IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

Case No. 4D16-4085

INDIGO REAL ESTATE LLC,

Appellant,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY,
Appellee.

ON APPEAL FROM A FINAL JUDGMENT ENTERED IN THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

The Honorable Carlos A. Rodriguez
Lower Tribunal Case No. 10-38088 CACE (14)

ANSWER BRIEF OF APPELLEE

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INTRODUCTION[1]

Appellant Indigo Real Estate LLC ("Indigo") is an opportunistic investor attempting to throw a "Hail Mary" pass. Indigo sued Appellee Fidelity National Title Insurance Company ("Fidelity") on a policy of title insurance that has long since expired, regarding a promissory note that it no longer owns, concerning an easement that was cleared *before* Indigo even purchased the note secured by the mortgage lien that was insured under the policy. [R. 759-84.] Indigo never gave notice of a potential claim, as is required under the policy. [R. 769-777.] Indeed, it could not; as stated above, the easement was cleared long before Indigo purchased the note. [R. 1088-90.] And the prior owner, who did give notice under an owner's policy and whose claim Fidelity did resolve, already sued Fidelity regarding the easement; that suit was dismissed and the dismissal was affirmed by this Court on appeal. *See Progresso Lofts of Ft. Lauderdale, LLC v. Progresso Lofts, LLC*, 44 So. 3d 260 (Fla. 4th DCA 2010). The trial court properly dismissed this action.

In 2008, Indigo acquired the mortgage lien which was insured under the lender's policy. [*See* R. 1317-19.] Indigo alleges, in sum, that its borrower, Progresso Lofts of Fort Lauderdale, LLC ("Progresso"), defaulted after it was

[1] "[R. #]" refers to the record; "[T. #] refers to the transcript of the September 19, 2016 hearing on the parties' cross motions for summary judgment; and "IB" refers to Appellant's Initial Brief. We define other terms in this brief below.

unable to develop the property quickly enough to pay off its loan because of an easement on the property. The easement, however, had been cleared by Fidelity in 2007, in response to a title claim brought by Progresso under the owner's policy of title insurance, *before* Indigo purchased the loan that was insured under the lender's policy. [R. 1088-90.]

Indigo *never* made a claim for coverage under *its* policy, the lender's policy. [*See* R. 1726, at ¶ 7.] And even if it had, title insurance policies do not insure that the borrower is going to repay the loan; they simply insure the validity of the mortgage lien. Further, after Indigo obtained a foreclosure judgment against Progresso, but *prior* to the foreclosure sale, Indigo transferred its interest in the property. [R. 1445-47.] Indigo did not file suit against Fidelity until *after* this transfer took place. [R. 1-60.] Moreover, the property has since been transferred to yet another entity. [R. 646-48.]

Based upon these undisputed facts, the trial court properly concluded that Indigo was barred from maintaining this action because Indigo's policy terminated, *as a matter of law*, when Indigo transferred its interest in the property. There is literally a nationwide body of law supporting this clear and obvious proposition. *See Second Benton Harbor Corp. v. St. Paul Title Ins. Corp.*, 337 N.W.2d 585, 587 (Mich. Ct. App. 1983) (affirming trial court's ruling that whatever rights the insured may have had under the policy were extinguished when it conveyed the

property to a third party); *Willow Ridge Ltd. P'ship v. Stewart Title Guar. Co.*, 706 F. Supp. 477, 486 (S.D. Miss. 1988) (finding that coverage under title policy ceased after the insured lost its interest in the subject property through foreclosure); *Gebhardt Family Inv., L.L.C. v. Nations Title Ins. of N.Y., Inc.*, 752 A.2d 1222, 1227 (Md. Ct. Spec. App. 2000) (finding that coverage is terminated, even where the interest in the property is transferred to a related entity); *Butera v. Attorneys' Title Guar. Fund, Inc.*, 747 N.E.2d 949, 955 (Ill. App. Ct. 2001) (affirming summary judgment in favor of title insurer and holding that coverage under the policy extinguished after insured relinquished its interest in the property); *Chicago Title Ins. Co. v. 100 Inv. Ltd. P'ship*, 355 F.3d 759, 764-65 (4th Cir. 2004) (title policy coverage only continues through ownership); *Stevens v. Dakota Title Ins. & Escrow Co.*, No. A-03-378, 2004 WL 2381386, *7 (Neb. Ct. App. Oct. 26, 2004) (following *Gebhardt* and holding that appellant was not entitled to insurance coverage after property transfer); *Shotmeyer v. N.J. Realty Title Ins. Co.*, 948 A.2d 600, 607-08 (N.J. 2008) (title insurance coverage terminated after property transfer occurred); *Kwok v. Transnation Title Ins. Co.*, 89 Cal. Rptr. 3d 141, 145 (Cal. Ct. App. 2009) (transfer by limited liability company to its two sole members terminated coverage under the title policy as a matter of law); *First Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 823 N.E. 2d 168, 177 (Ill. App. Ct. 2005) (affirming summary judgment in favor of title insurance

company because policy termination provisions were unambiguous); *Point of Rocks Ranch, L.L.C. v. Sun Valley Title Ins. Co.*, 146 P.3d 677, 680 (Idaho 2006) (individuals were not entitled to recover under the policy for easement on real property because they conveyed to their limited liability company *before*, not after, *they had made their claim*); *Londen Land Co., LLC v. Title Res. Guar. Co.*, 467 Fed. Appx. 708, 710 (9th Cir. 2012) (under the terms of the title insurance policy, the policy terminated when insured conveyed the property); *Gumapac v. Deutsche Bank Nat'l Trust Co.*, No. 2:11-cv-10767-ODW (CWx), 2012 WL 3150657, *7 (C.D. Cal. July 30, 2012) (dismissing breach of contract claim with prejudice because claim extinguished at foreclosure when title policy extinguished); *Durbano & Garn Inv. Co., LC v. First Am. Title Ins. Co.*, 330 P.3d 119, 123 (Utah Ct. App. 2014) (affirming district court's ruling in favor of the title insurance company because plaintiff ceased to be insured under the policy when it transferred the property by quit claim deed).[2]

[2] Fidelity discusses all thirteen of these decisions at length in Section III of the, *infra*. By contrast, Indigo claims in its brief that the five cases which Indigo cites are "typical" of a "relatively small" body of case law holding that a title insurer can be sued for breach of contract *after* termination of the policy to recover damages sustained while the policy was in effect. But unlike Fidelity, Indigo cites only to a secondary source instead of citing to this supposed body of case law. [IB. 27.] And, oddly, despite the wealth of cases supporting Fidelity's view (thirteen of which are discussed herein), Indigo actually represents to the Court that it is not aware of any case law that is contrary to its position. *Id*.

The trial court also held that Indigo's claims were barred because Indigo failed to give Fidelity notice under its policy.

The trial court was correct on both points, either of which supports the trial court's ruling being affirmed.

STATEMENT OF THE CASE

Indigo filed a breach of contract claim against Fidelity on September 17, 2010, claiming that Fidelity took too long to vacate an easement on the property. [R. 1-60.] After many years of inactivity, on February 24, 2015, Indigo's operative complaint, the Amended Complaint, was deemed filed. [R. 759-84; 785-86.] Fidelity answered on March 13, 2015. [R. 787-94.] Fidelity's answer included affirmative defenses regarding Indigo's failure to give notice of its claim prior to filing this lawsuit, as required by the title policy,[3] along with affirmative defenses regarding the policy terminating when Indigo transferred its interest to third parties.[4] On June 29, 2016, Indigo filed a Motion for Partial Summary Judgment, which included arguments regarding Fidelity's affirmative defense that the policy terminated. [R. 857-77.]

Fidelity filed a Response to Indigo's Motion [R. 1702-1915], along with its own Motion for Partial Summary Judgment on Condition Precedent, Policy

[3] *See* Affirmative Defenses 1 and 7. [R. 790-92.]

[4] *See* Affirmative Defenses 2 and 9. [R. 791-92.]

Exclusions, and Limitation of Damages. [R. 1262-1464.] Fidelity's motion demonstrated, as a matter of law, that the policy had terminated and that Indigo and its predecessors in interest never gave Fidelity notice of a claim under the lender's policy prior to filing suit. *Id*. Indigo did not file a response to Fidelity's Motion for Partial Summary Judgment.

On September 19, 2016, the trial court held a hearing on the cross-motions for summary judgment. [*See* T. 1.] At the conclusion of the hearing, the Court granted summary judgment in favor of Fidelity and against Indigo, and asked the parties to jointly prepare a final summary judgment order reflecting its oral pronouncements at the hearing. [*See* T. 47-49.]

While the final summary judgment order was being prepared, undersigned counsel contacted Indigo's counsel to reach agreement on the uncontroversial issue of staying discovery while the parties reached agreement on the form of the final summary judgment order. But Indigo's counsel would not agree. Indigo's counsel said that it wished to file its experts' reports, even though they had not been considered by the Court at the summary judgment hearing. Fidelity was thus forced to file a motion to stay discovery and to request an emergency telephonic hearing in light of the impending deadline to file expert witness materials. [R. 1991-96.] The Court granted Fidelity's Motion to Stay, and advised Indigo's counsel that it would be inappropriate to file experts' reports that had not been

considered by the Court at the summary judgment hearing. [R. 1999.] The Court's Stay Order was entered on October 10, 2016. *Id.* In light of the Court's ruling, neither party filed their expert reports.

On October 27, 2016, the Court entered Final Summary Judgment in Favor of Fidelity. [R. 2000-12.] Indigo's counsel participated in the drafting of the Final Summary Judgment and approved of its form. [*See* T. 45; 47-48.]

On November 4, 2016, Indigo filed a purported "Motion for Rehearing," to which it attached **three** expert reports: (i) Jamie A. Cole, whom Indigo's counsel retained to express an opinion on Fidelity's diligence in the removal of the easement; (ii) David E. Chase, whom Indigo's counsel also retained to express an opinion concerning Fidelity's removal of the easement; and (iii) Marcie D. Bour, whom Indigo's counsel retained as a damages expert. [R. 2013-86.] Notably, the "expert" testimony of Jamie A. Cole and David E. Chase is relevant only to Fidelity's diligence in removing the easement, *an issue on which neither party moved for summary judgment, which was not before the Court, and on which the Court never ruled.* [*Id*.] The expert testimony of Marcie D. Bour is relevant only to the issue of policy limits, which the Court *specifically declined to rule on at the summary judgment hearing*. [*Id*.] As a result, there was absolutely no cogent basis for Indigo to file these reports as exhibits to its so-called "Motion for Rehearing" other than to have them injected into the record on appeal.

The trial court properly denied the Motion for Rehearing on November 9, 2016. [R. 2093.] This appeal ensued. [*See* R. 2134-51.]

STATEMENT OF THE FACTS

1. On September 15, 2005, Progresso executed and delivered to BFSPE, LLC a Promissory Note (the "Note") in the amount of $5,396,749.00 and a Mortgage (the "Mortgage") secured by the real property at issue (the "Property"). [R. 1285-87.]

2. Fidelity issued an Owner's Policy of Title Insurance No. 1332-8886 dated September 19, 2005, insuring Progresso (the "Owner's Policy"), and a Loan Policy of Insurance No. 1482-75817 dated September 19, 2005, insuring BFSPE, LLC (the "Loan Policy"). [R. 769-77; R. 1070-80.]

3. The Loan Policy insured that validity of the mortgage lien; it did not insure that Progresso would pay back the mortgage. [*See* R. 769-77.]

4. The Loan Policy contains Section 2, which is a policy provision that delineates how the Loan Policy terminates:

> (a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal matter which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly owned subsidiary of the insured corporation, and their corporate successors by operation of law and

> not by purchase, subject any rights or defenses the Company may have against any predecessor insureds; and . . .
>
> (b)After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. . . .
>
> [R. 775; R. 1985.]

5. The Loan Policy also contains Section 3, which is a policy provision that delineates how notice is to be given:

> The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, or the lien of the insured mortgage, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, or the lien of the insured mortgage, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required, provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.
>
> [R. 775; R. 1985-86.]

6. The Loan Policy also contains Section 7, which is a policy provision that limits the amount of damages that the insured could recover:

> 7. DETERMINATION AND EXTENT OF LIABILITY
>
> This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.
>
> (a)**The liability of the Company under this policy shall not exceed the least of**:
>
> (i) **the Amount of Insurance stated in Schedule A**, or if applicable, the amount of insurance as defined in Section 2(c) of these Conditions and Stipulations;
>
> (ii) the amount of the unpaid principal indebtedness secured by the insured mortgage as limited and provided under Section 8 of these Conditions and Stipulations or as reduced under Section 9 of these Conditions and Stipulations, at the time the loss or damage insured against by this policy occurs, together with interest thereon; or
>
> (iii)the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.
>
> [R. 776 (emphasis added); R. 1987-88.]

7. The Amount of Insurance stated in Schedule A of the Loan Policy is $5,396,749.00. [R. 770.]

8. *Progresso* discovered an easement in favor of the City of Fort Lauderdale dated November 13, 1984, and recorded on January 8, 1985, in the Public Records of Broward County, Florida, under Official Records Book 12248, Page numbers 250-51 (the "Easement"), which was not disclosed in its Owner's Policy. [*See* R. 779-80.]

9. On March 24, 2006, Progresso gave written notice to Fidelity under the Owner's Policy demanding that the easement be vacated. [R. 1082.] Fidelity immediately acknowledged the title claim, on April 5, 2006, and accepted it on April 12, 2006. [R. 1084.]

10. On February 7, 2007, BFSPE, LLC assigned the Mortgage to BFWest, LLC. [R. 1310-11.] This assignment was recorded on February 27, 2007, in the Public Records of Broward County, Florida, under Official Records Book number 43667, Page numbers 65-66. [*Id.*]

11. Also on February 7, 2007, BFWest, LLC delivered a collateral assignment of the Mortgage and Loan Documents to WestLB AG, New York Branch, which had provided a credit facility to BFWest, LLC, as security for repayment of the credit facility. [R. 1313-15.] This assignment was recorded on February 27, 2007, in the Public Records of Broward County, Florida, under Official Records Book number 43667, Page numbers 67-69. [*Id.*]

12. On May 15, 2007, the Fort Lauderdale City Commission enacted an ordinance vacating the Easement. [R. 1913-15.] The ordinance was recorded on July 17, 2007, in the Public Records of Broward County, under Official Records Book 44341, Page numbers 1007-1009. [*Id.*]

13. Progresso defaulted under the Note on March 15, 2008. [*See* R. 1322-23.]

14. On April 23, 2008, BFWest, LLC executed and delivered an Absolute Assignment of Note, Mortgage and Other Loan Documents to Indigo, as assignee for WestLB AG, New York Branch. [R. 1435-37.] This assignment was recorded on May 22, 2008, in the Public Records of Broward County, under Official Records Book 45393, Page numbers 40-42. [*Id.*]

15. In other words, Indigo acquired its interest in the Property *after* the Easement was vacated and *after* Progresso had already defaulted on the Note.

16. Indeed, by that time, Progresso had already sued Fidelity in Broward Circuit Court (the "Progresso Action") regarding the Easement. [*See* R. 1237.]

17. On June 19, 2009, the Progresso Action was dismissed with prejudice. [*See Id.*] The dismissal was affirmed on appeal. *See Progresso Lofts of Ft. Lauderdale, LLC v. Progresso Lofts, LLC*, 44 So. 3d 260 (Fla. 4th DCA 2010).

18. On February 12, 2009, Indigo sued Progresso in Broward Circuit Court, Case No. 09-8484 CA 21, for defaulting on the Note and to foreclose the Mortgage (the "Foreclosure"). [R. 923-1034.]

19. On December 16, 2009, the Court entered a Final Judgment of Foreclosure after Default in the amount of $8,129,961.24 in Indigo's favor, which was recorded on January 4, 2010, in the Public Records of Broward County, under Official Records Book 46771, Page numbers 1486-90. [R. 1439-43.] Progresso did not contest the amount of this judgment. [*See Id.*]

20. On February 22, 2010, Indigo assigned its bid to Indigo Land Progresso Lofts, LLC through an Assignment of Bid recorded on February 23, 2010, in the Public Records of Broward County, under Official Records Book 46894, Page numbers 1305-07. [R. 1896-98.] *Indigo Land Progresso Lofts, LLC was not the parent or wholly owned subsidiary of Indigo*. [*See* R. 1449-51.]

21. In connection with the Foreclosure and the Assignment of Bid, a Certificate of Title was issued on March 8, 2010, in favor of Indigo Land Progresso Lofts, LLC, vesting title to the Property in favor of Indigo Land Progresso Lofts, LLC. [R. 1453.] The Certificate of Title was recorded on March 11, 2010, in the Public Records of Broward County, under Official Records Book 46933, Page number 1219. [*Id.*]

22. Six months later, Indigo, not Indigo Land Progresso Lofts, LLC, filed a Complaint against Fidelity in this action, on September 17, 2010. [R. 1-60.] Indigo filed its Complaint against Fidelity *after* the Property had already been transferred to a separate entity which was neither Indigo's parent nor Indigo's wholly owned subsidiary. [*See Id.*] Indigo filed its Complaint against Fidelity *after* the Progresso Action had already been dismissed with prejudice. [*See Id.*]

23. Prior to filing its Complaint, neither Indigo, nor any of its predecessors in interest, provided Fidelity with notice of a claim under the Loan Policy or otherwise made a claim to Fidelity under the Loan Policy. [*See* R. 1726, at ¶ 7.]

24. Neither Indigo, nor any of its predecessors, had submitted a sworn proof of loss to Fidelity regarding the damages Indigo claims in its lawsuit. [*See Id.* at ¶ 8.]

25. Fidelity never made a formal coverage determination to Indigo due to Indigo's failure to submit a claim to Fidelity under the Loan Policy. [*See Id.* at ¶ 9.]

26. Charles McCall, a representative of Fidelity, testified that "[i]f the lender had written [Fidelity] and said, 'Look, this is taking way too long. We need . . . this done sooner,' we would have gone back to the law firm and seen if there

was anything that could be done to expedite the process, or we could have looked at another firm perhaps to do what needed to be done." [*See* R. 2006, at ¶ 25.]

27. Robert Lochrie and Laura Coffy, two of the attorneys of the firm retained to vacate the Easement, testified that they do not recall any person or entity, including Indigo and Progresso, "ever complaining about a lack of diligence or unreasonable delay in vacating the Easement or about the speed with which the Easement was being vacated." [R. 1700-01; R. 1684-85.]

28. On December 13, 2011, the Property was transferred yet again when Indigo Land Progresso Lofts, LLC sold the Property and transferred title to Emanto Holdings Corp., through a deed that was recorded on December 19, 2011, in the Public Records of Broward County, under Official Records Book 48385, Page numbers 368-70. [R. 1906-08.]

SUMMARY OF ARGUMENT

The trial court properly granted summary judgment in favor of Fidelity and against Indigo. The underlying facts on which the trial court based its summary judgment are not in dispute: (1) the Loan Policy terminated before Indigo filed its lawsuit against Fidelity [*See* R. 2005, at ¶¶ 19-21; R. 2007]; (2) neither Indigo nor any of its predecessors in interest gave Fidelity notice of a claim under the Loan Policy prior to filing suit [*See* R. 1726, at ¶ 7; R. 2006, at ¶ 23]; and (3) Indigo had already transferred any and all interest in the Property by the date of the

foreclosure sale, without retaining any interest in the Property, taking back a purchase money mortgage, or making any warranty in the conveyancing document. [R. 2005, at ¶ 19]. Therefore, based upon a nationwide body of law, the trial court corrected concluded that Indigo's lawsuit was barred because the Loan Policy had terminated before Indigo filed suit and it no longer had an interest in the Property.

Even if this Court were to disagree with the trial court and find that an insured could still bring a claim under a terminated policy as long as the insured gave notice to the insurer prior to policy termination, Indigo's claim would still be barred because neither Indigo nor any of its predecessors in interest ever gave Fidelity notice of a claim under the Loan Policy. [*See* R. 1726, at ¶ 7.]

And moreover still, even if this Court were to disagree with the trial court and find that an insured can bring a claim under a terminated policy, even if the insured never gave notice to the insurer prior to policy termination, as long as the insured's "loss" occurred prior to policy termination, Indigo's claim would still be barred because a mortgagee's "loss" is measured at the time of the foreclosure sale. "Under Florida law, the measure of damages under the policy is the difference of value of the property with and without the [title defect] as of the date [the insured] acquired the property at foreclosure." *Regions Bank v. Chicago Title Ins. Co.*, No. 10-CV-80043, 2011 WL 709853, * 4 (S.D. Fla. 2011) (Ryskamp, J.). The reason for this nationwide rule is self-evident: property values increase and decrease over

time, so Courts peg a set time at which the "loss" is measured or insureds will sue at more opportune times when the real estate markets are down and claim an artificial loss.

In this case, Indigo never "acquired the property at foreclosure." The Certificate of Title was issued on March 8, 2010, in favor of Indigo Land Progresso Lofts, LLC, vesting title to the Property in favor of Indigo Land Progresso Lofts, LLC, and thereby terminating the Loan Policy. [R. 1453.] Therefore, Indigo never suffered a "loss" prior to the Loan Policy's termination. Any supposed "loss" was suffered by the owner at the time of foreclosure, *i.e.*, Indigo Land Progresso Lofts, LLC.

The trial court's decision granting summary judgment in Fidelity's favor should be affirmed.[5]

ARGUMENT

I. STANDARD OF REVIEW.

"The standard of review governing a trial court's ruling on a motion for summary judgment based upon the interpretation of an insurance policy is de novo." *Rodrigo v. State Farm Florida Ins. Co.*, 144 So. 3d 690, 692 (Fla. 4th DCA

[5] Indigo's insinuation that the trial court granted summary judgment "because no Florida case holds that an insurer may be liable for failing to exercise diligence in curing title defects" is belied by the record. [IB. 19.] Both the transcript of the summary judgment hearing and the summary judgment order (which Indigo helped to draft) reflect that the trial court granted summary judgment because the Loan Policy terminated and Indigo failed to give Fidelity notice. [T. 35:7-19; R. 2011.]

2014) (citation omitted) (affirming summary judgment in favor of an insurer where an insured failed to satisfy a condition precedent).

II. THE LOAN POLICY TERMINATED BEFORE INDIGO SUED.

Nobody disputes – not even Indigo – that the Loan Policy terminated, as a matter of law, before Indigo sued Fidelity. Section 2 of the Loan Policy delineates how the Loan Policy terminates:

> (a) After Acquisition of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of (i) an insured who acquires all or any part of the estate or interest in the land by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal matter which discharges the lien of the insured mortgage; (ii) a transferee of the estate or interest so acquired from an insured corporation, provided the transferee is the parent or wholly owned subsidiary of the insured corporation, and their corporate successors by operation of law and not by purchase, subject any rights or defenses the Company may have against any predecessor insureds; and . . .
>
> (b) After Conveyance of Title. The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. . . .
>
> [R. 775; R. 1985.]

The Loan Policy terminated, pursuant to Section 2, because Indigo did not retain any interest in the Property or the Mortgage; nor does Indigo have any liability by reason of covenants of warranty made to anyone in connection with its transfer or conveyance of its interest in the Property or the Mortgage. [R. 1445-47; R. 1453.]

On February 12, 2009, Indigo sued Progresso for defaulting on the Note and to foreclose the Mortgage. [R. 923-1034.] On December 16, 2009, the Court entered a Final Judgment of Foreclosure after Default. [R. 1439-43.] But on February 22, 2010, prior to the foreclosure sale, Indigo assigned its bid to Indigo Land Progresso Lofts, LLC through an Assignment of Bid recorded on February 23, 2010. [R. 1896-98.] Indigo Land Progresso Lofts, LLC is *not* the parent or wholly owned subsidiary of Indigo. [*See* R. 1449-51.]

On March 8, 2010, a Certificate of Title was issued in favor of Indigo Land Progresso Lofts, LLC, vesting title to the Property in favor of Indigo Land Progresso Lofts, LLC. [R. 1453.] The Certificate of Title was recorded on March 11, 2010. [*Id.*]

As a result, and as a matter of law, the Certificate of Title terminated the Loan Policy because the Property was transferred to an entity that was not the parent or wholly owned subsidiary of Indigo. [*See* R. 1449-51; R. 1453.]) "Because an insurance policy is a contract between the insurer and the insured,

contract principles apply to its interpretation." *Am. Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184, 186 (Fla. 2d DCA 2006) (citations omitted). "When the language of an insurance policy is clear and unambiguous, a court must interpret it according to its plain meaning, giving effect to the policy as it was written." *E. Florida Hauling, Inc. v. Lexington Ins. Co.*, 913 So. 2d 673, 676 (Fla. 3d DCA 2005). "Florida law cautions that courts must not add meaning to the terms of an insurance policy to create an ambiguity where none exists." *Ajax Bldg. Corp. v. Hartford Fire Ins. Co.*, 358 F.3d 795, 799 (11th Cir. 2004) (internal citations omitted).

Further, none of the continuation of coverage provisions of Section 2 are triggered. Coverage does not continue under Section 2(a)(i) because Indigo did not acquire "all or any part of the estate or interest in the land by foreclosure" because the Certificate of Title was issued in favor of Indigo Land Progresso Lofts, LLC, vesting title to the Property in Indigo Land Progresso Lofts, LLC. Coverage also does not continue under Section 2(a)(ii), because Indigo Land Progresso Lofts, LLC is not the parent or wholly owned subsidiary of Indigo (*i.e.*, Indigo Real Estate LLC).

Finally, coverage does not continue under Section 2(b) because Indigo did not retain any interest in the Property or the Mortgage and has no liability by

reason of covenants of warranty made to anyone in connection with its transfer or conveyance of its interest in the Property or the Mortgage.

Based on the unambiguous terms of the Loan Policy, the Loan Policy terminated, as a matter of law, when Indigo transferred its interest in the Property.

III. SUMMARY JUDGMENT WAS PROPERLY ISSUED IN FIDELITY'S FAVOR *BECAUSE* THE POLICY TERMINATED.

The point of contention on appeal is whether or not Indigo could nevertheless bring a claim against Fidelity under a terminated policy. Indigo would have this Court adopt a new rule – contrary to a nationwide body of case law – that would permit claims under terminated title insurance policies as long as either notice was given prior to policy termination or the "loss" occurred prior to policy termination. Neither one of these proposed exceptions is appropriate.

To begin with, there is a nationwide body of case law that supports the bright line rule that claims cannot be brought after a policy terminates. Fidelity discusses each of these decisions in this section. Many of these cases discuss why barring claims under terminated policies furthers the stability of the title insurance markets, an outcome which is favorable to insureds and insurers alike. On the flip side, if claims were permitted under terminated policies, then the level of unpredictability for title insurers would dramatically increase, causing title insurance premiums to likewise increase so that title insurers could maintain sufficient reserve funds to fund these belated, and unexpected claims.

Ironically, however, not only would the two exceptions that Indigo champions wreak havoc on the title insurance market, they would not even salvage Indigo's claim. Neither Indigo nor its predecessor in interest ever gave Fidelity notice of its claim prior to bringing suit (or, thereafter, for that matter).[6] And Indigo's alleged "loss" did not occur prior to the Loan Policy's termination.[7]

As a result, even if this Court were to be the first Court in Florida to allow claims to be brought under terminated policies, Indigo's claim would still be barred.

A. Cases From Across the Nation Support the Bright Line Rule Applied by the Trial Court[8]

Based upon the nationwide body of case law cited in Fidelity's Motion for Partial Summary Judgment, discussed in more detail below, the trial court correctly followed the rule precluding an insured from suing under a terminated title policy.

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[6] *See* Argument Section IV, *infra*.

[7] *See* Argument Section V, *infra*.

[8] These cases are presented to the Court in chronological order to chronicle the evolution of this body of law.

Second Benton Harbor Corp. v. St. Paul Title Ins. Corp.*[9] *("Second Benton")

In *Second Benton*, the insured filed its claim on July 5, 1979 – prior to the insured's October 2, 1979 conveyance of the property. *Id*. at 583-84. Notwithstanding that notice was made to the insurer *prior* to the conveyance, the trial court found that whatever rights the insured may have had under the policy were extinguished when it conveyed the property in October 1979. *Id*. at 585-86. The trial court, which granted summary judgment in favor of the insurer, reasoned that the policy's termination provision "became a contractual bar to the instant action" and the appellate court agreed. *Id*. at 586. Therefore, the *Second Benton* decision supports a bright-line rule that claims cannot be brought after a policy terminates, even if notice is given to the insurer prior to termination.[10]

[9] 337 N.W.2d 585, 587 (Mich. Ct. App. 1983) (affirming trial court's ruling that whatever rights the insured may have had under the policy were extinguished when it conveyed the property to a third party).

[10] Although the *Second Benton* court noted that, at the time of the conveyance, the insured had not suffered any damages, the court noted this in connection with its discussion of *another* policy exclusion which "specifically excludes from coverage any claims 'resulting in no loss or damage to the insured claimant.'" *Id.* at 587.

Willow Ridge Ltd. P'ship v. Stewart Title Guar. Co. [11] ***("Willow Ridge")***

Willow Ridge is a district court decision where the court ruled in favor of the insurer and against the insured because the policy terminated once the insured lost title to the property through foreclosure. *Id.* at 486. The *Willow Ridge* facts are close to the facts in this case.

The insured in *Willow Ridge* purchased an owner's policy of title insurance. Workers thereafter filed liens against the property. The insured lost the property through foreclosure, which the insured blamed on the liens. Indigo is claiming here exactly what the insured claimed in *Willow Ridge*: "Willow Ridge claims that the defect in title, *i.e.*, the liens, contributed to the foreclosure of the property by the Bank of Meridian and that because of Stewart Title's refusal to clear title and defend against the foreclosure, Willow Ridge suffered the loss for which it is entitled to recover." *Id*. at 483.

Just like Indigo, the insured in *Willow Ridge* claimed that its damages arose as a result of the foreclosure. But the trial court ruled that, pursuant to the "clear and unambiguous" language of the policy's continuation of coverage provision, "once the insured's interest in the land ceases, the coverage under the policy terminates …. once Willow Ridge lost title to the property through foreclosure, it

[11] 706 F. Supp. 477, 486 (S.D. Miss. 1988) (insured cannot sue under a terminated policy, even when notice was given prior to termination).

no longer had any legal interest in the property and the policy was rendered ineffective." *Id*. at 486. Notably, the Court ruled that Willow Ridge's claim was barred once the policy terminated even though Willow Ridge had given the insurer notice of its claim prior to foreclosure and even though the insurer had appointed counsel for the insured. *Id*. at 479 ("On August 14, Willow Ridge informed Stewart Title that liens were being filed against the insured property, following which Stewart title on September 17 retained [counsel] to represent the interests of Willow Ridge.") (internal references omitted).

Willow Ridge also supports the trial court's application of the rule precluding an insured from bringing a claim on a terminated policy.

Gebhardt Family Inv., L.L.C. v. Nations Title Ins. of N.Y., Inc.*[12] *("Gebhardt")

The *Gebhardt* trial court directed judgment in favor of the insurer, and the appellate court affirmed, on the grounds that the insureds' transfer of the subject property into a limited liability company (of which the insureds were the sole members) terminated insurance coverage. *Id*. at 466. Notably, the Gebhardts reported their claim to their insurer *before* they transferred the property to the limited liability company. *Id*. Despite this prior notice, the appellate court

[12]752 A.2d 1222, 1227 (Md. Ct. Spec. App. 2000) (finding that coverage is terminated, even where the interest in the property is transferred to a related entity).

affirmed the trial court's ruling on the basis of policy termination. *Id.* The appellate court refused to disregard the nature and viability of limited liability companies, holding that while the insureds may have an interest in the limited liability, they *individually* no longer had an interest in the property. *Id*. at 464. The appellate court reasoned that having accepted the estate planning benefits of transferring their interest in the property to a limited liability company, it was disingenuous for the insureds to deny that the conveyance ever took place for title insurance purposes. *Id*. at 466.

Butera v. Attorneys' Title Guar. Fund, Inc.*[13] *("Butera")

The *Butera* trial court granted summary judgment in favor of the insurer, finding that coverage under the policy extinguished after the insured conveyed title to the property. *Id*. at 608. On appeal, the *Butera* court affirmed the trial court's decision, even though the lien arose *prior* to the conveyance. *Id*. at 603. *Butera* thus also supports the trial court's decision barring claims under terminated title insurance policies.

[13] 747 N.E.2d 949, 955 (Ill. App. Ct. 2001) (affirming summary judgment in favor of title insurer and holding that coverage under the policy extinguished after insured relinquished its interest in the property).

Chicago Title Ins. Co. v. 100 Inv. Ltd. P'ship*[14] *("100 Inv.")

100 Inv. is one of the handful of cases on which Indigo relies to support its contention that its claim under the terminated Loan Policy is not barred. Indigo is wrong; it is conflating the "duty to defend" (which *100 Inv.* allowed) with the "duty to indemnify" (which *100 Inv.* disallowed). *Id.* at 765. Indigo is not seeking that Fidelity defend Indigo from any claims brought against it by third parties, so the "duty to defend" has no application here.

In *100 Inv.*, 100 Investment purchased a 1.145-acre tract with a defective title. When it conveyed that tract to NVR Homes in July 1995, it passed the defective title to NVR Homes, and it did not, in that conveyance, warrant that it had good title or that title was free from defects. In other words, at the point of conveyance to NVR Homes, any preexisting defect in the title became NVR Homes' problem, and NVR Homes would have to obtain its own title insurance to protect itself from any problem that might be caused by that defect. *Id.* at 764.

The parties filed cross-motions for summary judgment and the trial court ruled in favor of the insured. The appellate court reversed *as to the duty to*

[14] 355 F.3d 759, 764-65 (4th Cir. 2004) (title policy coverage only continues through ownership).

indemnify, finding that the insurer was not required to indemnify the insured once the policy terminated. *Id.* at 761-62.[15]

The *100 Inv.* appellate court's reasoning is telling, and applicable:

> The allocation of risk by this agreement gives title insurance coverage to the insured during the period when the insured purportedly owns the property, when most of the adverse consequences due to a defective title would occur. If a preexisting defect in title were to remain after the insured conveyed the land, the risk inherent in that defect would pass to the purchaser and the insured would no longer have risk, *nor coverage*. Of course, if the insured were to warrant the property against title defects, then the insured would be retaining the risk of a defective title, and coverage would continue for that risk. Thus, if the conveyance were accomplished by a deed containing a special warranty, the insured would be conveying no more than what it received from its grantor, *and coverage would end with the conveyance*.

Id. at 763-64 (emphasis added). Again, *100 Inv.* also supports the trial court's decision, despite Indigo's misplaced reliance on the decision by conflating the duty to defend with the duty to indemnify.

[15] As stated above, although the appellate court affirmed the trial court's decision as to the "duty to defend," that holding has no applicability here because Indigo is not seeking that Fidelity defend Indigo from any claims brought against it by third parties.

***Stevens v. Dakota Title Ins. & Escrow Co.*[16]**

In *Stevens*, the trial court granted summary judgment in favor of the insurer and the appellate court affirmed. *Id.* at *9. The *Stevens* court followed *Gebhardt* and held that the appellant was not entitled to insurance coverage after the property transfer took place. *Id.* at *7. Although the insured in *Stevens* gave notice of the claim to the insurer *after* transferring the property to a third party (which Indigo has not even done), the Court did not consider this in its holding. In other words, the Court did not take this into account in its analysis. Further, the *Stevens* court relied heavily on *Gebhardt*, in which prior notice was given to the insurer but the policy termination, nevertheless, barred the insured's claim. *Id.*

***Shotmeyer v. N.J. Realty Title Ins. Co.*[17]**

In *Shotmeyer*, the trial court granted summary judgment in favor of the insurer on the basis that the property transfer terminated title insurance coverage, the appellate court reversed, and the New Jersey Supreme Court reversed the appellate court and affirmed the trial court. *Id.* at 610. In doing so, the New Jersey

[16] Case No. A-03-378, 2004 WL 2381386, *7 (Neb. Ct. App. Oct. 26, 2004) (following *Gebhardt* and holding that appellant was not entitled to insurance coverage after property transfer).

[17] 948 A.2d 600, 607-08 (N.J. 2008) (title insurance coverage terminated after property transfer occurred).

Supreme Court reasoned that "because insurance premiums and coverage provisions are based on predictable levels of risk, title insurers need to rely on certain consistent conditions in order to calculate premium rates reliably." *Id.* at 606. *Shotmeyer* also supports the trial court's decision.

***Kwok v. Transnation Title Ins. Co.*[18]**

The *Kwok* decision also promotes the bright-line rule that the trial court accepted in this case. The *Kwok* facts are as follows: in April 2004, appellants formed Mary Bell, LLC and the LLC purchased real property located on Mary Bell Avenue in Los Angeles. The LLC was the only named insured in the title insurance policy. On September 21, 2005, the LLC transferred the property to the trust of the husband and wife that owned the LLC. After the transfer, litigation ensued with neighbors. The husband and wife tendered a claim to the insurer under the policy and the insurer denied coverage on the grounds that the transfer of the property by the LLC to the trust terminated coverage. *Id*. at 143-44. The trial court granted summary judgment in favor of the insurer and the appellate court affirmed. *Id*. at 149. Although the notice and the alleged claim occurred post-termination, the Court did not even discuss these facts as being determinative.

[18] 89 Cal. Rptr. 3d 141, 145 (Cal. Ct. App. 2009) (transfer by limited liability company to its two sole members terminated coverage under the title policy as a matter of law).

***First Midwest Bank, N.A. v. Stewart Title Guar. Co.*[19]**

The *First Midwest Bank* trial court granted summary judgment in favor of the insurer on its insured's claim seeking a declaration that Stewart Title was liable under the title insurance policy; the appellate court affirmed. *Id.* at 171. In doing so, the appellate court wrote that "[i]n situations such as this one, where the mortgage loan that was insured by the title policy is paid or voluntarily satisfied, the insurer's liability under the title policy is terminated." *Id.* at 175-76. The Court reasoned that under the language of the statute, any liability Stewart Title had under the title insurance policy was extinguished when the insured mortgage was paid in full by any person, voluntarily satisfied, or released, except as provided for in the continuation of coverage section. *Id*.

***Point of Rocks Ranch, L.L.C. v. Sun Valley Title Ins. Co.*[20]**

In affirming the trial court's decision granting summary judgment in favor of the insurer, the *Point of Rocks Ranch* court explicitly rejected Indigo's proposed exception for terminated policies. In *Point of Rocks Ranch*, the property was

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[19] 823 N.E. 2d 168, 177 (Ill. App. Ct. 2005) (affirming summary judgment in favor of title insurance company because policy termination provisions were unambiguous).

[20] 146 P.3d 677, 680 (Idaho 2006) (individuals were not entitled to recover under the policy for easement on real property because they conveyed to their limited liability company *before*, not after, *they had made their claim*).

transferred, like here, without notice of the claim being made to the insurer. *Id*. at 680. Nevertheless, the insured argued that the policy termination provision should be construed to mean that coverage only terminated with respect to claims that may arise in the future. *Id.* at 679 ("In other words, the Frenches contend the provision merely means that there is no coverage for liens, encumbrances, or title defects that came into existence after the Frenches conveyed the property since they had a claim, albeit unknown, while they owned the real property, they should still be permitted to recover damages under the policy.") The Court disagreed, and reasoned that "[c]onstruing the policy provision at issue as only applying to future liens, encumbrances, or title defects would render it meaningless. There is already no coverage for such matters." *Id.* at 680. As a result, the trial court's decision here - - to bar claims under terminated policies - - is not only correct as a matter of law, and as a matter of public policy, but it is also correct as a matter of logic.

***Londen Land Co., LLC v. Title Res. Guar. Co.*[21]**

The *Londen* court also affirmed the trial court's decision granting summary judgment in favor of the insurer without a discussion of when notice of the claim was given or when damages arose. *Id*. Instead, the *Londen* court applied the

[21] 467 Fed. Appx. 708, 710 (9th Cir. 2012) (under the terms of the title insurance policy, the policy terminated when insured conveyed the property).

simple and well-accepted rule that "[w]hen Londen conveyed the land to its wholly owned limited liability company, Florence Ventures, LLC (Florence) in fee simple, Londen's policy terminated because Londen conveyed the entirety of its estate or interest." *Id.*[22]

***Gumapac v. Deutsche Bank Nat'l Trust Co.*[23]**

Gumapac is a district court decision granting a motion to dismiss in favor of the title insurer because Plaintiffs had transferred their interest in the property. *Id.* The plaintiffs in *Gumapac* gave notice of the alleged title defect only after completion of the foreclosure sale, and thus after termination of the title insurance policy. *Id.* The *Gumapac* court found that the policy terminated at foreclosure, because that is when the plaintiffs were divested of title.

Again, in this case, in connection with the Foreclosure and the Assignment of Bid, a Certificate of Title was issued on March 8, 2010, in favor of Indigo Land Progresso Lofts, LLC, vesting title to the Property in favor of Indigo Land

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[22] The title policy in *Londen* must not have had an exclusion for transfers to wholly-owned subsidiaries, but that exclusion, which is contained in the Loan Policy, is inapplicable because Indigo Land Progresso Lofts, LLC, to which Indigo assigned its bid and which took title, is *not* Indigo's wholly-owned subsidiary.

[23] Case No. 2:11-cv-10767-ODW (CWx), 2012 WL 3150657, *7 (C.D. Cal. July 30, 2012) (dismissing breach of contract claim with prejudice because claim extinguished at foreclosure when title policy extinguished).

Progresso Lofts, LLC. Thus, Indigo was divested of title and could not bring suit under the Loan Policy after March 8, 2010.

***Durbano & Garn Inv. Co., LC v. First Am. Title Ins. Co.*[24]**

In *Durbano*, the parties, like here, filed cross-motions for summary judgment and the trial court granted summary judgment in favor of the insurer. *Id*. at 120. The appellate court affirmed. The district court determined that coverage under the policy terminated when the insured conveyed the property; the appellate court agreed. As part of its holding, the *Durbano* court recognized that

> Title insurance is an unusual type of insurance … [I]t is not a recurring policy: There is only a single premium, and a title insurance policy written on behalf of an owner theoretically remains outstanding forever to protect him or her from claims asserted by others.'" (quoting *Black's Law Dictionary* 875 (9th ed. 2009). Therefore, parties to a title insurance contract 'are free to define the exact scope of the policy's coverage and may specify the losses and encumbrances the policy is intended to encompass. (quoting *Pacific Am. Constr. v. Security Union Title*, 1987 P.2d 45)).

Id. at 122. Based upon the foregoing authorities, the trial court properly granted summary judgment in favor of Fidelity, finding that Indigo could not sue under a terminated policy.

[24] 330 P.3d 119, 123 (Utah Ct. App. 2014) (affirming district court's ruling in favor of the title insurance company because plaintiff ceased to be insured under the policy when it transferred the property by quit claim deed).

IV. INDIGO DID NOT PROVIDE NOTICE OF ITS CLAIM (DURING THE POLICY PERIOD, OR EVER).

Indigo relies heavily on *Keys v. Chicago Title Ins. Co.* ,[25] a district court decision where, admittedly, the insured was permitted to sue under a terminated loan policy because she presented evidence of a loss suffered, and a claim made, while the title policy was still effective. However, even if this Court were to adopt *Keys* (which appears to be a minority-view), it would still not salvage Indigo's claim.

It is undisputed that neither Indigo nor its predecessor in interest ever gave Fidelity notice of a claim under the Loan Policy. Coverage had been provided under the Owner's Policy, which is a separate policy, asserting a loss relating to the Easement and not the alleged delay in vacating it. Indigo tried to strap itself onto the notice given by Progresso under the Owner's Policy even though Indigo did not even own the Loan at the time and even though Progresso (*i.e.*, the owner) never complained about a delay in vacating the Easement. The trial court disallowed this, so even if this Court would adopt Indigo's proposed exception for claims under terminated policies when pre-termination notice is given by the insured, Indigo's claim would still be barred because Indigo never made a claim under the Loan Policy.

[25] No. 3:11-cv-617-CWR-FKB, 2012 WL 4510471, *7 (S.D. Miss. Sept. 28, 2012).

Indigo attempts to muddy the waters by claiming that Fidelity was required to prove Indigo's failure to give notice, coupled with prejudice, in order to prevail on this issue. That is incorrect. That puts the proverbial cart before the horse. Indigo's failure to give notice is fatal, without the trial court having to reach the question of whether or not Indigo's failure to give notice was prejudicial to Fidelity (and it was). With the exception of one case out of Arizona (discussed below), all of the cases on which Indigo relies concerned insureds who, unlike Indigo, had given the insurers notice of their claims *prior to* the policy termination. *See Keys*, 2012 WL 4510471, *7 ("Keys, individually, has standing to sustain her action against Chicago Title because she has presented evidence of loss incurred and a claim made under the Title Policy while the policy was still effective as to Keys individually"); *First Am. Title Ins. Co. v. Two Seventy Three Water Street, LLC*, 117 A.3d 857, 862-63 (Conn. App. Ct. 2015) (date of loss was February 18, 2005; claim submitted on August 15, 2007; and property transferred on May 23, 2011); *M & I Marshall & Isley Bank v. Wright*, No. CV-10-01657-PHX-FJM, 2011 WL 181292 (D. Ariz. Jan. 19, 2011) (claim made in October 2009 and property sold in November 2009). Therefore, the trial court was correct to bar Indigo's claims

because Indigo never gave Fidelity notice under the Loan Policy.[26]

V. INDIGO'S ALLEGED "LOSS" DID NOT OCCUR DURING THE POLICY PERIOD.

Indigo's alternative argument is to have this Court adopt a new rule that allows a claim under a terminated policy, even where pre-termination notice is never given to the insurer, as long as the "loss" occurs pre-termination. For this proposition, Indigo relies on only one case: *Centennial Dev. Group, LLC v. Lawyer's Title Ins. Corp.*, 310 P.3d 23 (Ariz. Ct. App. 2013).

But even if this Court were to adopt a rule permitting an insured to bring a claim under a terminated policy, even if notice were not given under the policy, as

[26] Even though not required, the record evidence is undisputed that Fidelity was prejudiced by Indigo's lack of notice. Charles McCall, a representative of Fidelity, testified that "[i]f the lender had written [Fidelity] and said, 'Look, this is taking way too long. We need . . . this done sooner,' we would have gone back to the law firm and seen if there was anything that could be done to expedite the process, or we could have looked at another firm perhaps to do what needed to be done." [*See* R. 2006, at ¶ 25.] Indigo devotes pages 36 through 39 of its Initial Brief with the red herring argument that Fidelity somehow waived its notice defense. Curiously, Indigo does not argue that Fidelity failed to raise notice in its answer (because it did). Rather, it argues that Fidelity did not specifically plead lack of notice *coupled with* prejudice. However, none of the cases cited by Indigo in support of its argument for waiver require a defendant to both plead the failure of a plaintiff to satisfy a condition precedent *and* to assert how that failure prejudiced the plaintiff. In the present case, Fidelity pled in its first affirmative defense with specificity and particularity that Indigo failed to provide it with the required notice of Indigo's claim prior to filing suit. Thus, Fidelity satisfied Rule 1.120(c)'s requirement for specificity and particularity. Moreover, Indigo fails to allege unfair surprise by this defense, as was the rationale in the waiver case it relies upon, *Cooke v. Ins. Co. of N. Am.*, 652 So. 2d 1156 (Fla. 2d DCA 1995).

long as the loss occurred during the policy period, Indigo would fare no better because Indigo was not the property owner when the "loss" supposedly occurred. Under Florida law (and every state's laws), the proper measure of "damages" under a title policy is the difference of value of the property with and without the [title defect] as of the date [the insured] **acquired the property at foreclosure**." *Regions Bank v. Chicago Title Ins. Co.*, No. 10-CV-80043, 2011 WL 709853, * 4 (S.D. Fla. 2011) (Ryskamp, J.) (emphasis added). Here, again, Indigo never "acquired the property at foreclosure"; Indigo Land Progresso Lofts, LLC did. As a result, Indigo never suffered a "loss" during the policy period.

Notably, the case law is uniform that a "loss" is measured at the time of the foreclosure sale. *See First Am. Bank v. First Am. Transp. Title Ins. Co.*, 759 F.3d 427, 432 (5th Cir. 2014) (affirming the district court's conclusion that "the policies unambiguously require valuation of the vessels as of the date of the **foreclosure sales**") (emphasis added); *Associated Bank, N.A. v. Stewart Title Guar. Co.*, 881 F.Supp.2d 1058, 1066-67 (D. Minn. 2012) (the market value of the property on the date of the **foreclosure sale** determines the loss under the insured mortgagee's title policy); *Marble Bank v. Commonwealth Land Title Ins. Co.*, 914 F.Supp. 1252, 1254 (E.D. N.C. 1996) (the appropriate date to calculate the insured lender's loss was the date of the **foreclosure sale**); *Karl v. Commonwealth Land Title Ins. Co.*, 20 Cal. App. 4th 972, 984, n. 10 (Cal. App. 1993) ("Nonpayment is thus certain

only on close of the **foreclosure sale**.") (emphasis added); *Green v. Evesham Corp.*, 430 A.2d 944, 948-49 (App.Div.1981) (loss is calculated as of date of **sheriff's sale**) (emphasis added).

Prior to the foreclosure date, an insured lender's borrower could always reinstate its loan or save the property by paying the full loan amount prior to the foreclosure sale. *See Karl*, 20 Cal.App.4th at 984, n. 10. Further, the competitive bidding at the foreclosure sale theoretically might generate a third party bid in excess of the face value of the insured lender's foreclosure judgment. *Id*.

Moreover, the public policy reasons behind this nationwide rule are particularly applicable in this day and age when property values fluctuate so wildly: property values increase and decrease over time, so Courts peg a set time at which the "loss" is measured or insureds would sue at more opportune times when the real estate markets are down and claim an artificial loss. As an example, suppose a lender made a $4 million loan secured by collateral purchased in 2006 in a depressed area (valued at the time at $5 million); and thereafter, the lender discovers a title defect and submits a claim; that lender would *only* have a loss under the title policy if its collateral proves inadequate because of the defect. If the property ultimately appreciated in value and is sold for a profit at the foreclosure sale, the lender would not have suffered any damages and would not have a compensable "loss" under the title policy. *See, e.g., Falmouth Nat. Bank v. Ticor*

Title Ins. Co., 920 F.2d 1058, 1062-63 (1st Cir. 1990) ("Another distinguishing characteristic of a contract to indemnify is that the loss must be actual."); *Associated Bank, N.A.*, 881 F. Supp. 2d at 1066-67 (granting summary judgment in favor of insurer because mortgagee did not sustain an insured loss when it settled with the borrower for an amount greater than the market value of the collateral on the date of the foreclosure sale); *Karl*, 20 Cal. App. 4th at 978 ("Absent a 'loss' there is no obligation to pay benefits under a title policy.") For all of the foregoing reasons, the date of an insured mortgagee's "loss" is uniform: the date of the foreclosure sale.

Further, there is an important distinction between a title insurance policy issued to the owner of property and a lender's policy (like the one here) because a lender merely has a security interest in the property. *Falmouth*, 920 F.2d at 1063. This distinction is crucial for purposes of determination of loss because an owner-insured is entitled to the full market value of the property, a value which is immediately diminished by the presence of title defects. *Id.* By contrast, a mortgagee-insured's loss cannot be determined unless and until the note is not repaid and the collateral for the mortgage proves inadequate. *Id.* ("[I]t is not the mortgage note that is insured, but rather, what is insured is the loss resulting from a defect in the security.") This occurs (or not) at the time of foreclosure.

CONCLUSION

As stated above, this is an attempt at a "Hail Mary" pass by an opportunistic investor. Indigo bought the Note after the Easement was vacated, after Progresso already defaulted, and after Progresso already sued Fidelity regarding the Easement. Indigo never gave notice under the Loan Policy. It could not, because the Easement was vacated long before it purchased the Note. And Indigo also never suffered a "loss," because another entity took title after the Foreclosure, which event terminated the Loan Policy, and that entity has since sold the Property yet again to another third party. The trial court thus correctly granted summary judgment in favor of Fidelity.

This Court ought not permit Indigo to try to create new law.

For the foregoing reasons, the trial court's order granting summary judgment in favor of Fidelity and against Indigo should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2017, a true and correct copy of the foregoing document has been furnished by E-Mail via 4DCA Case Mail to Peter A. Tappert, Esq., (ptappert@wdpalaw.com), (service@wdpalaw.com); Jeffrey M. Weissman, Esq. (jmwmit69@alum.mit.edu); and Brian S. Dervishi, Esq. (bdervishi@wdpalaw.com), (elastra@wdpalaw.com) of Weissman & Dervishi, P.A., SunTrust International Center, 1 S.E. 3rd Avenue, Suite 1700, Miami, Florida 33131.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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