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Exculpatory Clauses in Title Abstracts: Small Type that Could Lead to a Big Problem

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Attorneys in a number of different fields, from real estate to corporate to litigation, routinely order title searches on behalf of clients that have no intention of ever obtaining title insurance in the future. An attorney obtains a title abstract to determine certain information about a property, including existing liens and judgments. Many title abstracts contain language, usually hidden in small print and in the middle of the report, limiting the title searcher's liability to a nominal amount of money. The typical provision reads, "Total liability hereunder is limited to the fee paid for the search [or some other minimal amount unlikely to adequately compensate a party injured by a title searcher's negligence]."

Attorneys ordering these reports may have noticed these provisions without considering their enforceability. Such provisions are usually included in the title abstract and not in an agreement between the attorney (or, the attorney and his or her client) and the title searcher. The validity of these provisions is an important question for all practitioners who obtain title searches. An undiscovered lien or property interest can result in substantial injury far beyond the cost of the search.

New Jersey courts have yet to directly address the enforceability of these provisions. Courts across the country have come to conflicting conclusions.

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A Title Abstractor's Liability in Negligence and a Title Insurer's Liability in Contract

The liability of a title searcher is judged under tort law, while contract principles judge the liability of a title insurer. The New Jersey Supreme Court, in *Walker Rogge, Inc. v. Chelsea Title & Guaranty Company,* 116 N.J. 517, 535-42 (1989), explained the differences in theories of liability governing: a title company that provides only a title abstract; a company that produces an abstract for its own purposes in conjunction with the issuance of title insurance; and a title company that engages in providing a title abstract and title insurance as two separate undertakings.

A title company's liability, where it provides solely a policy of title insurance, is not based in tort, but in contract. The court in *Walker Rogge* found that the title company there had conducted a title search and prepared a title report only "in conjunction with its obligation to issue the title . . . policy." It had not undertaken to prepare a separate abstract for the benefit of the plaintiff, but had done so for its own benefit

The court did note, however, that a company undertaking only a title search was liable in tort ("the duty of the title company, unlike the duty of a title *searcher*, does not depend on negligence" (emphasis supplied). The court also noted that a title company providing a title insurance policy could be liable in negligence for separately providing a title abstract. ("If, however, the title company agrees to conduct a search *and* provide the insured with an abstract in addition to the title policy, it may expose itself for negligence as a title searcher in addition to its [contractual] liability under the policy." (emphasis supplied)).

Cases from Other Jurisdictions

Courts of New York and Pennsylvania, with sparse factual and legal analysis, have enforced provisions limiting the liability of title abstractors. In *Broser v. Royal Abstract Corp.,* 260 N.Y.S.2d 487, 492 (Civ. Ct. 1965), a New York trial court found a provision in a title abstract limiting the abstractor's liability to $1,000 was ineffective against a negligence claim, but would have been effective had the plaintiff elected a different remedy and pursued a breach of contract

claim. On appeal, the Appellate Term, without analysis, found the provision to be enforceable regardless of whether the plaintiff's theory of liability was based in tort or contract. 268 N.Y.S.2d 594, 595 (App. Term 1966) ("the certificate of title liability contains a valid exculpatory clause, sufficient to insulate the defendant abstract company from liability in excess of $1,000, regardless of whether the action sounds in tort or contract" (emphasis supplied)); s*ee also L. Smirlock Realty Corp. v. Title Guar. Co*., 421 N.Y.S.2d 232, 239 (App. Div. 1979) ("It has been uniformly held that the liability of an abstractor may be limited and controlled by the contract regardless of whether the action is on the contract or in negligence.").

In *Express Financial Services, Inc. v. Gateway Abstract, Inc*., 71 Pa. D. & C.4th 344 346-52 (2004), aff'd, 897 A.2d 525 (Pa. Super. 2006), a Pennsylvania trial court enforced an exculpatory provision in a title abstract limiting the title abstractor's liability to "a sum not exceeding the cost of the search." The title abstractor conceded that it was negligent and had "missed" an outstanding mortgage in conducting the title search. The title search was performed for a title insurance company with whom the abstractor had done hundreds of title searches in the past. Relying on the erroneous title search, the plaintiff issued a title insurance policy to a lender. Subsequently, the lender's mortgage was foreclosed following default of the loan secured by the undiscovered superior mortgage. The plaintiff as the insurer paid $220,000, and sought reimbursement from the title abstractor for its "breach of contract." Though the plaintiff conceded — and indeed, itself asserted — that there was a contract between the parties, it did "not want to be bound by the limitation of liability language contained in [the] written report."

Although the provision limiting liability was in the title report and not in an agreement to furnish the report, the court found that the "limitation of liability language" was "akin to an exculpatory clause" in a contract. The trial court concluded — based on the "volume of title searches requested [by the plaintiff] and prepared" by the defendant — that the parties entered into a valid contract, the terms of which were set forth in the title report. Accordingly, it awarded the plaintiff $40; the "cost of the search."

In *White v. Western Title Insurance Co.,* 710 P.2d 309. 315-16 (Cal. 1985), the Supreme Court of California came to a different conclusion. It determined that a title company that issued both an abstract and a title insurance policy could not limit its negligence liability for providing an inadequate abstract by including, in the title report itself, language limiting its liability. The preliminary title report in that case contained language stating that it was issued "solely for the purpose of facilitating the issuance of a policy of title insurance and no liability [was] assumed thereby." The court noted that in California, a title insurer furnishing a preliminary title report serves as an abstractor of title, takes on the same "rigorous" duty as a title abstractor, and accordingly, is liable in negligence to the insured (although the court made note of a statutory provision passed after the occurrence of the essential facts giving rise to the cause of action, which provided that a title insurer preparing a preliminary report does not have the same duty as a title abstractor).

The court found the provision was ineffective to limit the insurer's negligence liability, noting that the limitation appeared in the report, "*not* in a contract under which [the] defendant agreed to prepare that report itself" (emphasis supplied). Moreover, the court noted, even if it "viewed the title report as a contract, the . . . provision would be ineffective to relieve [the] defendant of liability for negligence. A title company is engaged in a business affected with the public interest and cannot, by an adhesory contract, exculpate itself from liability for negligence."; *See also Chase v. Heaney,* 70 Ill. 268 (1873) ("nor do we consider that it was competent for appellants to limit their liability by an obscure clause in their certificate appended to the abstract, without specially calling appellee's attention to it").

Other courts have found compelling the logic of the Supreme Court of California in *White*. The Supreme Court of Alaska followed the ruling in *White* to invalidate a disclaimer in a preliminary title report and commitment that read, "this report and commitment shall have no force or effect except as a basis for the coverage specified herein." *Bank of California, N.A. v. First American Title Insurance,* 826 P.2d 1126, 1130 (Alaska 1992). The court found that the provision did not effectively disclaim liability for negligence.

New Jersey's View on Exculpatory Clauses

White and *Express Financial Services* both suggest that limitation-on-liability provisions in title reports can be viewed as contractual exculpatory clauses. As a general matter, New Jersey takes a harsh view of exculpatory clauses. Because the typical provision limiting liability is made part of the title abstract and not part of a contract to which the party ordering the search has assented, New Jersey is likely to disapprove such provisions.

Under New Jersey law, an exculpatory provision binds only those who have expressly assented to it, and the party seeking to enforce the provision must unequivocally demonstrate that the releasing party executed the agreement knowingly, voluntarily, and intelligently, *See Gerhshon Administratrix Ad Prosequendum for the Estate of. Pietroluongo v. Regency Diving Ctr, Inc. and Costas Prodromo,* 368 N.J. Super 237, 247 (App. Div. 2004). Applying this heightened standard, New Jersey courts should not, and likely would not, enforce title abstract limitation on liability provisions. This stance echoes the prescient observation of the Supreme Court of California that such exculpatory language is not included in the contract for the preparation of the title abstract, but in the final product, the abstract itself. ■