SUPREME COURT OF FLORIDA

Case No. SC00-2242

On Appeal from the Third District Court of Appeal

Lower Tribunal No. 3D99-1597

BARRY I. HECHTMAN and BRENDA HECHTMAN,

Petitioners/Appellants,

v.

NATIONS TITLE INSURANCE OF NEW YORK, INC. and COMMONWEALTH LAND TITLE INSURANCE CO.,

Respondents/Appellees.

APPELLANTS' REPLY BRIEF

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ARGUMENT

1.

It is conceded that attorney-agents are the source of the vast bulk of the title industry's business.

In our original brief, we asked the Court to take judicial notice of the fact that billions of dollars of real estate is sold in Florida each year; that title insurance is the norm; that the vast majority of that title insurance is sold by attorneys; and that, therefore, attorney-agents are the probable source of the vast bulk of profit to Florida's title insurers.

Obviously, if any of this were not true, both title insurers would vigorously oppose the point. As it is, neither title insurer disputes that what we say is true. The sole objection comes from Nations Title, which argues - very briefly and without citation - that these are facts outside the record and not a proper matter for judicial notice.

However, the judicial notice statute is not restricted to trial courts and does not require that the facts in question be matters of record, but merely that they be facts that are "not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." Fla. Stat. § 90.202 (12) (2000). Neither title insurer challenges the accuracy of our sources or the correctness of our conclusions. This point is, therefore, in essence, conceded.

2.

The word "licensed," as it appears in this statute, is equivalent to "authorized," which would cover <u>attorney-agents</u>.

The first step in construing a statute is to see if the words used dictate a particular result. If they do, then it is presumed that that is what the Legislature intended and no extraneous indications of "intent" are of any import.[1]

When we look at this statute, we see that the word "licensed" appears twice. Presumably, it was intended to mean the same thing both times. Since we know that the second time the word appears it *cannot* be made to mean "licensed by the Department of Insurance," then we must consider whether there is an alternative meaning that will work in *both* places. If there is such a meaning, then that is the construction to be preferred.[2] In fact, a

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"It is neither the function nor prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning." *Heredia v. Allstate Insurance Company*, 358 So. 2d 1353, 1355 (Fla. 1978).

2

"...[A]ll parts of a statute must be read together in order to achieve a consistent whole." *Florida Cable Television Association v. Deason*, 635 So. 2d 14, 15 (Fla. 1994) (internal quotation and citation omitted). "Using... terms synonymously allows a consistent whole." *Id*.

meaning equivalent to “authorized” is the only one that will work in both places. This construction would lead to *all* agents being covered.

This is the pivotal issue in construing this statute. Yet, the Third District completely failed to address the meaning of “licensed” as it appears in the second sentence, or attempt to harmonize it with the first.[3] Commonwealth, even now, also completely fails to address the issue. Nation’s Title, which does tackle the issue, is forced to agree with us - tellingly - that the word “licensed” as used in the second sentence refers to some authority granted by the title insurers and not by the Department of Insurance, as follows:

> The second sentence of the statute surely contemplates “licensure” by title insurers of title insurance agents. In fact <u>all</u> insurance agents are “licensed” by some title insurance company. Some are licensed by more than one company.[4]

In essence, therefore - though it does its best to avoid actually saying so - Nation’s Title agrees that the word “licensed” as it is used in the second sentence, means “authorized.” Yet Nation’s Title still attempts to justify a different meaning for the same word in the prior sentence! This is not logical.

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[3] “In construing a statute effect must be given to every part, if it be reasonably possible to do so. Each part or section should be construed in connection with every other part, or section so as to produce a harmonious whole.” *The Ozark Corp. v. Pattishall*, 185 So. 333, 337 (Fla. 1939).

[4] Nation’s Title’s Answer Brief, p. 8-9. (Emphasis in the original).

If "licensed" means "authorized" in the second sentence, then there is no reason to give it a different meaning in the first.

3.
From the language of the statute itself, it is illogical to conclude that the Legislature intended to exclude liability for attorney-agent thefts.

Neither title insurer quarrels with our assertion that the first two limbs of this statute codify the existing common law of agency with regard to a principal's liability for the acts of his agents, generally. Both insurers, however, argue that the Legislature intentionally inserted the word "licensed" into the first sentence in order to restrict its ambit to lay agents. It is a necessary, logical corollary of such an argument, however, that the Legislature intended to codify the existing common law with regard to lay agents, but not codify the identical, existing, common law with regard to attorney-agents. What possible rationale could there have been for that? Neither insurer offers any answer.

Neither title insurer, moreover, quarrels with our assertion that it is the third limb of the statute - the provision at issue here - that makes the radical change. That provision states that, in circumstances where "no binder, commitment, policy or guarantee was issued" - i.e. where no particular insurer is clearly "on the hook" - all title insurers who "licensed" the particular agent

in question are, in effect, liable to the victims of his thefts in direct proportion to the amount of business he generated for them over the prior year. Fla. Stat. § 627.792.

The common-law has no remedy for this situation. Evidently, thefts in such circumstances were believed to be a problem, or the provision would not have been enacted. The Legislature's solution for the problem was to allocate the risk of loss in proportion to the profits derived by the various insurers from the thieving agent over the prior year. What logical justification could there be for the Legislature to have actually intended to restrict this market-based solution to just a tiny segment of the market and, thus, just a tiny segment of the problem? The title insurers offer none. Can this Court conceive that the Legislature - having identified a problem in the market and having come up with a market-based approach to liability - actually intended this statute to have such a minimal and interstitial effect?

4.

Commonwealth's argument that the Legislature intended to exclude attorneys from the statute, as requiring no further regulation, is untenable. This <u>statute regulates title insurers: not lawyers</u>.

Commonwealth attempts to argue that a clear legislative intent to exclude attorneys from this statute is, nevertheless, apparent from (a) the fact that attorney regulation is within the sole purview of this Court, (b) the text of the legislative debates indicate an intent not to further regulate lawyers, and (c) recent case-law which indicates that disparate treatment in the regulation of lay and attorney-agents is justifiable. As we shall see, however, none of this holds water.

First, we do not disagree with Commonwealth that the regulation of attorneys in the practice of law is largely the purview of this Court. However, the statute under discussion *does not regulate attorneys - it regulates title insurers*. This statute places no additional burden or responsibility on any attorney: it places additional liability on title insurers. Commonwealth's entire argument, founded as it is on this wholly mistaken premise of "attorney regulation," is, therefore, fundamentally flawed.

Second, the "legislative history" that Commonwealth quotes is a snippet from a Senate Commerce Committee Session, on April 17, 1985, consisting

of a question from a Senator and a response from a title insurance industry lobbyist. Beyond the fact that this would be scant support for the presumed intent of the entire Legislature - if it were accurate - anyway, the full transcript reveals that the matter actually being *directly* addressed by the speakers was the effect of an amendment to the escrow account provisions of the Bill, and not the issue of title insurer liability, thus:

> CHAIR; Okay, any questions? There's a lengthy amendment which is – are these in the booklets? On page 1, line 19 – excuse me, on page 29, lines 18 and 19, strike all those lines and insert a lengthy amendment, section 24, relating to escrow. Senator Thomas?
> SENATOR THOMAS: This talks about an insurance agent being engaged in the business as an escrow agent.
> MR. GRAINGER: This would require title insurance agents who hold any money prior to closing to place the money in escrow and it sets up requirements for them to maintain the escrow funds and maintain certain records with regard to the escrow funds.
> CHAIR: Okay, any objection to that amendment offered by Senator Thomas? If not, show that adopted without objection. Show the title amendment adopted without objection. [.....] Okay, Senator Thomas moves the bill as amended. Is there any discussion or any questions, anybody want to speak on the bill? If not ...
> AUDIENCE: Inaudible.
> AUDIENCE: The industry is completely for the bill, Mr. Chairman. I represent Florida Land Title, --
> CHAIR: Okay.
> SEN. SCOTT: Mr. Chairman?
> CHAIR: Yes, Senator Scott?
> SEN SCOTT: It is my understanding that this does not apply to attorneys who issue title insurance.

> AUDIENCE [Fla. Land Title Speaker]: No sir, it doesn't, Senator. It specifically excludes attorneys, which since they're regulated by the Supreme Court, we don't think they need any more regulation.
> SEN. SCOTT: Thank you.[5]

Indeed, even if we were to assume that Senator Scott's question was directed to the Bill as a whole, and not merely to the escrow rules amendment, the Senator's question would have been correctly answered - the statute in question does not purport to regulate the bar in any way, it regulates the title insurance industry.

Moreover, if one reviews the Senate Staff Analysis and Economic Impact Statement of April 18, 1985, prepared one day later, one sees no indication that the Senate intended to differentiate between the insurers' liability for their lay agents and their liability for their attorney-agents. Indeed, one sees, quite to the contrary, that The Senate Commerce Committee considered the liability portion of the bill to cover *all* agents, thus:

> The amendment further provides that the title insurer shall be liable for the defalcation, conversion, or misappropriation of escrowed funds by *its title insurance agents*." (Emphasis added).[6]

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See Certified Transcript of Record of Excerpts from Meeting of Fla. S. Comm. On Com., Regular Session, April 17, 1985 (available at Florida Dep't of State, Div. Of Archives, Tallahasee, Fla.), attached as Appendix "1."

6

See Senate Staff Analysis and Economic Impact Statement on SB520, p. 2 (Fla. April 18, 1985), attached as Appendix "2."

Third, Commonwealth's same, erroneous premise with regard to the regulation of attorneys renders *Dept. of Insurance v. Keys Title and Abstract Company, Inc.*, 741 So.2d 599 (Fla. 1st DCA 1999), wholly inapposite. That case dealt with the issue of whether the disparate regulatory burden on lay agents and attorney-agents was constitutionally permissible. This case does not, however, involve any such issue. The statute under discussion regulates title insurers. The issue is whether, in enacting the statute, the Legislature intended to excuse title insurers from vicarious liability for a certain class of their agents, the attorney-agents.

5.
There is no other logical reason for the Legislature to have intended to exempt title insurers from liability for attorney-agent theft.

Commonwealth also suggests, in essence, that it was a fair and logical choice to exclude title insurer liability for victims of theft by their lawyer agents, because victims of theft by lawyers have significantly better chances of recovery than victims of thefts by lay people. Starting from this highly debatable premise, Commonwealth suggests that it would be outright unfair to hold title insurers liable for thefts by their attorney agents, because they cannot effectively audit them. None of this makes much sense.

First, Commonwealth argues that an attorney who steals from his trust fund is liable for a breach of fiduciary duty and that this, somehow, gives the victim greater rights than a victim of a lay thief, and this greater right of recovery makes it fair and logical to exempt the title insurers from liability for thefts by their attorney-agents. This, however, is wrong. There is no distinction between the legal liability of lawyer and a layman. Obviously, anyone - lawyer or layman - who steals from a trust account commits a breach of fiduciary duty - and conversion and civil theft, too, for that matter. Equally obviously, in practical terms, any right of action is only as good as the defendant's ability to pay, which will vary from case to case, regardless of whether or not the thief is a lawyer.

What this statute does is to shift the risk of ultimate loss from the victim to the insurers who put the thief in business and profited from his activities. The victim is accorded presumptively solvent defendants to make him whole - the title insurers - and they, in turn, take the risk of attempting to recoup their loss against their agents, who may or may not be able to pay.[7]

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[7] In the present case, for example, the thief, Hernandez, is worthless, and the un-reimbursed losses of his various victims are well over $1,000,000.00.

There is nothing unfair about this scheme. The title insurers freely selected the agent, put him in business and made money off him. They are made to re-pay the money that their agent stole, in proportion to the business that each insurer got from the thief in the recent past, and to bear the risk that the agent may not be able to pay them back. There is nothing in this scheme that would logically justify the exclusion of liability for the thefts of certain agents based on whether or not they were lawyers.

Commonwealth next argues that the collateral sources of recovery sometimes presented by attorney malpractice insurance or the Client Security Fund provide a cogent reason for exempting title insurers from liability for the thefts of their attorney-agents. However, malpractice insurance is neither compulsory nor universal. Moreover, malpractice policies cover negligence: it would be the rare malpractice policy that did not exclude liability for theft.[8] As for the Client Security Fund, given that funds are limited and payment discretionary, this is tantamount to arguing that there is no need for a legal right of recovery against the insurers, because of the possibility of charity![9]

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[8] Hernandez's malpractice insurer stands on just such an exclusion, here.

[9] The Fund has declined any payment, here.

Commonwealth then says that it would be unfair to hold title insurers liable for the trust account thefts of their attorney-agents because of their inability to "effectively audit" their trust accounts. There are a two simple responses to this. The first response is that the risk from attorney-agents and the consequent need to monitor their activities is not as great as in the case of lay agents. Commonwealth, indeed, admits as much, as follows:

> the requirements for admission to The Florida Bar are much more demanding than for becoming a licensed title insurance agent through DOI, and the title insurers should be entitled to reasonably believe that, generally speaking, attorney agents are more mature, experienced and ethically reliable than the minimum qualifications for licensure by DOI, and that their scrutiny is not as acutely needed for attorney agents as it is for DOI licensed title agents.[10]

The further response, of course, is that there is nothing to stop title insurers from auditing their attorney-agents. Real estate transactions are matters of public record. There is nothing likely to be privileged in the pertinent portion of the transaction file or the applicable trust account reconciliation. As a matter of fact, title insurers can - and do - routinely audit their attorney-agents, as both Nations Title and Commonwealth well know.[11]

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[10] Commonwealth's Answer Brief, p. 10.

[11] One of our own firm's members, Ana Escagedo, Esq., writes title insurance for Chicago Title and expects to be, and is, routinely audited.

Commonwealth then argues that the possibility of obtaining a Closing Protection Letter ("CPL"), and thus making a single insurer liable, is also somehow a material consideration.[12] However, this just begs the question. The provision of the statute under discussion applies when no "binder, commitment, policy or guarantee was issued." Fla. Stat. § 627.792. The mischief that the Legislature was addressing was the situation where no insurer had yet been chosen, yet money had been paid and money had been stolen. As noted in our initial brief and above, this statute remedied a gap in the common law. This case is a serious instance of a theft occurring in such circumstances. Had a CPL been issued, then a single insurer would have been selected, which is not the situation that the statute was designed to address.[13]

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[12] What proportion of transactions are covered by CLPs is unknown.

[13] Commonwealth points to the dearth of cases on point as perhaps indicating a widespread use of CPLs. It may, of course, equally, signify a widespread acceptance of liability by title insurers in other cases, and the consequent prompt settlement of other claims.

6.

To construe this statute as excluding liability for attorney-agent thefts would constitute a __constitutionally impermissible result__.

A Court should, of course, always strive to construe a statute in such a way as to reach a constitutionally permissible result.[14] Nation's Title says, however, that our equal protection argument comes now, for the first time, and is too late. This is wrong on both counts. We addressed the equal protection problem inherent in the title industry's approach before the Third District.[15] Moreover, even if it were now being raised for the first time, given the fundamental error that would otherwise result, it would not be too late.[16]

Commonwealth's argument regarding constitutionality is based on law and arguments already made earlier in its brief. We show the flaws in Commonwealth's reasoning above, and we do not need to repeat our argument, here. Suffice it to say that the construction we urge would be in the

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"...[W]herever possible the court should, in preference to invalidating a loosely written statute or ordinance, look to the legislative intent of the enactment and construe the enactment so as to bring it within constitutional bounds." *City of Pompano Beach v. Capalbo*, 455 So. 2d 468, 472 (Fla. 4th DCA 1984).

15

See Hechtman's Reply Brief, January 2, 2000, pp. 5-7.

16

Sanford v. Rubin, 237 So.2d 134,137 (Fla. 1970).

public benefit - which should always be the objective[17] - while the construction urged by the title insurers would be solely in the interest of the title insurers.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief is in compliance with the font standards and specifications as stated in Fla.R.App.P. 9.210(a)(2) and is typed in proportionately spaced 14 point Arial.

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[17] "Any uncertainty as to legislative intent should be resolved by an interpretation that best accords with the public interest." *Sunshine State News Co. v. State*, 121 So. 2d 705, 707 (Fla. 3d DCA 1960); *Tanner v. Hertog*, 618 So. 2d 177, 183 (Fla. 1993).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided to James S. Telepman, Esq., Cohen, Norris, Scherer, Weinberger & Wolmer, 712 U.S. Highway One, Suite 400, North Palm Beach, Florida 33408; Thomas Manick, Esq., Manick Rosenberg & Contreras LLP, Alhambra International Center, 255 Alhambra Circle, Suite 425, Coral Gables, Florida 33134 and Robert A. Cohen, Esq., Cohen Fox, PA, First Union Financial Center, 200 South Biscayne Boulevard, Twentieth Floor, Miami, Florida 33131, via U.S. Mail on this 12th day of March, 2001.

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