligates a title insurer under the policy.

The claim asserted in this case was for the costs and attorney's fees incurred in the mortgage foreclosure, and is not a claim founded upon an alleged defect, lien, encumbrance, or other matter, as stated in Question II.

The claim was for costs and attorney's fees, not only for proving the allegations of the Complaint in the mortgage foreclosure, but also to defend ten affirmative defenses, and five counterclaims, all of which occurred after the effective date of the policy, and which did not involve the mortgage being foreclosed; instead, all such acts involved a contract of sale entered into after the effective date of the policy.

The policy does not insure any defects, liens, encumbrances, or other matters which come into existence after the effective date of the policy.

In addition, any defects, liens, encumbrances, or other matters which the insured creates are excluded from the policy.

The title insurer, pursuant to the provisions of the policy, has no duty to provide for the defense of the insured in a mortgage foreclosure action when the defenses interposed are not insured against.

In this case, since the general denial did not interpose a defense, and the affirmative defenses and counterclaims were not covered by the policy, the insurer had no obligation to provide a defense.

It is respectfully submitted that we must agree with the dissenting opinion written by Judge Letts in the District Court of Appeal, that, should the majority opinion stand, the future:

> . . . will require title insurance companies to pay the costs and fees of foreclosing mortgages every time any junior lien holder, who acquires his interest years after the policy is issued, files a general denial when named in a foreclosure suit.

The doctrine set forth in this case by the District Court of Appeal will subject title insurance companies to greater liability, forcing the Department of Insurance to promulgate a dramatic increase in premium rates for the future real property buyers in this state. Such increase will be in direct relation to the increase in liability of title insurers doing business in this state.

## CONCLUSION

In a mortgage foreclosure action, a general denial of an allegation in the Complaint is not a defense interposed by a defendant; and, therefore, does not obligate a title insurer, pursuant to the provisions of a title insurance policy, to provide for the defense of an insured. The insurer, under the policy provisions, has the duty only to provide a defense to matters insured against.

Based upon the foregoing arguments and authorities cited, it is respectfully submitted by this Amicus Curiae that the answers to Questions I and II, certified by the District Court of Appeal of the State of Florida, Fourth District, be in the negative.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to: J. A. PLISCO, 2875 South Ocean Boulevard, Suite 213, Palm Beach, Florida 33480; LARRY KLEIN, Suite 201, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401; THOMAS D. DeCARLO, of the firm of Gunster, Yoakley, Criser & Stewart, P.A., Post Office Box 71, Palm Beach, Florida 33480; and to PAUL J. STICHLER, Post Office Box 2671, Orlando, Florida 32802, this 22nd day of April, 1985.

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