IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 66,712

PIONEER NATIONAL TITLE INSURANCE COMPANY,

Petitioner,

vs.

FOURTH COMMERCE PROPERTIES CORPORATION,

Respondent.

PETITIONER'S INITIAL BRIEF

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PREFACE

The decision of the Fourth District Court of Appeal from which this review is taken is found at 10 FLW 89 (December 19, 1984), rehearing denied and questions certified, 10 FLW 561 (March 6, 1985).

Petitioner, Pioneer National Title Insurance Co., was the Defendant at the trial court and Appellee at the Fourth District, and is referred to herein as "Pioneer".

Respondent Fourth Commerce Properties Corporation, was the Plaintiff at the trial court and Appellant at the Fourth District, and is referred to herein as "Fourth Commerce".

References to the record on appeal refer to the record as delivered to the Fourth District, and are indicated by the letter "R" followed by the page of the record as prepared by the Clerk of the Circuit Court.

ISSUES PRESENTED FOR REVIEW AS FRAMED BY THE FOURTH DISTRICT COURT OF APPEAL

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?

STATEMENT OF THE CASE AND OF THE FACTS

In August, 1975, LE CHALET, INC. ("Le Chalet"), the owner of a vacant parcel of real estate needed financing in order to develop the property and, thus, approached VIRGINIA NATIONAL BANK ("VNB") for a loan. VNB agreed to lend Le Chalet $5.5 million and as security therefore required Le Chalet to execute and deliver to VNB a first mortgage on the property.

In connection with the loan transaction, on August 28, 1975, Pioneer National Title Insurance Co. ("Pioneer") issued to VNB a mortgagee title insurance policy which insured that, as of the effective date of the policy, VNB's mortgage was prior to any other lien or encumbrance on the property. The material policy language provided:

> Subject to the exclusions from coverage ... Pioneer National Title Insurance Company ... insures, as of date of policy shown in Schedule A, against loss or damage ... and costs, attorneys' fees and expenses ... sustained or incurred by the insured by reason of:
>
> ....
>
> 5. The invalidity or enforceability of the lien of the insured mortgage ...;
>
> 6. The priority of any lien or encumbrance over the lien of the insured mortgage; (R. 5).

In the exclusions section, the policy provided that the policy did not insure against:

> 3. Defects, liens, encumbrances, adverse claims, or other matters ...
>
> (a) created, suffered, assumed or agreed to by the Insured
>
> ...
>
> [or] (d) attaching or created subsequent to Date of Policy .... (R. 5)

Subsequent to its issuance on August 28, 1975, this policy was amended twelve times by endorsement. These endorsements altered or amended the legal description of the property, provided for the extension of the due date of the note executed by Le Chalet, and increased the amount of the insurance from $5.5 million to $7.5 million. The twelfth and final endorsement bore an effective date of January 3, 1979. This is a key date in this case, because, as will be seen, all of the claims against Pioneer in this case relate to events which took place subsequent to this date, a fact which Pioneer has always maintained operates to exclude such events from coverage under the exclusion set out in 3(d) above, the "created subsequent" exclusion.

On or about February 1, 1979, an entity named Steckmar National Realty Corp. ("Steckmar") entered into a contract with Le Chalet to purchase the property. The purchase and sale contract was recorded in the Public Records of Palm Beach County, Florida. When the sale of the property failed to close, Steckmar filed suit against Le Chalet seeking specific performance of the contract. Steckmar ultimately lost this litigation, and the trial court's order in that suit was affirmed by the Fourth

District Court of Appeal. The contract for purchase and sale, however, remained of record in the public records.

On April 1, 1980, VNB assigned its first mortgage to Fourth Commerce Properties Corporation ("Fourth Commerce"). As of the date of this assignment by VNB, Le Chalet was already in default on the note and mortgage, and Fourth Commerce immediately instituted foreclosure proceedings. Fourth Commerce joined Steckmar as a defendant in the foreclosure action due to the existence of the recorded purchase and sale contract.

Paragraph 13 of Fourth Commerce's foreclosure complaint provided:

> On August 28, 1975, Conrad J. DeSantis, individually and as trustee, who on said date was the owner in fee simple of the lands mortgaged as alleged in this paragraph, made, executed and delivered a promissory note and mortgage securing payment of said promissory note to VNB: the mortgage was recorded on August 28, 1975 in Official Record Book 2452, Page 156. This mortgage shall hereinafter be referred to as mortgage number 1. Copy of said mortgage is attached hereto as Exhibit "2".
>
> (a) Said mortgage number 1 was modified by that certain document dated April 1, 1976 and recorded April 7, 1976 in Official Record Book 2525, Page 1821. Said document is attached hereto as Exhibit "3".
>
> (b) Said mortgage number 1 was further modified by that certain document dated February 1, 1977 and recorded March 1, 1977 in Official Record Book 2646, Page 159. Said document is attached hereto as Exhibit "4".

Steckmar responded to this Complaint by filing an answer, affirmative defenses, and a five-count counterclaim. Each of the Steckmar affirmative defenses and counterclaims were based

upon claims arising out of Steckmar's February 1, 1979 contract to purchase the real estate from Le Chalet. In response to paragraph 13 of Fourth Commerce's Complaint, Steckmar answered, "Denied except as to the existence of public records."

On June 9, 1980, Fourth Commerce's trial counsel sent Pioneer a copy of Steckmar's Answer, Affirmative Defenses and Counterclaims; however, Fourth Commerce did not then assert that the filing of this pleading gave rise to any duty to "defend" on the part of Pioneer the action. (R. 85).

In June, 1980, the trial court entered Final Judgment against Steckmar on its contract based claims. Fourth Commerce forwarded a copy of this Final Judgment to Pioneer on June 25, 1980. Steckmar filed a Motion for Rehearing, a copy of which was also forwarded to Pioneer on July 9, 1980. After the trial court denied Steckmar's rehearing motion, it appealed to the Fourth District Court of Appeal, which affirmed the Final Judgment against Steckmar.

In September, 1980, while Steckmar's appeal was pending in the Fourth District, Fourth Commerce for the first time made its demands on Pioneer. Fourth Commerce demanded that Pioneer reimburse Fourth Commerce for the costs (all costs, including all attorneys' fees) incurred in foreclosing its mortgages, in defending against Steckmar's appeal, and in defending against Steckmar's counterclaims, a total of $128,250.00. (R. 40-41). Pioneer responded to Fourth Commerce's demands by denying that it had any obligation to provide coverage, basing its position specifically on exclusions 3(a) and 3(d) of the insurance policy here involved. (R. 42-43).

In response to Pioneer's refusal to provide coverage to Fourth Commerce, Fourth Commerce filed its Complaint and instituted the action that is the subject of the case at bar. Fourth Commerce's Complaint alleged that "[Pioneer] was obligated by its policy of insurance to provide [Fourth Commerce] with a defense of the foreclosure suit as to the matters raised by Steckmar."

Each party moved for summary final judgment in the trial court. Fourth Commerce based its Motion on the clause in the policy which obligated Pioneer to defend any litigation commenced against the insured or any defenses interposed against the insured "to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy." Pioneer contended that Steckmar's claims were not of the type covered by the policy, that it had no duty to defend Fourth Commerce in the foreclosure action, and that the specific exclusions above set out were applicable and barred coverage and prevented any duty to defend from arising in these circumstances.

In the long, well reasoned opinion, the trial court first noted:

> A cursory reading of the Steckmar affirmative defenses and counterclaims reflects whatever interest he [sic] may have alleged to have in the real property being foreclosed, such interest arose <u>after</u> Pioneer issued the insurance policy insuring the priority of the mortgage held by VNB. There was no duty to defend as to those matters. (R. 256).

The trial court then focused its attention on Fourth Commerce's claim that Steckmar's pro forma denial of one paragraph of the foreclosure complaint constituted a "defense[] . . . interposed against a foreclosure of the insured mortgage . . ." In dismissing this claim, the trial court noted that a denial such as that pled by Steckmar does not trigger a title insurer's duty to defend. Any other result, the trial court noted, would convert title insurance into mortgage foreclosure insurance, forcing title insurer's to "underwrite the expenses of their insured's foreclosure action, carte blanche". The trial court concluded that such a result was not required by the Florida Rules of Civil Procedure. Thus, Pioneer did not have any duty to defend Fourth Commerce against the claims of Steckmar. (R. 256-58).

Fourth Commerce appealed the trial court's order to the Fourth District Court of Appeal. Fourth Commerce's sole contention on appeal was that Steckmar's pro forma denial of paragraph 13 of Fourth Commerce's Complaint constituted a "defense" within the meaning of the policy. Pioneer responded by asserting the proposition which the trial court had found correct; that the pro forma denial of one paragraph of the foreclosure complaint did not constitute an assertion of a "defense" within the meaning of the policy.

The majority of the Fourth District panel (Judge Letts dissenting) reversed the lower tribunal's determination. Pioneer filed a Motion for Rehearing and a Suggestion Of and

Motion Requesting Certification as a Matter of Great Public Importance. The Fourth District denied rehearing but did certify two questions to this Court:

> 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?

This Court accepted jurisdiction pursuant to Florida Constitution, article 5, §3(b)(4) and Florida Rules of Appellate Procedure 9.030 (a)(2)(A)(v).

SUMMARY OF ARGUMENT

When a mortgagee files a mortgage foreclosure action and joins a clearly junior lienor, the mortgagee's title insurance company does not have a duty to prosecute the mortgage foreclosure when the junior lienor generally denies the allegations of the mortgagee's complaint. By virtue of the mortgagee title insurance policy involved herein, Pioneer National Title Insurance Company insured that the mortgage taken by Virginia National Bank constituted a valid first mortgage on the property. The policy excluded from coverage any claim created or assured by the mortgagee, and any claim arising subsequent to the effective date of the policy. The policy clearly does not provide coverage for any action that is not an attack on the priority or validity of the mortgage.

The actions of the junior lienor herein, Steckmar National Realty Corporation, did not trigger Pioneer's "duty to defend" for two reasons. First, the pro forma denial of portions of the foreclosure complaint does not constitute a "defense" to the validity or enforceability of Fourth Commerce's mortgage. Second, any claim asserted by Steckmar clearly arose after the effective date of the policy. This is clear from the face of Steckmar's own pleadings filed in the foreclosure action.

Petitioner submits that the trial court correctly determined that no "duty to defend" arose by virtue of Steckmar's pleadings. In reversing, the majority of the Fourth District

panel (Judge Letts dissenting) made a decision that is not only legally, but also logically, incorrect. The Fourth District's opinion imposes a duty on title insurance companies to "defend" foreclosure actions any time a clearly junior lienor denies pro forma allegations in the foreclosure complaint. This effectively coverts "title" insurance into "prepaid legal" insurance, thereby destroying the economic viability of the title insurance industry.

The trial court correctly decided the issue involved herein. In reversing, the Fourth District's majority reached a result that is both legally and logically erroneous. This court should reverse the Fourth District's holding and reinstate the judgment of the trial court.

ARGUMENT

I.

THE GENERAL DENIAL BY A JUNIOR LIENOR IN THE INSTANT MORTGAGE FORECLOSURE ACTION OF ONE PARAGRAPH OF THE COMPLAINT TO FORECLOSE DID NOT CONSTITUTE A "DEFENSE", NOR CAUSE THE MORTGAGEE TITLE INSURER TO BE UNDER ANY DUTY TO DEFEND THE ACTION.

The two questions certified to this Court by the Fourth District can be simplified, and the great public importance of the question before this Court clarified, by combining them into one question. Applying the facts of the case at bar, the question is:

> Under the terms and conditions of Pioneer's title insurance policy, did Pioneer have a duty to defend Fourth Commerce in Fourth Commerce's mortgage foreclosure action where Steckmar, at best a junior lienor, filed a general denial as to the allegation that the mortgage was executed by the fee simple owner?

We respectfully submit that if the title insurance industry in Florida is to remain an economically viable one with the ability to make a product available, at reasonable cost, to those who need and seek title insurance protection, the answer to this question must be a resounding "No". Steckmar's general denial of the allegations of Fourth Commerce's Complaint simply does not constitute a "defense" to the validity, enforceability

or priority of the first mortgage held by Fourth Commerce, and hence no coverage existed and no duty to defend ever arose in this case.

The first reason why Steckmar's denial of the allegations of Fourth Commerce's Complaint does not rise to the level of "defense" to the validity, enforceability or priority of the mortgage is simply that a denial of an allegation does not constitute a defense.

The distinction between a "denial" and a "defense" has long been recognized and established in Florida civil procedure. Florida Rule of Civil Procedure 1.110 provides that an answer to a complaint must either admit or deny each allegation of the complaint, and further provides that a defendant must additionally set forth any defenses that he has in short, plain statements of fact.

> In pleading to a proceeding pleading a party must set forth affirmatively any matter constituting an avoidance or an affirmative defense. Stated otherwise, a defendant is not confined to a mere denial of the allegations of the plaintiff's complaint. He is entitled to, and indeed he must in some cases, set up new matter on which to predicate affirmative relief, or to meet and avoid the cause of action relied on by the plaintiff. New matter, as here intended, is matter extrinsic to that set up in the complaint as the basis of a cause of action.

40 Fla. Jur. 2d, Pleadings §159. See also 40 Fla. Jur. 2d, Pleadings §143-47.

The distinction between a "denial" and a "defense" was addressed by the Third District in Accurate Metal Finishing Corp. v. Carmel, 254 So. 2d 556 (Fla. 3d DCA 1971). In Carmel,

the plaintiff sued the defendant, Lynn, alleging that Lynn had endorsed a promissory note to the plaintiff and that the maker either could not or would not pay the amounts due and owing on the note. In his answer, Lynn made a general denial of the allegation that he endorsed the note. The plaintiff filed a Motion for Summary Judgment, and Lynn opposed the Motion by filing an affidavit in which he stated that when he signed the note, it had already been endorsed by Carmel, so that Lynn's signature did not constitute an endorsement. The trial court entered Summary Final Judgment against Lynn, and Lynn appealed. In affirming the trial court's order, the Third District held that Lynn's original denial in his answer of the allegations concerning his endorsement did not constitute a defense to the action, and so Lynn could not introduce testimony concerning the order of endorsement. The Third District concluded that the mere denial of a key allegation in the complaint did not constitute a defense.

The distinction between a "denial" and a "defense" is also made clear by an analysis of the differences in the legal effect of each. A denial puts the facts as set forth by the plaintiff "in issue." 40 Fla. Jur. 2d, Pleadings §143-44. An affirmative defense, however, is treated as an admission of the material elements of the complaint but with the addition of new facts or matters that would constitute an avoidance of liability on the facts as admitted. As noted by Trawick, a denial corresponds to the common law "traverse" while a defense cor-

responds to the common law "confession and avoidance." Trawick, Florida Practice and Procedure §11-1. See also 40 Fla. Jur. 2d, Pleadings §162.

The need for a clear understanding of the distinction between a "denial" and a "defense" is also important in the case at bar because of the effect that each has on respective burdens of proof. A plaintiff has the burden of proving any material allegation of a complaint that is denied by the defendant. Ness v. Cowdery, 110 Fla. 427, 149 So. 33 (1933); Ambrecht Lumber Co. v. Adair, 91 Fla. 460, 108 So. 222 (1926); De Mendoza v. Board of County Commissioners, 221 So. 2d 797 (Fla. 3d DCA 1969). The burden of proof for a defense, however, is on the defendant who asserts the defense. Hough v. Menses, 95 So. 2d 410 (Fla. 1957); Heitman v. Davis, 127 Fla. 1, 172 So. 705 (1937). For this reason, Florida Rule of Civil Procedure 1.110(d) requires a defense to be stated in short, concise, separate statements of the material facts necessary to support the defense. It is also for this reason that a reply to a defense, which either admits or denies the allegations of that defense, is required, while a reply to a denial is neither required nor permitted. Fla. R. Civ. Pro. 1.100(a).

In spite of the clear distinction between a "denial" and a "defense", and ignoring the potential ramifications of confusing a "denial" with a "defense", the Fourth District majority concluded that Steckmar's pro forma "denial" constituted a defense within the provisions of the Pioneer policy. The

Fourth District majority did so by concluding that the term "defenses" in the policy was "ambiguous" and must be construed against the draftsman. There is nothing ambiguous about "defense", however. Clearly, Steckmar did not set forth short, concise, separate statements of additional material facts that would avoid liability even if all of the allegations of the complaint were assumed to be true. Steckmar did not say in effect, "I will concede the correctness of the allegations of the complaint, but here are additional facts that avoid your complaint." Steckmar said exactly the opposite; "I deny that the allegations of your complaint are true." Furthermore, Steckmar did not by virtue of its denial take on the burden to prove that the fee simple owner did not execute the note and mortgage; the burden remained on the plaintiff, Fourth Commerce, to prove that the fee simple owner did execute the note and mortgage. Contrary to the opinion of the majority of the Fourth District, the term "defense" is not ambiguous and cannot be construed to include simple pro forma denials.

We respectfully submit that the majority's decision in the court below is based upon a fundamental misunderstanding as to why mortgagees purchase title insurance, what it is they receive when such protection is purchased and the ramifications that will result from their decision. Title insurance policies issued to mortgagees insure only that, as at a specific point in time, there exist no claims or liens recorded in the public records which are superior to the insured mortgage. Title

insurance is not "prepaid legal insurance" or "mortgage foreclosure insurance", and yet the District Court's decision effectively converts mortgage title insurance into such.

In any foreclosure action, the plaintiff must allege that the mortgagor executed a note and mortgage. The plaintiff must also join as defendants to the action any party which the public record shows can or does claim an interest in the real property that is or may be inferior to the interests of the plaintiff; failure to do so prevents such inferior interests from being foreclosed and the title to the property, upon foreclosure will not be clear. Quinn Plumbing Co. v. New Miami Shores Corp., 100 Fla. 412, 129 So. 690 (1930); Marks Brothers Paving Co. v. Ovellet, 124 So. 2d 514 (Fla. 3d DCA 1960), appeal after remand, 131 So. 2d 771 (Fla. 3d DCA 1961).

In the normal case, the junior lienor will not have been a party to the execution of the mortgage being foreclosed, and so will not be able to admit or deny the allegations of the complaint concerning the execution of the mortgage. Instead, the junior lienor is permitted to plead, and most times must plead, that he lacks sufficient knowledge to either admit or deny the allegations of the complaint, and this statement is treated as a denial of the allegation. Fla. R. Civ. P. 1.110. If the court below is correct in its conclusion that a "denial" is the same as a "defense", triggering a duty in the mortgagee title insurance company to defend the title (and effectively prosecute the insured's foreclosure action), and if a plea of

"without knowledge" constitutes a denial, then any time an allegedly inferior lienor pleads that he lacks sufficient knowledge concerning the allegations of the mortgagor's execution of the note and mortgage (which such a lienor must do if he, in fact, lacks such knowledge), then mortgagee "title" insurance would be converted into prepaid legal assistance in substantially all foreclosure actions in which a junior lienor is made a party defendant. Indeed, it appears from the pleadings in this case that Steckmar was not involved in the execution of the mortgage by Le Chalet some four years before Le Chalet contracted with Steckmar; if so, then the proper plea by Steckmar would have been "without knowledge", not "denied." This Court should not sanction a rule which will convert "title" insurance into "prepaid mortgage foreclosure" insurance.

To adopt the Fourth District's conclusion that there is no difference between a "defense" and a "denial" would reverse the clear history of the distinctions between these two terms. If this Court were to construe a "denial" as a "defense", how would this affect the rules of pleading? Would a defendant who is now permitted to simply deny allegations be henceforth required to set out in short, concise statements of material fact the basis for each of his denials? More importantly, who would have the burden of proof? Would the defendant who denies an allegation now be required to prove the incorrectness of the allegation because he must prove his defenses, or would the burden be put on the plaintiff to "disprove" the "defenses" (denials) raised by the defendant?

In spite of the majority holding below that "defense" and "denial" are ambiguous terms, these terms are not ambiguous. By adopting the Fourth District majority's holding, this Court would create ambiguity where none has previously existed.

II.

THE CLAIMS OR DENIALS OF STECKMAR IN THE FOURTH COMMERCE MORTGAGE FORECLOSURE ACTION DID NOT CAUSE PIONEER TO BE UNDER ANY DUTY TO DEFEND WHEN IT AFFIRMATIVELY APPEARED FROM THE FACE OF THE PLEADINGS THAT STECKMAR'S INTEREST IN THE PROPERTY, IF ANY, WAS CREATED SUBSEQUENT TO THE EFFECTIVE DATE OF THE POLICY.

Fourth Commerce's claim that Steckmar's denial triggered a duty to defend runs counter to the plain language of the policy. By providing the title insurance to VNB, Pioneer insured only that, as of the effective date of the insurance policy, there were no claims or encumbrances that would constitute a prior lien on or interest in the property which were superior to the lien of VNB. Originally, as of August 28, 1975, 2:00 p.m. and later, by final endorsement, as of January 3, 1979, 8:00 a.m., Pioneer insured the priority of VNB's mortgage.

The terms of the policy also set forth what is not insured. The policy expressly excludes coverage for, "3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; ... [or] (d) attaching or created subsequent to Date of Policy ...."

As the trial court said in its Order in this case, even "[a] cursory reading of the Steckmar affirmative defenses and counterclaims reflects whatever interest he [sic] may have alleged to have in the real property being foreclosed, such

interest arose after Pioneer issued the insurance policy ... There was no duty to defend as to those matters." (R. 256). The lower tribunal was right since a mere reading of Steckmar's Answer, Affirmative Defenses, and Counterclaims (R. 26-33) demonstrates that all of Steckmar's claims constitute either matters "created, suffered, assumed or agreed to" by VNB and Fourth Commerce or matters "attaching or created subsequent to" January 3, 1979.

In paragraph 34 of its Answer and Affirmative Defenses, Steckmar unequivocally states that any interest it may have had in the property did not arise until February 1, 1979, well after January 3, 1979. (R. 28-29). Fourth Commerce has apparently now recognized the problem that this fact creates for it in this case because, while it originally claimed in the trial court that coverage existed by reason of the content of Steckmar's affirmative defenses and counterclaims, it dropped any such claims concerning the affirmative defenses and counterclaims at the Fourth District level, and relied solely on Steckmar's denial of paragraph 13 for its coverage and duty to defend arguments.

That Fourth Commerce recognized that any interest Steckmar may have asserted arose only after the effective date of Pioneer's title insurance policy can be seen from its Reply to Motion for Rehearing, wherein it contends, "The fact that Steckmar became a party to the action by virtue of an event occurring after the making of the mortgage is neither relevant

nor excluded by the policy." (emphasis added). Fourth Commerce's statement that Steckmar's interest, which it now admits arose after the effective date of the title insurance policy, is not relevant nor excluded by the plain terms of Pioneer's policy is wrong. The language of the exclusion is clear and the fact that the Steckmar interest arose after the effective date of the policy is not only relevant, but controlling. Pioneer had no duty to defend VNB or Fourth Commerce against any interest "created subsequent" to the effective date of the policy. As Steckmar's Answer unequovically states, and as Fourth Commerce has admitted, Steckmar's interest arose after the effective date of the policy, and Steckmar's claim, therefore could not trigger a duty to defend against such claim.

The Fourth District majority dealt with this issue simply by not dealing with it at all. While quoting extensively from the title insurance policy, the majority failed to quote, or ever refer to, the exclusion relating to "created subsequent" interests. In his dissent, however, Judge Letts did discuss this exclusion, noting:

> Quite simply, it is my view that the controversy here was not insured against by this policy because the unsuccessful purchaser who has interposed this general denial acquired whatever interest he had long after the policy was written and his affirmative defenses and his counterclaims are plainly not directed to the validity of the original mortgage or any lien or defect superior to it.

Because of this, Judge Letts concluded that Steckmar's alleged interest, arising as it did after the effective date of the

policy, could not trigger a duty to defend, since such an interest was clearly excluded by the "created subsequent" policy exclusion.

We respectfully submit that one must not lose sight (neither the trial judge nor Judge Letts did) of the fact that the "adverse claims" asserted by Steckmar were all clearly founded upon acts and events which occurred after the effective date of the Pioneer policy. Title insurance companies do not, and by law cannot, (because title insurance companies cannot lawfully write casualty insurance protecting insureds against future events) insure prospectively; title insurance is limited to actions and occurrences that pre-date the effective date of the policy. See Fla. Stat. §627.786 (1983).

If this Court were to adopt the majority view set out in Fourth District's opinion, it would effectively re-write Pioneer's title insurance policy (and the entire America's Land Title Association Loan Policy 1970 form utilized in this case--see policy face sheet (R. 5)) to include a duty to defend even against interests that clearly did not exist as of the effective date of the policy, but arose only well after that point in time. This Court should decline to so extend the policy, and should construe the policy in light of the exclusions clearly set forth therein. Steckmar's claim, clearly not arising until after the effective date of the Pioneer policy, could not trigger any duty of Pioneer to defend.

CONCLUSION

Contrary to the assertions of the majority at the Fourth District Court of Appeal, the terms "denial" and "defense" are not ambiguous. In light of the clear dichotomy between these terms, Steckmar's pro forma denial of an allegation in the Complaint would not rise to the level of a "defense" tantamount to assertion of a superior claim or interest.

Furthermore, given the clear and unambiguous exclusions from coverage contained in the Pioneer policy, it cannot be said that Steckmar's denial or assertions of affirmative defenses could possibly trigger a duty on the part of Pioneer to defend the mortgage foreclosure suit when it is evident on the face of Steckmar's pleading that any interest it may have had arose only after the effective date of the policy. The trial court in this cause correctly determined that Pioneer did not have a duty to defend the mortgage foreclosure suit prosecuted by Fourth Commerce and correctly granted Summary Judgment in favor of Pioneer. The Fourth District Court of Appeal erred in reversing the trial court's conclusion. The trial court and Judge Letts reached the correct result. This Court should

reverse the Fourth District Court's majority holding, and reinstate the judgment of the trial court.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to J. A. Plisco, Esquire, 2875 South Ocean Boulevard, Suite 213, Palm Beach, Florida, 33480; Larry Klein, Esquire, Suite 201, Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida, 33401; Paul Stichler, Esquire P. O. Box 2671, Orlando, Florida, 32802; and Peter Guarisco, Esquire, 2003 Apalachee Parkway, Suite 101, Tallahassee, Florida, 32301 by mail this 19th day of April, 1985.

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