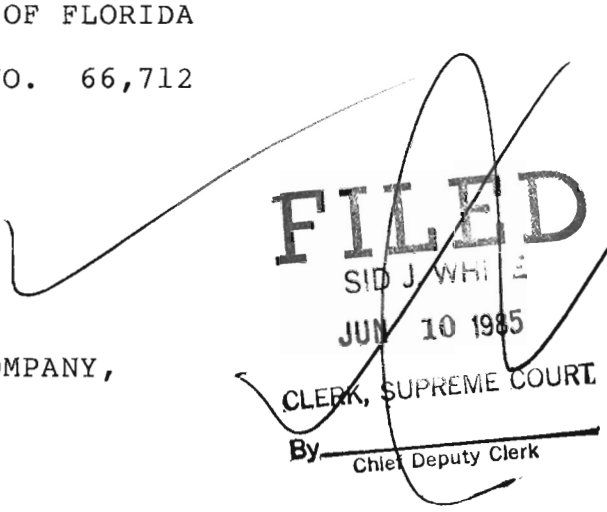
IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 66,712



PIONEER NATIONAL TITLE INSURANCE COMPANY,

Petitioner,

vs.

FOURTH COMMERCE PROPERTIES CORPORATION,

Respondent.

_____/

PETITIONER'S REPLY BREIF

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PREFACE

The decision of the Fourth District Court of Appeal from which this review is taken is found at 463 So. 2d 307.

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 CLIAM 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?

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 (and subsequently assigned by it to Fourth Commerce) constituted a valid first mortgage on the property. The policy excluded from coverage any lien or encumbrance created or assumed by the mortgagee, and any lien or encumbrance 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 "general denial" of portions of the foreclosure complaint did 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 and was thus excluded from coverage by the clear language of the policy. This fact 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 general denials. 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 any allegation contained in the foreclosure complaint. This effectively converts "title" insurance into "prepaid legal" insurance, thereby substantially impairing (as set forth in the Amicus Brief of Florida Land Title Association, Inc.) the economic viability of the title insurance industry.

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.

When read in light of the undisputed facts of the case at bar, it is apparent that Steckmar's "general denial" (these words are the exact words used by the Fourth District in each of the certified questions to describe the nature of the Steckmar pleading) of one paragraph of Fourth Commerce's complaint to foreclose the mortgage insured by Pioneer did not trigger a duty to defend on the part of Pioneer. This conclusion is compelled by both the procedural aspects of the case, as reflected in the first question certified to this Court by the Fourth District, and the substantive aspects, as reflected by the second certified question. As a result, this Court should reverse the Fourth District's decision in this cause and reinstate the Order of the Trial Court.

As discussed at length in Pioneer's Initial Brief to this Court, Steckmar's denial of one paragraph of Fourth Commerce's mortgage foreclosure complaint did not constitute a defense to the foreclosure action which would trigger Pioneer's duty to defend. The distinction between a "denial", which puts the facts as plead by the Plaintiff "in issue", and a "defense", which sets up new matter to avoid the legal effects of Plaintiff's complaint but does not

controvert the factual allegations of that complaint, is addressed at length in Pioneer's Initial Brief, and need not be repeated herein. See Initial Brief of Petitioner at 10-18. The distinction between these two legal concepts is not only clear, but of long standing. See, e.g., Heitman v. Davis, 127 Fla. 1, 172 So. 705 (1937) (Defendant has burden of proof for defense); Ambrecht Lumber Company v. Adair, 91 Fla. 460, 180 So. 222 (1926) (Plaintiff has burden of proof of allegations in complaint). Steckmar's general denial of one paragraph of Fourth Commerce's complaint to foreclose the mortgage did not constitute a "defense" to the foreclosure action and, therefore, did not trigger Pioneer's duty to defend.

The authority cited by Fourth Commerce in its Answer Brief on the Merits does not alter this conclusion. Fourth Commerce cites Black's Law Dictionary, the Federal Rules of Civil Procedure, and three non-Florida cases. None of these authorities discuss the long standing dichotomy in Florida between the concepts of "denial" and "defense"; these authorities do not discuss the different pleading requirements, nor do these authorities address the respective burdens of proof for each of these concepts. Most importantly, none of these authorities deal with the important implications of a pronouncement that a "denial" is a "defense" which triggers a title insurance company's duty to defend a mortgage foreclosure action. The authority cited by Fourth Commerce is simply inapplicable to the issues presented.

Pioneer submits that if this Court adopts the Fourth District's conclusion that Steckmar's "general denial" constitutes a "defense" which triggered a duty to defend, and, in effect, prosecute Fourth

Commerce's foreclosure action, then title insurance in Florida will be converted into little more than prepaid legal assistance, to the extent that the title insurance industry can survive such a proclamation. Each time a mortgagee forecloses an insured mortgage and joins a junior lienor, the junior lienor is required to plead "without knowledge" to any paragraph of the foreclosure complaint which it cannot affirmatively admit or deny. Fla. R. Civ. Pro. 1.110. (Fourth Commerce takes issue with our calling Steckmar a "junior lienor", contending instead that it was a "contract purchaser" which elevated it to the status of "equitable owner"; it is difficult to see how Steckmar could accurately be characterized as the "equitable owner" of the property in light of prior court rulings in which it was determined that Steckmar, in fact, had no rights to or interest in the property.) Thus, a junior lienor is required to plead that he is "without knowledge" as to the facts surrounding the execution of the mortgage if he was not present at the time of the execution of that mortgage, as will be true in the great majority of cases. If this occurs, then the junior lienor's plea is treated as a denial of the allegations. Fla. R. Civ. Pro. 1.110.

If this Court were to hold that a denial constitutes a defense which in turn triggers a title insurer's duty to defend, thereby affirming the Fourth District's majority opinion, it will be, in effect, requiring the title insurance industry to prosecute most, if not all, foreclosures wherein there is joined any junior lienors. This conclusion would be economically devastating to the title insurance industry, and, to the extent that the industry would be

able to continue offering coverage in Florida, it would be required to price this coverage out of the reach of many people who need such coverage and would otherwise purchase it.

In its Brief, Fourth Commerce fails to address any of these points. Rather, Fourth Commerce submits that the questions certified by the Fourth District are not of great public importance "because this is a very unusual factual situation and the question has never come up in Florida or any other jurisdiction." (Brief for Respondent at p. 1). The statement that the factual situation in the case at bar is "very unusual" would, if accurate, come as a great surprise to an experienced commercial litigator. As noted above, in most (if not all) cases in which a mortagee seeks to foreclose its mortgage, and joins a junior lienor in the suit, this exact situation arises; in fact, because the junior lienor is required to plead "without knowledge", the Florida Rules of Civil Procedure compel this result. What is "unusual" about this case is that Fourth Commerce has gotten this far with the strained reading which it gives to the Pioneer National Title Insurance policy. Furthermore, the reason that these issues have never been decided by any court is not the uniqueness of the factual situation, but because no mortgagee has ever been able to stretch the language of a title insurance policy to cover a factual situation which is clearly not covered by the terms of the policy. The questions in this case are not only of great public importance, but, as clearly and lucidly pointed out in the Amicus Briefs of Florida Land Title Insurance Association, Inc. and of Attorneys' Title Insurance Fund, are crucial to the continued economic viability of the title insurance industry in Florida.

The distinction between a "denial" and a "defense", and the procedural implications supporting this distinction, are well settled in Florida. To adopt the Fourth District's conclusion that a "denial" constitutes a "defense" would create ambiguity and confusion where none had previously existed. This Court should decline to do this, and should reverse the Fourth District's holding and reinstate the trial court's decision.

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.

The Fourth District's conclusion that Steckmar's denial raised Pioneer's duty to defend is also incorrect in light of the plain language of the title insurance policy issued by Pioneer to Fourth Commerce. The title insurance policy issued to Fourth Commerce obligated Pioneer to defend Fourth Commerce "in all litigation consisting of ... defenses ... interposed against a foreclosure of the insured mortgage ... to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy." (emphasis added).

The policy expressly excluded from coverage "defects, liens, encumbrances, adverse claims, or other matters ... attaching or created subsequent to Date of Policy ...." (R. 5).

Fourth Commerce does not deny that Steckmar's interest, if any, arose after the effective date of the policy; in fact, in its Brief, Fourth Commerce admits that Steckmar's interest arose 28 days after the effective date of the policy. (Brief of Respondent at p. 15). In spite of this candid admission, and in spite of the plain language of the title insurance policy excluding coverage for any defect or encumbrance arising after the effective date of the policy, Fourth Commerce contends that Pioneer had a duty to defend Fourth Commerce, an assertion clearly not supportable either in fact or in law.

In support of its position that Steckmar's denial constituted a defense which allegedly triggered a duty to defend, Fourth Commerce cites National Union Fire Insurance Company v. Lenox Liquors, Inc., 358 So. 2d 533 (Fla. 1977). A careful reading of Lenox demonstrates that not only does the decision not support Fourth Commerce's position, but, in fact, the Lenox holding compels the conclusion that Pioneer had no duty to defend Fourth Commerce in its foreclosure suit.

In Lenox, National Union Fire Insurance Company ("National"), issued a liability insurance policy to Lenox Liquors, Inc. ("Lenox"). McClendon entered the liquor store carrying two guns. Rosen, the president of Lenox, believing that a robbery was in progress, shot McClendon. McClendon filed suit against Lenox for personal injuries, alleging that Rosen had intentionally and willfully caused such injuries. Lenox called on National to defend it in the lawsuit. National refused to do so, taking the position that because McClendon's injuries were alleged to be the result of intentional acts of Lenox or its agents, and such acts were excluded from coverage by the express terms of the liability policy, National had no duty to defend. Lenox filed suit against National for wrongful refusal to defend.

On these facts, the Third District held that, because litigation between Lenox and McClendon terminated based on a finding of negligence, National's denial of coverage was wrongful. In so ruling, the Third District concluded that National's duty to defend was greater than its duty to pay. Thus, while National would not have had a duty to pay any judgment founded on the intentional conduct of Lenox's agents, the Third District reasoned that National nonetheless had a duty to defend Lenox.

This Court reversed the decision of the Third District in Lenox and concluded that no duty to defend existed, saying: "[T]he well-established rule of this state [is] that the insurer is under a duty to defend a suit against an insured only where the complaint alleges a state of facts within the coverage of the insurance policy ...." Because McClendon's original complaint in the action sounded in intentional tort, and the insurance policy clearly excluded coverage for the intentional acts of Lenox or its agents, National had no duty to defend the action.

In ruling in Lenox, this Court quoted from the Third District's previous opinion in Capoferri v. Allstate Insurance Company, 322 So. 2d 625, 627 (Fla. 3d DCA 1975), wherein the Third District had noted:

> A liability insurance company has no duty to defend a suit where the complaint upon its face alleges a state of facts which fails to bring the case within the coverage of the policy. Consequently, the company is not required to defend if it would not be bound to indemnify the insured even though the plaintiff should prevail on his action.
>
> Here, the only cause of action alleged in the Dimon's complaint was one for intentional acts by Capoferri. The record reflects that intentional acts by the insured were not within the coverage of the Allstate automobile liability policy. Even if Dimon had proved all of the allegations in his complaint and taken a judgment against Capoferri, based on the rule set forth above, Allstate would have been under no obligation to indemnify Capoferri. Therefore, since Allstate had no duty to defend in this matter, the trial court properly granted judgment for Allstate on its motion for summary judgment.

This same principal was applied in connection with a title insurance policy in Louisville Title Insurance Company v. Guerard, 409 So. 2d 514 (Fla. 5th DCA 1982). Guerard owned real estate located in Hernando County. Louisville Title Insurance Company

("Louisville") insured Guerard's title to the property. Waldron and Glenda Roper filed suit against Guerard seeking to establish a prescriptive easement (obviously an unrecorded interest) over a portion of Guerard's property. Guerard called on Louisville to defend the lawsuit. Louisville denied coverage and refused to defend based on an exception in the policy which provided, "[T]he policy does not insure against any loss or damage by reason of ... unrecorded easements, if any, on, above or below the surface ...." Louisville maintained (just as Pioneer maintains here) that it was not obligated to defend against claims excluded from coverage, not known to it when the policy was issued and not shown or discoverable by a search of the public records.

Guerard filed suit against Louisville, alleging that Louisville's denial of coverage and refusal to defend the suit were wrongful. The trial court, on summary judgment, reached the anamalous conclusion that, while the exclusion clearly did except coverage as to any loss resulting from unrecorded easements, the exclusion did not except <u>claims</u> for such unrecorded easements and, hence, Louisville was obliged to defend against such a <u>claim</u> even though it would not be obliged to <u>pay</u> the claim; that is, no coverage existed, but a duty to defend arose by virtue of the mere assertion of the claim. Thus, the trial court concluded (falling back on the old saw which the Fourth District relied on in the case at bar) that the Louisville policy was ambiguous and that such ambiguities are to be construed against the insurer, and, therefore, entered judgment against Louisville.

Louisville appealed the trial court's order to the Fifth District Court of Appeal. In reversing, the Fifth District, quoting Capoferri v. Allstate Insurance Company, 322 So. 2d at 626, ruled that an insured is not obligated to defend any claim which, if proven, the insurer would not be obligated to pay. The Fifth District said, "[W]here an insurer is not liable under the policy to pay the insured for a judgment arising out of a claim, it has no duty to defend the action for the insured." Guerard, 409 So. 2d at 516. Because the facts as alleged in the complaint stated a cause of action to establish a prescriptive easement, and because Louisville had no obligation to pay any claim based on a prescriptive easement, Louisville had no duty to defend such an action. Thus, the Fifth District reversed the judgment against Louisville. See also, Battisti v. Continental Casualty Company, 406 F.2d 1318 (5th Cir. 1969) (complete reading of complaint demonstrated facts within professional liability insurance policy exclusion--insurance company had no duty to defend suit); Auto-Owners Insurance Company v. Jones, 397 So. 2d 317, 320 (Fla. 4th DCA 1981) ("The complaint must allege a state of facts within the coverage of the insurance policy in order to establish a duty to defend. Conversely, there is no duty to defend a suit where the complaint fails to bring the case within the coverage of the policy."); Federal Insurance Company v. Applestein, 377 So. 2d 229, 231 (Fla. 3d DCA 1979) ("[T]he contents of the fourth amended complaint bring the case, as to both defendants, clearly within the terms of the 'intentional injury' exclusion. It is well-settled in Florida that an insurer's duty to defend an action against its putative insured is determined by the allegations of the plaintiff's

complaint. No obligation to defend the action, much less to pay any resulting judgment, arises when the pleading in question shows either the non-existence of coverage or the applicability of a policy exclusion." (citations omitted)).

As applied to the facts of the instant case, these cases clearly demonstrate that Pioneer had no duty to defend Fourth Commerce by virtue of Steckmar's Answer and Affirmative Defenses. The pleading that would have given rise to any duty to defend in this action would have been Steckmar's Answer and Affirmative Defenses. Steckmar's answer clearly demonstrated, however, that any interest it may have had in the property arose after the effective date of the policy; Fourth Commerce does not deny this fact. Pursuant to the plain terms of the policy, Pioneer had no duty to insure or provide coverage as to any claims or defenses founded on liens or encumbrances arising after the effective date of the policy; therefore, as the above-cited cases teach, Pioneer could have never been under any duty to defend any such claim or defenses. Based on the four corners of Steckmar's pleading, Pioneer had no duty to pay and, therefore, had no duty to defend.

Pioneer respectfully suggests to this Court that this conclusion is compelled not only by the common law of Florida, but also by a common sense approach to title insurance. Title insurance is designed to guarantee that, as of a particular moment in time, the item insured is what it purports to be. In this case, Fourth Commerce's predecessor in interest obtained insurance from Pioneer assuring that the mortgage constituted a first mortgage lien, not subject to any prior liens or encumbrances. Pioneer did not

undertake to insure against any subsequent events which might impact on the status or priority of Fourth Commerce's mortgage. Steckmar's contract is such a subsequent event, not within Pioneer's contemplation at the time of the issuance of the policy. Significantly, both the trial judge and Judge Letts, in his dissent, (two of four judges heretofore ruling in this case) recognized this fact, and concluded that it was controlling. With due respect to the Fourth District's majority, Pioneer submits that the trial judge and Judge Letts perceived the correct resolution of this case.

The Fourth District majority failed to consider either the plain language of the insurance policy or the common law of Florida as set forth by both this Court and its sister District Courts of Appeal. This Court should reverse the Fourth District's holding and reinstate the decision of the trial court. Steckmar's claim, clearly arising after the effective date of the policy, did not, and could not, trigger any duty of Pioneer either to pay or to defend.

CONCLUSION

In light of the clear dichotomy between the terms "denial" and "defense", Steckmar's "general denial" of an allegation in the Complaint could not rise to the level of a "defense" tantamount to the assertion of a superior claim or interest. To hold to the contrary would inject confusion and ambiguity into an area of procedural law which is, and has long been, well settled.

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. It is evident on the face of Steckmar's pleading that any interest it may have had did not arise until 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. 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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