

1989

Valley Bank and Trust Company, a Utah coporation v. U.S. Title Insurance Company of Dallas, a Texas corporation : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 890043 IN THE SUPREME COURT
FOR THE STATE OF UTAH

VALLEY BANK AND TRUST COMPANY,
a Utah corporation,

Plaintiff-Appellant,

v.

U.S. TITLE INSURANCE COMPANY
OF DALLAS, a Texas corporation,

Defendant-Respondent.

89-0043 CA

Case No. 87-0358
Priority No. 14B

BRIEF OF APPELLANT VALLEY BANK AND TRUST COMPANY

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE HOMER F. WILKINSON, DISTRICT COURT JUDGE

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COURT OF APPEALS

Clerk, Supreme Court, Utah

IN THE SUPREME COURT
FOR THE STATE OF UTAH

VALLEY BANK AND TRUST COMPANY,)
a Utah corporation,)
)
Plaintiff-Appellant,)
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JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to Article VIII, §3 of the Utah Constitution, Utah Code Annotated §78-2-2 (1953 as amended), and Rule 3(a), Rules of the Utah Supreme Court.

NATURE OF PROCEEDINGS

This appeal is from a final judgment entered by the Honorable Homer F. Wilkinson, Third Judicial District Court of Salt Lake County, State of Utah, in favor of U.S. Life Title Insurance Company of Dallas ("U.S. Title") and dismissing Valley Bank and Trust Company's ("Valley Bank") complaint with prejudice.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this case:

1. Whether the District Court erred in concluding that Valley Bank "created" a prior recorded, but undisclosed lien within the meaning and intent of an exclusion for defects created by the insured contained in a Mortgagee Policy of Title Insurance issued by U.S. Title to Valley Bank, despite the fact that U.S. Title knew about the prior recorded lien, but failed to list it as an exception to coverage.

2. Whether the District Court erred in concluding that a Mortgagee Policy of Title Insurance exclusion for defects created by the insured is effective to exclude coverage for the prior recorded lien under the facts of this case.

3. Whether the District Court erred in concluding that U.S. Title is not liable under the Mortgagee Policy of Title Insurance it issued to Valley Bank for losses incurred by Valley Bank as a result of the existence of a prior recorded, but undisclosed lien.

STATEMENT OF THE CASE

1. Nature of the Case

This is an action by Valley Bank to recover the loss it incurred because of U.S. Title's failure to list a prior recorded lien as an exception to coverage under a Mortgagee Policy of Title Insurance (the "Policy") issued by U.S. Title to Valley Bank insuring the priority of a trust deed held by Valley Bank. U.S. Title denies coverage, asserting that coverage is excepted because of a policy exclusion for defects or encumbrances created by the insured.

2. Course of Proceedings

On April 2, 1986, Valley Bank filed an action in the Third Judicial District Court in and for Salt Lake County, State of Utah, against U.S. Title to recover damages caused by U.S. Title's failure to insure the trust deed given to Valley Bank on certain real property. (Record on Appeal, Valley Bank

and Trust Company v. U.S. Life Title Insurance Company of Dallas, Civil No. C86-2379 (hereafter "R."), p. 2). Valley Bank filed a motion for partial summary judgment on July 3, 1986, on the issue of whether the exclusionary provision contained in paragraph 3 of the "Exclusions From Coverage" section of the Policy was enforceable. (R. 31). On August 4, 1986, U.S. Title filed a motion for summary judgment, which was heard, together with Valley Bank's motion for partial summary judgment, by the Honorable Homer F. Wilkinson on August 15, 1986. (R. 64). Both motions were denied. Id.

A trial was held before the Honorable Homer F. Wilkinson on May 14, 1987, at which time the Judge granted judgment in favor of U.S. Title. (R. 95). In his findings of fact and conclusions of law filed on July 7, 1987, Judge Homer F. Wilkinson concluded that Valley Bank's complaint should be dismissed with prejudice upon the merits. (R. 107). Valley Bank moved for a new trial pursuant to Rule 59(a), Utah Rules of Civil Procedure, on July 10, 1987, (R. 117), which motion was denied by an Order entered on September 2, 1987. (R. 129-30). Valley Bank filed a Notice of Appeal to the Utah Supreme Court on September 24, 1987. (R. 131).

3. Statement of Facts

a. Identification of the Parties

Valley Bank is a banking corporation incorporated under the laws of the State of Utah. It is a wholly owned

subsidiary of Valley Utah Bancorporation, a Utah corporation, and is a separate and distinct entity from Valley Mortgage Corporation ("Valley Mortgage"). (Transcript of the May 14, 1987, trial of Valley Bank and Trust Company v. U.S. Life Title Insurance Company of Dallas, Civil No. C86-2379 (hereafter "Tr."), p. 3, 8).

Valley Mortgage is also a wholly owned subsidiary of Valley Utah Bancorporation. Id. As a Utah corporation, Valley Mortgage was and is in the business of originating mortgage loans. (Tr. 18). After Valley Mortgage originated such loans, Valley Bank typically closed the loans on Valley Bank documentation. Id. There has never been any suggestion or allegation in this case that Valley Bank and Valley Mortgage are the alter egos of each other.

U.S. Title is a Texas corporation incorporated for the purpose of underwriting and issuing policies of title insurance. One of its agents in the state of Utah is Mountain View Title Company of Ogden, Utah ("Mountain View").

b. Small Business Administration's Grant of the SBA Loan in Early April, 1983

In April, 1983, Valley Bank, through its Small Business Administration Department ("SBA Department"), made a loan (the "SBA Loan") to F. Kent Nance and Patricia J. Nance (the "Nances") in the principal sum of \$65,000. (R. 104). The SBA Loan was secured by a trust deed (the "SBA Trust Deed")

against certain real property (the "Property") owned by the Nances in Summit County, Utah. (R. 104; Exhibit (hereafter "Ex.") 6). The SBA Trust Deed was recorded in the office of the Summit County Recorder on April 5, 1983. (R. 105; Ex. 6).

c. Valley Mortgage's Grant of the Residential Loan in Late April, 1983

Approximately three weeks after Valley Bank made the SBA Loan to the Nances, the Nances approached Valley Mortgage for the purpose of obtaining an additional loan. The Nances executed and delivered to Valley Mortgage a Valley Bank promissory note in the principal sum of \$101,500 (the "Residential Loan"). (R. 104). The Residential Loan was secured by a trust deed (the "Residential Trust Deed") against the Nances' Property, (R. 104), and was recorded in the office of the Summit County Recorder on April 26, 1983. (R. 104; Ex. 1).

To determine the existence of other loans procured by its borrowers, Valley Mortgage did not customarily perform a physical search of its own files or of Valley Bank's files. (Tr. 44-45). Additionally, Valley Mortgage did not have a computer indexing system with which to search for previous loans extended to borrowers. (Tr. 45). Instead, Valley Mortgage typically relied on the borrower's loan application, routine credit checks, preliminary title reports and policies of title insurance to ascertain the existence of prior secured loans. Id.

During the time the Nances applied for and obtained the Residential Loan, they did not disclose the existence of the earlier SBA Trust Deed to either Valley Mortgage or to Valley Bank. (Tr. 21, 22; Ex. 17). At the time the Residential Loan closed, Valley Mortgage's loan officer in charge of the Residential Loan, Paul Thurston ("Thurston"), was unaware of the existence of the SBA Loan. (R. 105). Furthermore, Thurston never discussed with any representative of Valley Bank the existence of other loans which the Nances might have had with Valley Bank. (Tr. 36-37, 40).

d. Valley Mortgage's Procuring of the Commitment of Title Insurance

As a condition to closing the Residential Loan and in order to determine all liens or encumbrances which might have existed against the Property, Valley Mortgage requested a title report from U.S. Title's agent, Mountain View. (Tr. 22). On April 15, 1983, U.S. Title issued a Commitment of Title Insurance (the "Commitment") to Valley Bank. (Tr. 24; Ex. 2). The Commitment listed as exceptions to coverage liens held by First Security Bank of Utah and Citizens Bank. (Tr. 26; Ex. 2). The Commitment did not disclose the existence of the SBA Trust Deed previously recorded on April 5, 1983. Id.

In connection with the closing of the Residential Loan, Valley Mortgage issued written closing instructions to Mountain View directing Mountain View to "[s]earch title to

date and record above documents providing nothing has been filed or recorded affecting subject property since last certificate date." (Tr. 32, 33; Ex. 15). Remarkably, Mountain View recorded the Residential Trust Deed despite the fact that the SBA Trust Deed had been of record for some three weeks. (Ex. 1).

e. U.S. Title's Issuance of the Policy.

Three months later, in July, 1983, U.S. Title issued a Mortgage Policy of Title Insurance to Valley Bank, insuring the Residential Trust Deed as a first and paramount lien against the Property. (R. 104; Ex. 3). The Policy made no mention of the SBA Trust Deed as an exception to coverage. Id.

Prior to issuing the Policy, Mountain View, through its president, Michael L. Hendry ("Hendry"), acquired actual knowledge of the existence of the SBA Trust Deed. (R. 105; Tr. 132, 134). Mountain View may have been aware of the SBA Trust Deed through a vice president, Kevin N. Parkinson, as early as April 26, 1983, the date the Residential Trust Deed was recorded (Tr. 120, 121-22, 127-28, 146, 149-50). Mountain View did not, however, communicate that knowledge to Valley Mortgage before issuing the Policy. (Tr. 134, 138, 160-61).

f. Valley Mortgage's Sale of the Residential Loan and Residential Loan Trust Deed in the Secondary Mortgage Market

After originating a loan, Valley Mortgage commonly, if not always, sold the loan in the secondary mortgage market. (Tr. 23). In this case, Valley Mortgage sold the Residential Loan and Trust Deed to Federal Home Loan Mortgage Corporation ("Federal Home"). (R. 104; Ex. 5). Prior to the sale, Valley Bank assigned the Residential Trust Deed to Valley Mortgage and Valley Mortgage assigned the Trust Deed to Federal Home. (Tr. 38; Ex. 4, 5). In connection with both assignments, Valley Bank and Valley Mortgage warranted that the Residential Trust Deed was a first lien on the Property. (R. 2).

In its instruction letter to Mountain View governing recordation of the Residential Trust Deed, Valley Mortgage specifically requested an indorsement on the Policy so that the transferee of the Residential Loan and Trust Deed, Federal Home, could be named as an insured. (R. 104; Tr. 37). At the time Mountain View received Valley Mortgage's closing instructions, Mountain View, through its president, Hendry, knew of Valley Mortgage's assignment of the Residential Loan and Trust Deed. (Tr. 135-36, 137). Though Hendry knew of the assignment to Federal Home and of the earlier recorded SBA Trust Deed, Hendry failed to disclose the existence of the SBA Trust Deed to Federal Home. (Tr. 136).

g. Valley Bank's Repurchase of the Residential Loan.

In early 1984, the Nances defaulted on both the SBA and Residential Loans. (R. 105). The Nances also defaulted on a loan made to them by Intermountain Thrift & Loan ("Intermountain"), (R. 105), a wholly owned subsidiary of Valley Utah Bancorporation. (Tr. 7-8). After filing a notice of default, (Ex. 8), Intermountain sold the Property and an adjacent lot by trustee's sale to Valley Bank as the successful bidder. (R. 105-06).

After the default, Federal Home also instituted foreclosure proceedings against the Property. In connection with the proceedings, Federal Home obtained a title report pertaining to the Property, from which it learned of the existence of the prior recorded SBA Trust Deed. (Tr. 54). Thereafter, Federal Home submitted a claim to U.S. Title, demanding that U.S. Title provide coverage for the SBA Trust Deed. (Tr. 54-55; Ex. 23). Concurrently, Federal Home and Valley Bank entered into negotiations in an effort to solve the problems which had arisen because of the SBA Trust Deed. (Tr. 56). Because those negotiations were unsuccessful, Federal Home made demand in early 1986 upon Valley Bank, demanding that Valley Bank either repurchase the Residential Loan or bring it current. (Tr. 56; Ex. 10). U.S. Title formally denied coverage in November, 1985, (Tr. 68-69; Ex. 11), though the testimony indicates that U.S. Title had verbally denied

coverage prior to that date. (Tr. 69-71). As a result, Valley Bank was forced to repurchase the Residential Loan from Federal Home for the sum of \$103,912.78. (R. 4; Ex. 12). Federal Home did not complete foreclosure proceedings against the Property. (Tr. 58).

h. Terms of the Mortgagee Policy of Title Insurance

In the case at bar, U.S. Title issued the Policy to Valley Bank, insuring that the Residential Trust Deed was a first and paramount lien against the Property. (R. 104; Ex. 3). The insuring provision of the Policy provides as follows:

[The Insurer], insures . . . against
loss or damage . . . sustained or
incurred by the insured by reason of:

2. Any defect in or lien or
encumbrance on such title;

6. The priority of any lien or
encumbrance over the lien of the
insured mortgage. . . .

(Ex. 3).

The Policy also contains a number of exclusions from coverage. The title policy exclusion which is at the heart of this case provides as follows:

The following matters are expressly
excluded from the coverage of this
policy: . . .

Defects, liens, encumbrances,
adverse claims, or other matters
(a) created, suffered, assumed or

agreed to by the insured claimant; . . .

(Ex. 3, "Exclusions from Coverage").

SUMMARY OF ARGUMENTS

1. Argument I

In reviewing a trial court's conclusions of law, an appellate court should give no deference to those conclusions, but reviews the conclusions for correctness. Because Valley Bank challenges only the District Court's conclusions of law, this court should review those conclusions for correctness.

2. Argument II(A)

As a policy of title insurance, the Policy involved in this case is a warranty of the state of title as represented by the insurer. Exclusions to the Policy must be construed strictly against the insurer and liberally in favor of the insured and must be construed in accordance with important public policy.

3. Argument II(B)

Valley Bank's primary contention is that the exclusion for defects created by the insured, contained in paragraph 3(a) of the Policy, should be construed to be inapplicable to the facts of this case. Instead, the exclusion for defects created by the insured should be enforced only where the insured has engaged in fraud or misconduct. Because there is

no showing that Valley Bank acted in bad faith or inequitably, the exclusion should not apply to deny coverage for the SBA Trust Deed.

4. Argument II(C)

The exclusion should not apply for the further reason that U.S. Title had actual knowledge of the prior recorded SBA Trust Deed at the time it issued the Policy to Valley Bank. Not only did U.S. Title fail to list the SBA Trust Deed as an exception to coverage in the Policy, but it also failed to disclose the existence of the lien to Valley Bank, Valley Mortgage or to the assignee of the Residential Loan and Trust Deed, Federal Home.

5. Argument II(D)

The fact that neither Valley Mortgage nor Valley Bank had actual knowledge of the existence of the prior recorded SBA Trust Deed provides additional support for the argument that Valley Bank should not be deemed to have "created" the prior encumbrance within the meaning and intent of the exclusion. As interpreted by courts, the word "create" implies that the insured must have actual knowledge of the defect. Because neither Valley Mortgage nor Valley Bank had actual knowledge of the SBA Trust Deed, Valley Bank should not be deemed to have "created" the SBA Trust Deed.

6. Argument III

Public policy and principles of equity dictate that U.S. Title not be allowed to escape coverage for the SBA Trust Deed. While U.S. Title breached its contractual obligations under the Policy by failing to list the SBA Trust Deed as an exception to coverage and by failing to disclose its existence to Valley Bank, Valley Bank complied with its obligations under the Policy and was innocent in its dealings with U.S. Title. To enforce the exclusion under the facts of this case, would encourage negligence and sanction wrongdoing on the part of U.S. Title.

7. Argument IV

Finally, U.S. Title is equitably estopped from asserting the exclusion for defects created by Valley Bank as a bar to coverage. By issuing the Policy, U.S. Title represented that the SBA Trust Deed did not exist. Valley Bank, in turn, relied on the representations made in the Policy in assigning the Residential Trust Deed and Loan to Federal Home, and warranting to Federal Home that the Residential Trust Deed was in first position. As a result of Valley Bank's reliance, it was later forced to repurchase the Residential Loan from Federal Home, thereby incurring the loss which it is now attempting to recover.

ARGUMENT I

THE SUPREME COURT IS NOT
REQUIRED TO ACCORD ANY
DEFERENCE TO THE DISTRICT
COURT'S CONCLUSIONS OF LAW
AND REVIEWS THOSE CONCLU-
SIONS FOR CORRECTNESS

It is a well settled principle of appellate review that an appellate court is not required to accord any deference to the lower court's conclusions of law. Wessel v. Erickson Landscaping Co., 711 P.2d 250, 253 (Utah 1985). This court has consistently held that in reviewing the trial court's legal conclusions, the reviewing court reviews the lower court's legal conclusions for correctness. Id.; Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

In this appeal, Valley Bank accepts as true each of the factual findings adopted by the District Court. See R. 103-07. Thus, Valley Bank readily endorses the crucial facts that at the time Valley Mortgage closed the Residential Loan, it did not know of the prior SBA Loan obligation, (R. 105), and that at the time the Policy was issued, U.S. Title knew of the recorded SBA Trust Deed. (R. 105).

Valley Bank does, however, challenge the District Court's conclusion of law, paragraph "A," that Valley Bank "created" the SBA Trust Deed within the meaning of the Policy. Valley Bank further challenges the trial court's conclusion of law, paragraph "B," that paragraph 3(a) of the Policy is effective to exclude the SBA Trust Deed from coverage. Finally,

contrary to the District Court's conclusion of law, paragraph "C," Valley Bank contends that U.S. Title is liable under the Policy for losses incurred by Valley Bank as a result of the existence of the SBA Trust Deed. As demonstrated below, the District Court misapplied the law governing the circumstances under which exclusions for defects created by the insured are enforced.

ARGUMENT II

THE DISTRICT COURT ERRED IN CONCLUDING THAT VALLEY BANK "CREATED" THE SBA TRUST DEED WITHIN THE MEANING AND INTENT OF THE EXCLUSION FOR DEFECTS CREATED BY THE INSURED

A. The Policy Constitutes an Unequivocal Warranty Against Prior Recorded Liens and Encumbrances and Policy Exclusions Must be Construed Against U.S. Title

This court has held in Bush v. Coult, 594 P.2d 865 (Utah 1979), that title insurance policies are warranties that the state of title is as the insurer has represented it to be. Bush v. Coult, 594 P.2d at 867. See also Lawyers Title Insurance Corp. v. Research Loan & Investment Corp. 361 F.2d 764, 767 (8th Cir. 1966). According to the Bush court, "[a] title policy is much in the nature of a covenant of warranty or a covenant against encumbrances." Id. (quoting Empire Development Co. v. Title Guaranty and Trust Co., 225 N.Y. 53, 121 N.E. 468, 470 (1918)).

Not only must the Policy be viewed as a warranty of title, but exclusions, exceptions, and limitations to insuring agreements must be construed strictly against the insurer and liberally in favor of the insured so as to afford the greatest possible coverage to the insured. National Union Fire Insurance Co. of the State of Pennsylvania, Inc. v. Reno's Executive Air, Inc., 100 Nev. 360 682 P.2d 1380, 1383 (Nev. 1984); Safeco Insurance Co. of America v. Davis, 44 Wash. App. 161, 721 P.2d 550, 551 (1986). In accordance with that rule, paragraph 3(a) must be construed broadly so as to afford coverage for Valley Bank.

Finally, policies of title insurance should be construed as a whole to give effect to the parties' reasonable expectations and must also be construed in accordance with important public policy. Stanton v. Public Employees Mutual Insurance Co., 13 Wash. App. 904, 697 P.2d 259, 261 (1985). As discussed below in Argument III, to enforce the exclusion for defects created by the insured under the circumstances of this case would be contrary to the public policies discouraging negligence and encouraging parties' compliance with their contractual obligations.

In this case, the District Court failed to appreciate the unconditional warranty against prior encumbrances contained in the Policy, to construe the title policy exclusion

liberally in favor of Valley Bank and strictly against U.S. Title, and to interpret the exclusion in light of important public policy.

B. In the Absence of Fraud or Misconduct on the Part of Valley Bank, the Exclusion for Defects Created by the Insured Should Not Apply

Case law interpreting exclusions for defects created by the insured establishes that such exclusions should not be enforced unless the insured has engaged in misconduct or inequitable dealings. In American Savings and Loan v. Lawyers Title Insurance Corp., 793 F.2d 780 (6th Cir. 1986), the insured, a construction lender, loaned \$1 million dollars to the developers of a housing complex, knowing that the loan might be insufficient to fund the project. To secure the loan, the construction lender obtained a trust deed on the real property. The lender also acquired from the insurer a policy of title insurance, insuring the priority of the trust deed. At the time the insurer issued the title policy, the construction lender and the insurer were both aware that the construction lender's lien could become subordinate to mechanics' liens which might subsequently be recorded.

As a result of the difficulties with the construction of the housing complex, suppliers filed notices of mechanics' liens. By operation of law, the mechanics' liens gained priority over the construction lender's lien. The construction lender eventually settled the lien claims and demanded recovery

from its insurer. After the insurer's refusal to pay the construction lender's loss, the construction lender brought suit against the insurer.

On appeal, the court considered the issue of whether the construction lender, by extending the loan despite the construction lender's knowledge that subsequently filed mechanics' liens would take priority over the lender's lien, "created, suffered, assumed or agreed to" the mechanics' liens which were later filed. After discussing the interpretation of the word "created," the court emphasized that the exclusion for defects created by the insured should be applied only where the insured has engaged in fraud or misconduct. According to the court:

The cases discussing the applicability of the "created or suffered" exclusion generally have stated that the insurer can escape liability only if it is established that the defect, lien or encumbrance resulted from some intentional misconduct or inequitable dealings by the insured or the insured either expressly or impliedly assumed or agreed to the defects or encumbrances in the course of purchasing the property involved. The courts have not permitted the insurer to avoid liability if the insured was innocent of any conduct causing the loss or was simply negligent in bringing about the loss.

American Savings and Loan, 793 F.2d at 784 (quoting Brown v. St. Paul Title Insurance Co., 634 F.2d 1103, 1107-08 n.8 (8th Cir. 1980)) (emphasis added).

The court in American Savings and Loan also emphasized that the enforcement of exclusions for defects created by insureds often depends on equitable considerations. American Savings and Loan, 793 F.2d at 784. The opinion noted that courts are more likely to rule that an insured created a defect where the insured "breached an obligation or would derive a windfall profit from recovery against its insurer." Id. Because the construction lender had performed each of the obligations of its loan agreement, would not have derived a windfall profit from an insurance recovery, and had not engaged in any wrongdoing, the court held that the construction lender would not be deemed to have created the mechanics' liens within the meaning of the exclusion. Id.

Conway v. Title Insurance Co., 277 So.2d 890 (Ala. 1973), similarly indicated that the enforcement of exclusionary clauses for defects created by the insured should be limited to situations where the insured has engaged in misconduct. With regard to exclusions for defects created by the insured, the court stated,

Such exceptions and limiting provisions either in the language of the present policy, or in language of

similar import, have been held effective because of the misconduct of the insured . . .

Conway, 277 So.2d at 893 (citations omitted). See also Keown v. West Jersey Title & Guaranty Co., 161 N.J. Super. 19, 390 A.2d 715 (1978).

Cases which have enforced exclusions for defects created by the insured reinforce the proposition stated in American Savings and Loan and Valley Bank's position that the exclusion should not be enforced in the absence of fraud or misconduct on the part of the insured. See, e.g., Brown v. St. Paul Title Insurance Corp., 634 F.2d 1103 (8th Cir. 1980) (involving mechanics' liens which were filed because of the insured-lender's failure to provide adequate funds to pay for work completed on a construction project); Taussig v. Chicago Title Insurance and Trust Co., 171 F.2d 553 (7th Cir. 1948) (involving an insured who obtained property in bad faith); Conway, 277 So.2d 890 (involving the misconduct of the insured mortgagee in attempting to conceal from the mortgagor the fact that the mortgagor could release his property from the mortgage); Brick Realty Corp. v. Title Guaranty and Trust Co., 161 Misc. 296, 291 N.Y.S. 637 (1936) (involving the acquisition of property and a subsequent foreclosure action by the insured as part of the insured's fraudulent scheme to extinguish the insured's wife's dower rights in the property foreclosed);

Ginger v. American Title Insurance Co., 29 Mich. App. 279, 185 N.W.2d 754 (1971) (involving a defect of title due to the insured's participation in the fraudulent transfer of property); Feldman v. Urban Commercial, Inc., 87 N.J. Super. 391, 209 A.2d 640 (1965) (involving an insured who inappropriately placed a mortgage on property without obtaining the required consent as part of an unconscionable scheme to protect his interest); Rosenblatt v. Louisville Title Co., 292 S.W. 333 (Ky. Ct. App. 1927) (involving a defect in the title which resulted from the insured's fraud in procuring the deed from the grantor). See generally 87 A.L.R. 3d 515 (1978).

Appellant is not able to locate the history and original intent underlying the policy exclusion for defects created by the insured. It is likely, however, that the provision was intended to function just as it has been applied by courts -- to protect insurers from insuring encumbrances which are the result of the insured's fraud or misconduct. Underlying this position is the well settled principle that no person should benefit from his own wrongdoing. If insurers were to cover losses incurred by insureds because of their culpable conduct, those insureds would be protected from that loss and in some cases would benefit from their wrongdoing.

Additionally, there appears to be no reason to enforce the exclusion for defects created by the insured in cases which do not involve wrongdoing on the part of the insured. Where

the insured has acted in bad faith or with dishonesty, the exclusion functions to shift the loss from the insurer to the insured. If the exclusion were enforced to deny coverage in cases other than those where the insured engages in fraudulent conduct, the insured would in effect be penalized for its innocent conduct.

According to the cases discussed above, the exclusion for defects created by the insured will not be enforced in the absence of fraud or inequitable conduct on the part of the insured. The position reinforces the probable intent underlying the exclusion and furthers the reasonable expectations of the parties. Because Valley Bank did not engage in fraud or misconduct with regard to the SBA Trust Deed, the policy exclusion should not apply to exclude coverage for the SBA Trust Deed.

C. Because U.S. Title Knew About the SBA Trust Deed, Valley Bank Should Not be Deemed to Have Created the SBA Trust Deed Within the Meaning of the Exclusion

Valley Bank should not be deemed to have created the SBA Trust Deed for the further reason that U.S. Title had actual knowledge of the SBA Trust Deed. (R. 105; Tr. 132, 134). At least one case has placed great significance on the insurer's knowledge of a defect in determining whether an insured created a claim.

In Hansen v. Western Title Insurance Co., 33 Cal. Rptr. 668, 671 (Cal. Dist. Ct. App. 1963), the insureds' attorney drafted a contract ("Contract") with a third party, Wilson, whereby the insureds obtained an option to Wilson's property and an assignment of an option held by Wilson to a second parcel of property held by Fissori ("Fissori Property"). Because of the insureds' attorney's poor draftsmanship of the the Contract, the Contract gave rise to an interest in the Fissori Property to Wilson. The insureds did not know about Wilson's possible interest.

Subsequent to the date of the Contract, the insureds entered into a holding agreement ("Holding Agreement") with Fissori, the owner of the second parcel of property. The Holding Agreement was drafted by a title insurance company officer. At the time the officer prepared the Holding Agreement, the officer knew about the Contract previously entered into by the insureds and Wilson. The insurance company officer also knew about Wilson's possible interest in the property.

In addressing the issue of whether the insureds, through the poor draftsmanship of their attorney, had created Wilson's claim to the Fissori property, the court focused on the fact that the insurer knew or at least had reason to know of Wilson's claim. The court held that the insured will not be deemed to have created the claims where "the insured did not intentionally produce the claim and [where] the insurer had

opportunity to know of the defect." Hansen, 33 Cal. Rptr. at 671 (emphasis added). The court further indicated that an insured may be deemed to create a claim which the insurer would be unable to reasonably find and which results from the insured's inadvertence. Id. It is clear from the language of the opinion that whether the insurer had opportunity to know of the defect was an important element in determining whether the insured would be deemed to have created the defect.

The court in Ginger v. American Title Insurance Co., 29 Mich. App. 279, 185 N.W.2d 54 (1970) also indicated the significance of whether the insurer has knowledge of the defect. The facts of Ginger involved a conveyance made to the insured which was set aside as a conveyance intended to defraud creditors. The trial court found that the insured, who was also the debtor's lawyer, had been the primary actor in the fraudulent scheme.

On appeal, the court held that the insured had created the defect. Ginger, 185 N.W.2d at 56. Though the court did not give a detailed explanation for its holding, it did point to facts which it appeared to view as dispositive of the case. Among those facts was the fact that the insurer was unaware of the defect. Id.

The insurer in this case not only had opportunity to know of the prior encumbrance, (Tr. 120-22, 127-28, 146, 149-50), but had actual knowledge of the encumbrance. (R. 105;

Tr. 132, 134). Because U.S. Title knew about the earlier recorded SBA Trust Deed, Valley Bank should not be deemed to have created the SBA Trust Deed.

D. Valley Bank Should Not be Deemed to Have Created the SBA Trust Deed Because Valley Bank Did Not Have Knowledge of the SBA Trust Deed

A careful examination of the meaning of the word "create" provides additional support for the position that Valley Mortgage should not be deemed to have created the SBA Trust Deed. Courts which have considered the meaning of the word "create" in the context of policy exclusions for defects created by the insured typically define the word as implying knowledge or deliberateness. The New Jersey Supreme Court in Feldman v. Urban Commercial, Inc., 87 N.J. Super. 391, 209 A.2d 640 (1965), for example, held that the word "'create' connotes the idea of knowledge, the performance of some affirmative act by the insured, a conscious and deliberate causation." Feldman, 209 A.2d at 648. See also Laabs v. Chicago Title Insurance Co., 72 Wis.2d 503, 241 N.W.2d 434, 438 (1976). The word "knowledge" has, in turn, been defined as existing where a person possesses information or is aware of something. Antoine v. Fletcher, 307 S.W.2d 898, 905 (Mo. App. 1958). The word "conscious" has been defined as a knowing act, Ford Motor Co. v. Wagoner, 192 S.W.2d 852, 852 (Tenn. 1946), and Webster states that the meaning of the word "deliberate" is characterized by

an awareness of the consequences. Merriam Webster Inc., Webster's Ninth New Collegiate Dictionary (1986) (second definition).

It is clear from the definitions above, that to create a defect, an insured must have full knowledge and a clear understanding that his actions will result in a defect of title. A person cannot be deemed to have created a defect when that person did not deliberately act to bring about the defect or when the person had no knowledge of the existence of the defect. Additionally, the words used by courts to describe the word "create" imply that the insured must have actual knowledge to create a defect. A person cannot, for example, be "conscious" of a fact of which he does not have actual knowledge.

Requiring actual knowledge of the insured for the purpose of determining whether the insured has created the defect is especially important in the context of complex corporate entities. Corporate insureds obtain title insurance not only to insure against defects created by third parties but also, and just as importantly, to determine whether its own departments or divisions have created encumbrances on the same property. If corporate insureds are deemed to have created an encumbrance that was created by one of the corporation's departments, encumbrances created by corporate departments will always be excluded from coverage under the exclusion for

defects created by the insured. As a result, corporate insureds will be forced to obtain professional opinions or to develop internal indexing systems to locate defects created by corporate departments. Corporations might further be forced to develop systems of self insurance to insure against those defects. Not only would these measures be highly expensive, but they would duplicate the resources already amassed by title insurance companies.¹

In determining whether Valley Bank had actual knowledge of the SBA Trust Deed, it is important to identify each of the actors involved. The Small Business Administration

¹ The conclusion that the insured must have actual knowledge in order to be deemed to have created a defect in title is also consistent with case law interpreting exclusions for defects created by the insured. In cases which hold that the insured did not create the defect or encumbrance, the insured did not have actual knowledge of the defect. See, e.g., First National Bank Co. of Port Chester v. New York Title Insurance Co., 171 Misc. 854, 12 N.Y.2d (1939) (the insured-mortgagee accepted a mortgage from mortgagors who were subsequently forced into an involuntary bankruptcy so that the mortgage became a preferential transfer under bankruptcy law); Foremost Construction Co. v. Killam, 399 S.W.2d 553 (Kan. Ct. App. 1966) (involving unpaid special taxes which were improperly indexed and impossible to find); Arizona Title Insurance & Trust Co. v. Smith, 21 Ariz. App. 371, 519 P.2d 860 (1974) (insured had no actual knowledge of existence of unpaid special tax assessment), Laabs, 72 Wis.2d 503, 241 N.W.2d 434 (1976) (insured had no actual knowledge of pre-existing boundary dispute); Hansen, 33 Cal. Rptr. 666 (Cal. Dist. Ct. App. 1963) (insured had no actual knowledge that an option contract prepared by the insured's attorney created an interest in real property in a third party in the insured's real property).

Department is a department of Valley Bank. Valley Bank is in turn a wholly owned subsidiary of Valley Utah Bancorporation, a Utah corporation. (Tr. 3, 8). Valley Mortgage is also a wholly owned subsidiary of Valley Utah Bancorporation. Id. The transaction which gave rise to the Residential Trust Deed was handled solely by Valley Mortgage personnel. Neither Valley Bank nor SBA Department personnel were involved. Though Valley Mortgage personnel were exclusively involved in the Residential Loan and Trust Deed, the transaction was completed on Valley Bank documentation. (Tr. 44).²

Approximately two weeks before the Residential Loan closed, the SBA Department extended a \$65,000 loan to the Nances and took a trust deed on the Property. (R. 104). There is no evidence that Valley Mortgage participated in any phase of the transactions which gave rise to the SBA Trust Deed. Moreover, Valley Mortgage had no knowledge of the SBA Trust Deed at the time the SBA took the trust deed or at the time Valley Mortgage later took the Residential Trust Deed. (R. 105; Tr. 36-37, 40).

Furthermore, Valley Mortgage had no reasonable means of finding out about the SBA Trust Deed. The record shows that Valley Mortgage did not have an indexing system with which to

² In closing the Residential Loan on Valley Bank documentation, it is not clear whether Valley bank was acting as Valley Mortgage's agent (R. 33), or whether Valley Mortgage was acting as Valley Bank's agent (Tr. 18).

determine if either Valley Bank or Valley Mortgage had taken a lien on a particular parcel of real property. (Tr. 45). The testimony indicates that Valley Mortgage relied on the expertise and resources of title insurance companies to determine the state of title. Id. At the time Valley Mortgage took the Residential Trust Deed, the normal procedure by which to determine whether a prior lien existed on property, whether created by Valley Mortgage, Valley Bank, a department of Valley Bank, or by a third party, was to obtain a title report. Id. Because Valley Mortgage had no knowledge of the SBA Trust Deed and no reasonable means of finding out whether another department at Valley Bank had created a lien on the property, Valley Bank could not have obtained knowledge of the SBA Trust Deed through Valley Mortgage.

The meaning of the word "create" includes and requires that the insured have actual knowledge of that which he is creating. An insured should not be deemed to have created a defect of which he is unaware. In this case, the SBA Department created the SBA Trust Deed. Valley Bank did not have actual knowledge of the existence of the SBA Trust Deed. Accordingly, Valley Bank should not be deemed to have "created" the Trust Deed for purposes of the exclusion for defects created by the insured and is therefore entitled to coverage with regard to the SBA Trust Deed.

ARGUMENT III

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE EXCLUSION FOR DEFECTS CREATED BY THE INSURED IS EFFECTIVE TO DENY COVERAGE FOR THE SBA TRUST DEED

It is well settled that contracts which are against public policy are void and unenforceable. McCall v. Frampton, 99 Misc.2d 159, 415 N.Y.S.2d 752, 758 (1979). Though what constitutes public policy is difficult to define, it is often said that public policy is the reflection of society's values at a particular time and of policies which further the well being of society as a whole. One of the public interests relevant to this case is society's interest in encouraging parties to perform their contractual obligations. Contract law has traditionally protected injured, innocent parties by requiring that the breaching party make the innocent party whole. The enforcement of the exclusion for defects created by the insured under the facts of this case would not only violate public policy but would constitute a miscarriage of justice.

As discussed above in Argument II, a title insurance policy is a contractual warranty, whereby the insurer agrees to research the state of title and to warrant the title as represented to the insured. See Bush v. Coult, 594 P.2d 865, 867 (Utah 1979). The record is clear that the SBA Trust Deed was of record prior to the time Mountain View issued Valley

Bank the Commitment and prior to the time U.S. Title issued the Policy to Valley Bank. (R. 104-05). More importantly, U.S. Title had actual knowledge of the prior lien. (R. 105; Tr. 132, 134). Not only did U.S. Title fail to list the SBA Trust Deed as an exception to coverage in breach of its contractual obligations, (Ex. 1), but it also failed to inform Valley Bank of the existence of the prior lien. (Tr. 134, 138, 160-61).

A ruling for U.S. Title is tantamount to sanctioning U.S. Title's negligence and breach of contract. Enforcing the exclusion in this case will allow U.S. Title to use the exclusion to unfairly escape coverage. Additionally, U.S. Title's failure to list the SBA Trust Deed as an exception to coverage prevented Valley Bank from taking measures to protect itself against the earlier encumbrance. U.S. Title knew that Valley Mortgage was going to sell the Residential Loan to Federal Home and yet it failed to inform either Valley Mortgage or Federal Home of the prior encumbrance. (Tr. 134, 138, 160-61). Had Valley Bank or Valley Mortgage known of the SBA Trust Deed, they could have withheld from selling the SBA Trust Deed on the secondary market and thereby prevented Valley Bank's loss.

U.S. Title's conduct is even more grievous in view of the underlying purposes and practical workings of the title insurance system. Title insurance was developed so that title information could be concentrated in one area to increase the

certainty of title opinions, to increase efficiency, and to decrease expense. See Bush, 594 P.2d at 867. Lenders such as Valley Bank comprise a large category of title policy insureds and usually consist of numerous departments, divisions and subsidiary corporations. The position of Valley Bank is analogous to, for example, Citicorp, a complex corporate entity having branches located throughout the United States. Such lending institutions apply for title insurance not only to insure against encumbrances held by third parties but, of equal importance, to insure against encumbrances created by their own divisions. If insurers are allowed to escape coverage in a situation such as this, insureds will be forced to develop internal indexing systems to locate defects created by other departments or subsidiaries as well as systems of self insurance to insure against those defects. Both measures would be a waste of the resources already amassed by title insurance companies and the expense of these measures would ultimately be passed on to lending institution customers. Additionally, there is no policy reason why defects created by the insured without any fraud or misconduct and which are not known to the insured should not be insured just as any other encumbrance, where the insured is able to locate the defect.

Finally, not only would the enforcement of the exclusion violate public policy, but it would also run against principles of fair dealing and justice. As mentioned above in

Argument II(B), the application of exclusions for defects created by the insured often depends on equitable considerations, including whether the insured is innocent of any wrongdoing or would derive a windfall profit from recovery against its insurer. See American Savings and Loan v. Lawyers Title Insurance Corp., 793 F.2d 780, 784-85 (6th Cir. 1986). In this case, the equities are clearly on the side of Valley Bank. Valley Bank paid the required premium to Mountain View in compliance with its contractual obligations under the Policy. Valley Bank had no knowledge of the prior SBA Trust Deed, had no reasonable means of locating the prior encumbrance, and had no duty to do so. Valley Bank is free from any inequitable or culpable conduct. On the other hand, U.S. Title breached its contract of title insurance by failing to list the SBA Trust Deed as an exception to coverage. Though U.S. Title knew of the earlier encumbrance and knew that Valley Mortgage was going to sell the loan to Federal Home, it failed to disclose those facts to Valley Bank or to Federal Home. U.S. Title's conduct is clearly culpable and inequitable.

Furthermore, to impose the loss on Valley Bank under the facts of this case is harsh and unjustified. Valley Bank did not cause the loss it incurred. Through its failure to disclose the existence of a prior lien to Valley Bank, U.S.

Title was the direct cause of Valley Bank's loss. While Valley Bank conducted itself appropriately, U.S. Title was culpable in its dealings with Valley Bank. To enforce the exclusion under the facts of this case rises to the level of unconscionability.

ARGUMENT IV

THE DOCTRINE OF EQUITABLE ESTOPPEL PROHIBITS U.S. TITLE FROM RELYING ON THE TITLE POLICY EXCLUSION TO AVOID COVERAGE

The doctrine of equitable estoppel is founded upon principles of fair dealing and good conscience. The doctrine has developed to prevent the manifest injustice which results to one party when the other party relies on a legal right to take unconscionable advantage of his own wrongdoing. Matter of Shaw, 189 Mont. 310, 615 P.2d 910, 914 (1980). The Utah Supreme Court has repeatedly recognized the doctrine and has set forth the elements of equitable estoppel as requiring: 1) conduct, representations, or admissions made by one party, 2) which lead another party to take action in reasonable reliance thereon, and 3) which action results in detriment to the second party. Blackhurst v. Transamerica Insurance Co., 699 P.2d 688, 691 (Utah 1985); Celebrity Club Inc. v. Utah Liquor Control, 602 P.2d 689, 694 (Utah 1979).

The facts involved in the case at bar conform exactly with the elements required by the doctrine of equitable

estoppel. It is clear that the conduct required on the part of the party to be estopped need not be affirmative, but may be the failure to act or speak when that party ought to act or speak. Hunter v. Hunter, 669 P.2d 430, 432, 433 (Utah 1983). Because U.S. Title had a contractual duty to disclose the prior lien to Valley Bank, U.S. Title's failure to reveal the SBA Trust Deed to Valley Bank satisfies the first element of the doctrine of equitable estoppel requiring action or a failure to act. Furthermore, in view of the fact that the Policy was a warranty of the state of title to the Property, Bush v. Coult, 594 P.2d 865, 867 (Utah 1979), U.S. Title's failure to disclose the existence of the SBA Trust Deed was tantamount to a representation that the prior lien on the property did not exist.

Valley Bank received the Commitment of Title Insurance on or about April 15, 1983. The Commitment listed two prior encumbrances held by First Security Bank of Utah and Citizens Bank. (Ex. 2). The Commitment did not list the SBA Trust Deed as an exception to coverage. (Ex. 2). Valley Bank relied on the Commitment in assigning the Residential Trust Deed to Valley Mortgage and Valley Mortgage relied on the Commitment in assigning the Residential Trust Deed to Federal Home. In connection with the assignments, Valley Bank and Valley Mortgage both warranted that the Residential Trust Deed was the first trust deed on the Property. (R. 2). If Valley Mortgage

had known of the SBA Trust Deed, it would not have sold the Residential Loan on the secondary market and Valley Bank would not have incurred the loss which it incurred as a result of that sale.

Valley Bank not only relied on the representations made by U.S. Title in the Policy but that reliance was reasonable and justified. The title insurance system is designed so that upon paying a premium, an insured can obtain a determination of the state of title to certain real property. The policy of title insurance is in effect a warranty by the title company as to the state of title as the company has represented it. Bush, 594 P.2d at 867. The system is designed so that the insured may rely on the representations made by the title company and so that in the event those representations are incomplete or inaccurate, the company will cover the insured's loss.

Valley Bank was entitled to rely on the representations made in U.S. Title's policy of insurance for the further reason that Valley Bank had no duty to check the accuracy of U.S. Title's representations. In Bush v. Coult, the Utah Supreme Court held that an insured has no duty to perform the responsibilities of the insurer to ascertain the state of title. Bush, 594 P.2d at 867. Valley Bank's reliance is

reasonable for the further reason that Valley Bank did not know of the prior lien, (R. 105), and had no reasonable means of discovering the lien. (Tr. 44-45).

After becoming aware of the existence of SBA Trust Deed, Federal Home made demand upon Valley Bank that Valley Bank either repurchase the Residential Loan or bring the loan current. (Tr. 56; Ex. 10). In December, 1986, Valley Bank paid Federal Home \$103,912.78, the full amount remaining due and owing under the Residential Loan. (R. 106; Ex.12). The damage incurred by Valley Bank in having to pay the Residential Loan clearly resulted from U.S. Title's failure to list the SBA Trust Deed as an exception to coverage on the Policy. Having failed to list the SBA Trust Deed in breach of its obligations under the Policy, U.S. Title is now estopped from asserting the exclusion for defects created by the insured as a bar to U.S. Title's liability for Valley Bank's loss incurred as a result of the SBA Trust Deed.

CONCLUSION

The District Court erred in its legal conclusion that the exclusion for defects created by the insured applies to exclude coverage for the SBA Trust Deed. Accordingly, Valley Bank respectfully requests that this court reverse the judgment entered by the District Court, enter judgment in favor of

Valley Bank as a matter of law, and remand the case to the trial court on the issue of the damages incurred by Valley Bank.

DATED this 22d day of January, 1988.

BIELE, HASLAM & HATCH

A handwritten signature in black ink, appearing to read "Roy G. Haslam", written over a horizontal line.

Roy G. Haslam
Elizabeth S. Whitney
Attorneys for Appellant

FILED IN CLERK'S OFFICE
Salt Lake County Utah

ADDENDUM No. 1

JUL 7 1987

d. Dixon Hindey, Clerk of District Court
By G.A. Shields Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

—ooo0ooo—

VALLEY BANK & TRUST COMPANY,
a Utah corporation,

Plaintiff,

v.

U.S. TITLE INSURANCE COMPANY
OF DALLAS, a Texas corporation,

Defendant.

:

: FINDINGS OF FACT AND
CONCLUSIONS OF LAW

:

: Civil No. C-86-2379

: (Judge Wilkinson)

:

—ooo0ooo—

The trial in the above case came on for hearing on the 14th day of May, 1987, before the Honorable Homer F. Wilkinson, District Court Judge. Appearing on behalf of the plaintiff was Roy G. Haslam of the law firm of Biele, Haslam & Hatch. Appearing on behalf of the defendant was Steven H. Gunn of the law firm of Ray, Quinney & Nebeker. Having received various documents into evidence and having heard the testimony of witnesses and the arguments of counsel, the Court now enters the following

FINDINGS OF FACTS:

1. Plaintiff brings this action seeking damages under a certain Mortgagee Policy of Title Insurance (the "Policy") (Plaintiff's Exhibit 3).

Under the Policy plaintiff is listed as the "named insured". By endorsement the Federal Home Loan Mortgage Corporation ("FHLMC") was also added as an insured.

2. The Policy was issued for the purpose of insuring plaintiff's trust deed lien on certain real property (the "subject property") located in Summit County, Utah. The trust deed insured under the Policy secured payment of a loan by plaintiff to F. Kent Nance and Patricia J. Nance in the sum of \$101,500.00. (Hereinafter the loan secured by the trust deed covered under the Policy shall be referred to as the "residential loan" and the trust deed shall be referred to as the "residential trust deed".) The residential trust deed was executed April 25, 1983, and was recorded April 26, 1983. Subsequent to the closing of the loan, plaintiff assigned the loan to FHLMC.

3. The residential loan was closed April 26, 1983, and the title policy was issued some time subsequent to July 22, 1983. Neither the Policy nor the Commitment which preceded it specifically identified and excluded the SBA trust deed from insurance coverage.

4. Previous to the time of the closing of the residential loan plaintiff's SBA loan department had loaned the Nances the sum of \$65,000.00 and had taken as security for that loan a trust deed on the subject property. (Hereinafter the said earlier loan made by plaintiff shall be

referred to as the "SBA loan" and the trust deed which secured its payments will be referred to as the "SBA trust deed.") The date of execution of the SBA trust deed was April 1, 1983. It was recorded on April 5, 1983.

5. The officer of plaintiff who closed the residential loan, Paul Thurston, was unaware at the time of closing of the existence of the SBA loan.

6. At the time the title policy was issued by defendant insuring the residential loan, its agent, Mountain View Title, was aware that the prior SBA trust deed was of record and failed to communicate such knowledge to the plaintiff prior to issuing the Policy.

7. Paragraph 3(a) ("Exclusions from Coverage") of the Policy provides:

The following matters are expressly excluded from coverage of this Policy:

. . .

3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant . . .

8. In November, 1983, the Nances borrowed the sum of \$10,000.00 from Intermountain Thrift & Loan ("Intermountain Thrift") and gave as security a trust deed on the subject property and on an adjacent unimproved lot owned by the Nances.

9. In early 1984, the Nances defaulted in making payments on the SBA and residential loans. They also defaulted on the Intermountain Thrift loan. As a consequence, Intermountain Thrift filed a notice of default and thereafter sold the subject property and the adjacent lot by trustee's sale

on April 4, 1985. Plaintiff was the successful bidder at the sale and received a Trustee's Deed (Plaintiff's Exhibit 8A) which recited a purchase price in the sum of \$11,941.45.

10. At no time has plaintiff or FHLMC ever foreclosed judicially or nonjudicially on the subject property.

11. On or about November 21, 1986, plaintiff sold the subject property to Gary T. Weaver and Shauna L. Weaver ("the Weavers") and delivered to them a warranty deed (Plaintiff's Exhibit 21).

12. The purchase price paid by the Weavers to plaintiff upon sale of the subject property was \$55,000.00. The net proceeds which plaintiff received from the sale was \$51,857.17. The proceeds of sale were applied by plaintiff against the amount owed on the SBA loan.

13. On or about December 23, 1986, plaintiff released its SBA trust deed lien on the subject property by a Full Reconveyance (Defendant's Exhibit 25).

14. On or about December 11, 1986, plaintiff paid FHLMC the full amount owed under the residential loan. An officer of plaintiff testified at trial that the residential trust deed lien would be released by reconveyance as soon as practical following the trial.

Based upon the foregoing Findings of Fact, the Court enters the following:

CONCLUSIONS OF LAW

A. The act of plaintiff in obtaining from the Nances a trust deed lien on the subject property to secure payment of the SBA loan "created a

lien or encumbrance" within the meaning of the Policy.

B. The lien of the SBA trust deed is excluded from coverage under the Policy by paragraph 3(a) of the Exclusions from Coverage.

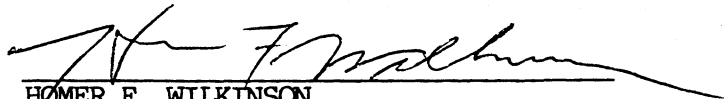
C. Defendant is not liable under the Policy for losses incurred by Plaintiff as a result of the existence of the SBA trust deed.

D. Plaintiff's complaint should be dismissed with prejudice and upon the merits.

E. Because the SBA trust deed is excluded from coverage under the Policy, it is unnecessary for the Court to determine what loss plaintiff incurred as the result of the existence of the said trust deed or to determine whether plaintiff breached the Policy as alleged by Defendant in its Supplemental Answer.


DATED THIS 2 day of July, 1987.

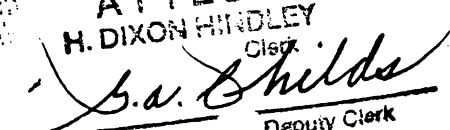
BY THE COURT:


HOMER F. WILKINSON
District Court Judge

Approved as to form:


Steve H. Gunn


Roy G. Haslam

ATTEST
H. DIXON HINDLEY
Clerk

Deputy Clerk

Mortgagee Policy of Title Insurance

ADDENDUM No. 2

NANCE
Loan # 5880-6



POLICY OF TITLE INSURANCE Issued by USLIFE Title Insurance Company of Dallas, SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, USLIFE Title Insurance Company of Dallas, a Texas corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land;
4. Unmarketability of such title;
5. The invalidity or unenforceability of the lien of the insured mortgage upon said estate or interest except to the extent that such invalidity or unenforceability, or claim thereof, arises out of the transaction evidenced by the insured mortgage and is based upon
 - a. usury, or
 - b. any consumer credit protection or truth in lending law;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien of the insured mortgage, except any such lien arising from an improvement on the land contracted for and commenced subsequent to Date of Policy not financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy, the insured has advanced or is obligated to advance; or
8. The invalidity or unenforceability of any assignment, shown in Schedule A, of the insured mortgage or the failure of said assignment to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

IN WITNESS WHEREOF, USLIFE Title Insurance Company of Dallas has caused this policy to be signed and sealed by its duly authorized officers in facsimile to be valid, as of Date of Policy shown in Schedule A, only when it bears an authorized, original countersignature.



Robert M. Merrill

President & Chief Executive Officer

Robert Michael Clark

Attest: Senior Vice-President, Secretary and General Counsel

Robert M. Merrill
Authorized Countersignature

EXCLUSIONS From Coverage

The following matters are expressly excluded from the coverage of this policy:

1. Any law, ordinance or governmental regulation (including but not limited to building and zoning ordinances) restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or governmental regulation.
2. Rights of eminent domain or governmental rights of police power unless notice of the exercise of such rights appears in the public records at Date of Policy.
3. Defects, liens, encumbrances, adverse claims, or other matters: (a) created, suffered, assumed or agreed to by the insured

claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy or acquired the insured mortgage and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) resulting in no loss or damage to the insured claimant; (d) attaching or created subsequent to Date of Policy (except to the extent insurance is afforded herein as to any statutory lien for labor or material).

4. Unenforceability of the lien of the insured mortgage because of failure of the insured at Date of Policy or of any subsequent owner of the indebtedness to comply with applicable "doing business" laws of the state in which the land is situated.

Conditions and Stipulations

1. Definition of Terms

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A. The term "insured" also includes (i) the owner of the indebtedness secured by the insured mortgage and each successor in ownership of such indebtedness (reserving, however, all rights and defenses as to any such successor who acquires the indebtedness by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin or corporate or fiduciary successors that the Company would have had against the successor's transferor), and further includes (ii) any governmental agency or instrumentality which is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing said indebtedness, or any part thereof, whether named as an insured herein or not, and (iii) the parties designated in paragraph 2 (a) of these Conditions and Stipulations.

(b) "insured claimant": an insured claiming loss or damage hereunder.

(c) "knowledge": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of any public records.

(d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": those records which by law impart constructive notice of matters relating to said land.

(a) Continuation of Insurance after Acquisition of Title

This policy shall continue in force as of Date of Policy in favor of an insured who acquires all or any part of the estate or interest in the land described in Schedule A by foreclosure, trustee's sale, conveyance in lieu of foreclosure, or other legal manner which discharges the lien of the insured mortgage, and if the insured is a corporation, its transferee of the estate or interest so acquired, provided the transferee is the parent or wholly owned subsidiary of the insured; and in favor of any governmental agency or instrumentality which acquires all or any part of the estate or interest pursuant to a contract of insurance or guaranty insuring or guaranteeing the indebtedness secured by the insured mortgage; provided that the amount of insurance hereunder after such acquisition, exclusive of costs, attorneys' fees and expenses which the Company may become obligated to pay, shall not exceed the least of:

- (i) the amount of insurance stated in Schedule A;
- (ii) the amount of the unpaid principal of the indebtedness as defined in paragraph 8 hereof, plus interest thereon, expenses of foreclosure and amounts advanced to protect the lien of the insured mortgage and secured by said insured mortgage at the time of acquisition of such estate or interest in the land; or
- (iii) the amount paid by any governmental agency or instrumentality

if such agency or instrumentality is the insured claimant, in the acquisition of such estate or interest in satisfaction of its insurance contract or guaranty.

(b) Continuation of Insurance after Conveyance of Title

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured so long as such insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from such insured, or so long as such insured shall have liability by reason of covenants of warranty made by such insured in any transfer or conveyance of such estate or interest; provided, however, this policy shall not continue in force in favor of any purchaser from such insured of either said estate or interest or the indebtedness secured by a purchase money mortgage given to such insured.

3. Defense and Prosecution of Actions—Notice of Claim to be given by an Insured Claimant

(a) The Company, at its own cost and without undue delay, shall provide for the defense of an insured in all litigation consisting of actions or proceedings commenced against such insured, or defenses, restraining orders or injunctions interposed against a foreclosure of the insured mortgage or a defense interposed against an insured in an action to enforce a contract for a sale of the indebtedness secured by the insured mortgage, or a sale of the estate or interest in said land, to the extent that such litigation is founded upon an alleged defect, lien, encumbrance, or other matter insured against by this policy.

(b) The insured shall notify the Company promptly in writing (i) in case any action or proceeding is begun or defense or restraining order or injunction is interposed as set forth in (a) above, (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 such prompt notice shall not be given to the Company, then as to such insured all liability of the Company shall cease and terminate in regard to the matter or matters for which such prompt notice is required; provided, however, that failure to notify shall in no case prejudice the rights of any such insured under this policy unless the Company shall be prejudiced by such failure and then only to the extent of such prejudice.

(c) The Company shall have the right at its own cost to institute and without undue delay prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, and the Company may take any appropriate action under the terms of this policy, whether or not it shall be liable thereunder, and shall not thereby concede liability or waive any provision of this policy.

(d) Whenever the Company shall have brought any action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any such litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

SCHEDULE A

Date of Policy: April 26, 1983 @ 4:00 p.m.

GF No. D 2643

Amount of Insurance \$ 101,500.00
(435.00)

Name of Insured:

VALLEY BANK & TRUST COMPANY

The estate or interest in the land described in this Schedule and which is encumbered by the insured mortgage is: (a fee, a leasehold, etc.)
fee simple

The estate or interest referred to herein is at Date of Policy vested in:

F. KENT NANCE & PATRICIA J. NANCE,
his wife, as joint tenants

The mortgage, herein referred to as the insured mortgage, and the assignments thereof, if any, are described as follows:

DEED OF TRUST

Dated: April 25, 1983

Amount: \$101,500.00

Trustor: F. KENT NANCE & PATRICIA J. NANCE, husband and wife

Beneficiary: VALLEY BANK & TRUST COMPANY

Trustee: VALLEY BANK & TRUST COMPANY

Recorded: April 26, 1983

Entry Number: 205040

Book: 258 Page: 542

The land referred to in this policy is described as follows:

Beginning 173.55 feet North and 1466.1 feet East of the Quarter Section corner on the West line of Section 17, Township 3 South, Range 7 East, Salt Lake Base and Meridian, and running thence North 185.97 feet, more or less, to the South boundary line of State Road Right of Way; thence along said boundary South 69°59' East 106.4 feet; thence South 148.78 feet; thence East 100 feet to the place of beginning. Also being known and designated as Lot 3 of Kamp Kill Kare Lots, according to the official plat thereof on file in the office of the County Recorder of Summit County. Together with a right of way 20 feet wide being 10 feet on either side of the following described centerline, being on a point on the South Quarter boundary line of State Road Right of Way 632 feet North and 856.1 feet East of the Quarter Section corner of the West line of said section 17; thence South 468.5 feet East 1080 feet; thence North 40 feet, more or less, to the State Road Right of Way.

This Policy does not insure against loss or damage by reason of the following:

1. Taxes for the year 1982 were paid. SERIAL NUMBER: KK 3
2. Said property is included within the boundaries of the Weber Basin Water Conservancy District, South Summit Fire Protection District, South Summit Cemetery Maintenance District, Special District #7 and is subject to any charges and assessments levied by them as a result of services provided. Charges are current.
3. Rights of way for any roads, ditches, canals or transmission lines now existing over, under or across said property.

Any and all outstanding oil, gas, mining and mineral rights, etc., together with the right of the proprietor of a vein or lode to extract his ore therefrom should the same be found to penetrate or intersect the premises, and the right to ingress and egress for the use of said rights.

4. WARRANTY DEED

Dated: January 29, 1953

Deeded to: MASON CONSTRUCTION, INC.

Book: U Page: 332

"As a part of the consideration for this Deed, the Grantee agrees not to use the above described property to conduct a business, trade or manufacture of any sort or nature, no buildings shall be erected thereon except one private dwelling house with a garage appurtenant thereto. Any violation of the above mentioned restrictions shall cause this Deed to become null and void."

SCHEDULE B—PART II

In addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule A is subject to the following matters, if any be shown, but the Company insures that such matters are subordinate to the lien or charge of the insured mortgage upon said estate or interest:

None

Endorsement

(to and forming a part of Policy of Title Insurance No. M 076156)

Issued by

USLIFE TITLE INSURANCE Company of Dallas (Herein called the company)

The Company hereby insures against loss which said Insured shall sustain by reason of any of the following matters:

1. Any incorrectness in the assurance which the Company hereby gives:

(a) That there are no covenants, conditions, or restrictions under which the lien of the mortgage or deed of trust referred to in Schedule A can be cut off, subordinated, or otherwise impaired;

(b) That there are no present violations on said land of any enforceable covenants, conditions, or restrictions;

(c) That, except as shown in Schedule B, there are no encroachments of buildings, structures, or improvements located on said land onto adjoining lands, nor any encroachments onto said land of buildings, structures, or improvements located on adjoining lands.

2. (a) Any future violations on said land of any covenants, conditions, or restrictions occurring prior to acquisition of title to said estate or interest by the Insured, provided such violations result in loss or impairment of the lien of the mortgage referred to in Schedule A, or result in loss or impairment of the title to said estate or interest if the Insured shall acquire such title in satisfaction of the indebtedness secured by such mortgage;

(b) Unmarketability of the title to said estate or interest by reason of any violations on said land, occurring prior to acquisition of title to said estate or interest by the Insured, of any covenants, conditions, or restrictions.

3. Damage to existing improvements, including lawns, shrubbery or trees:

(a) Which are located or encroach upon that portion of the land subject to any easement shown in Schedule B, which damage results from the exercise of the right to use or maintain such easement for the purposes for which the same was granted or reserved;

(b) Resulting from the exercise of any right to use the surface of said land for the extraction or development of the minerals excepted from the description of said land or shown as a reservation in Schedule B.

4. Any final court order or judgment requiring removal from any land adjoining said land of any encroachment shown in Schedule B.

The total liability of the Company under said policy and any endorsements attached thereto shall, however, not exceed, in the aggregate, the face amount of said policy and the costs which the Company is obligated under the schedules, conditions and stipulations thereof to pay.

This endorsement is made a part of said policy and is subject to the schedules, conditions and stipulations therein, except as modified by the provisions hereof.

This Endorsement is not to be construed as insuring the title as of any later date than the date of said policy, except as herein expressly provided as to the subject matter hereof.

Signed under seal for the Company, but this Endorsement is to become valid only when it bears an authorized countersignature.

Dated: April 26, 1983



Robert M. Clark

President & Chief Executive Officer

Robert M. Clark

Attest: Vice President, Secretary and General Counsel

Robert M. Clark

Authorized Officer or Agent

Endorsement

(to and forming a part of Policy of Title Insurance No. M 076156)

Issued by

USLIFE TITLE INSURANCE Company of Dallas (Herein called the company)

The Company assures the Insured that at the date of said policy there is located on said land

A single family dwelling also known as:

The 7 Milé Marker of Highway 35
Woodland, Utah 84036

and that the map attached to this policy shows the correct location and dimensions of the land described in Schedule A as described by those records which under the recording laws impart constructive notice as to said land.

The Company hereby insures the Insured against loss which said Insured shall sustain in the event the assurances herein shall prove to be incorrect.

The total liability of the Company under said policy and any endorsements attached thereto shall; however, not exceed, in the aggregate, the face amount of said policy and the costs which the Company is obligated under the schedules, conditions and stipulations thereof to pay.

This endorsement is made a part of said policy and is subject to the schedules, conditions and stipulations therein, except as modified by the provisions hereof.

Signed under seal for the Company, but this Endorsement is to become valid only when it bears an authorized countersignature.

Dated: April 26, 1983





President & Chief Executive Officer



Attest Vice-President, Secretary and General Counsel



Authorized Officer or Agent

INDORSEMENT
Attached to Policy No. M 076156
Issued by
USLIFE TITLE INSURANCE Company of Dallas

Fee \$

The Company assures . . .

- (a) That by a valid assignment or assignments the beneficial interest under the mortgage referred to in paragraph 4 of ALTA Schedule A has been transferred to said Assured;
FEDERAL HOME LOAN MORTGAGE CORPORATION
- (b) That there are no subsisting tax or assessment liens which are prior to said mortgage except:
- (c) That there are no matters affecting the validity or priority of the lien of said mortgage, other than those shown in said policy, except:
- (d) That there are no United States tax liens or bankruptcy proceedings affecting the title to said estate or interest shown by the public records, other than those shown in said policy, except:

The Company hereby insures said Assured against any loss of principal, interest or other sums secured by said mortgage, which said Assured shall sustain in the event that the assurances herein shall prove to be incorrect.

The total liability of the Company under said policy and any indorsements therein shall not exceed, in the aggregate, the face amount of said policy and costs which the Company is obligated under the conditions and stipulations thereof to pay.

This indorsement is made a part of said policy and is subject to the schedules, conditions and stipulations therein, except as modified by the provisions hereof.

This indorsement is not to be construed as insuring the title to said estate or interest as of any later date than the date of said policy, except as herein expressly provided as to the subject matter hereof.

Dated: July 13, 1983
USLIFE TITLE INSURANCE COMPANY of Dallas


Robert W. Bonnell

President & Chief Executive Officer

Ervin H. Bal

Attest Senior Vice-President, Secretary and Treasurer

Countersigned:

Richard A. [Signature]

5186
Paul [Signature]

(e) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured hereunder shall secure to the Company the right to so prosecute or provide defense in such action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of such insured for such purpose. Whenever requested by the Company, such insured shall give the Company all reasonable aid in any such action or proceeding, in effecting settlement, securing evidence, obtaining witnesses, or prosecuting or defending such action or proceeding, and the Company shall reimburse such insured for any expense so incurred.

Notice of Loss—Limitation of Action

In addition to the notices required under paragraph 3(b) of these Conditions and Stipulations, a statement in writing of any loss or damage for which it is claimed the Company is liable under this policy shall be furnished to the Company within 90 days after such loss or damage shall have been determined and no right of action shall accrue to an insured claimant until 30 days after such statement shall have been furnished. Failure to furnish such statement of loss or damage shall terminate any liability of the Company under this policy as to such loss or damage.

5. Options to Pay or Otherwise Settle Claims

The Company shall have the option to pay or otherwise settle for or in the name of an insured claimant any claim insured against or to terminate all liability and obligations of the Company hereunder by paying or tendering payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred up to the time of such payment or tender of payment by the insured claimant and authorized by the Company. In case loss or damage is claimed under this policy by an insured, the Company shall have the further option to purchase such indebtedness for the amount owing thereon together with all costs, attorneys' fees and expenses which the Company is obligated hereunder to pay. If the Company offers to purchase said indebtedness as herein provided, the owner of such indebtedness shall transfer and assign said indebtedness and the mortgage and any collateral securing the same to the Company upon payment therefor as herein provided.

6. Determination and Payment of Loss

(a) The liability of the Company under this policy shall in no case exceed the least of:

- (i) the actual loss of the insured claimant; or
- (ii) the amount of insurance stated in Schedule A, or, if applicable, the amount of insurance as defined in paragraph 2(a) hereof; or
- (iii) the amount of the indebtedness secured by the insured mortgage as determined under paragraph 8 hereof, at the time the loss or damage insured against hereunder occurs, together with interest thereon.

(b) The Company will pay, in addition to any loss insured against by this policy, all costs imposed upon an insured in litigation carried on by the Company for such insured, and all costs, attorneys' fees and expenses in litigation carried on by such insured with the written authorization of the Company.

(c) When liability has been definitely fixed in accordance with the conditions of this policy, the loss or damage shall be payable within 30 days thereafter.

7. Limitation of Liability

No claim shall arise or be maintainable under this policy (a) if the Company, after having received notice of an alleged defect, lien or encumbrance insured against hereunder, by litigation or otherwise, removes such defect, lien or encumbrance or establishes the title, or the lien of the insured mortgage, as insured, within a reasonable time after receipt of such notice; (b) in the event of litigation until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title or to the lien of the insured mortgage, as insured, as provided in paragraph 3 hereof; or (c) for liability voluntarily assumed by an insured in settling any claim or suit without prior written consent of the Company.

Reduction of Liability

(a) All payments under this policy, except payments made for

the acquisition of title to said estate or interest as provided in paragraph 2(a) of these Conditions and Stipulations, shall not reduce pro tanto the amount of the insurance afforded hereunder except to the extent that such payments reduce the amount of the indebtedness secured by the insured mortgage.

Payment in full by any person or voluntary satisfaction or release of the insured mortgage shall terminate all liability of the Company except as provided in paragraph 2(a) hereof.

(b) The liability of the Company shall not be increased by additional principal indebtedness created subsequent to Date of Policy, except as to amounts advanced to protect the lien of the insured mortgage and secured thereby.

No payment shall be made without producing this policy for endorsement of such payment unless the policy be lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

8. Liability Noncumulative

If the insured acquires title to the estate or interest in satisfaction of the indebtedness secured by the insured mortgage, or any part thereof, it is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage hereafter executed by an insured which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy.

10. Subrogation Upon Payment or Settlement

Whenever the Company shall have settled a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant, except that the owner of the indebtedness secured by the insured mortgage may release or substitute the personal liability of any debtor or guarantor, or extend or otherwise modify the terms of payment, or release a portion of the estate or interest from the lien of the insured mortgage, or release any collateral security for the indebtedness, provided such act occurs prior to receipt by the insured of notice of any claim of title or interest adverse to the title to the estate or interest or the priority of the lien of the insured mortgage and does not result in any loss of priority of the lien of the insured mortgage. The Company shall be subrogated to and be entitled to all rights and remedies which such insured claimant would have had against any person or property in respect to such claim had this policy not been issued, and if requested by the Company, such insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect such right of subrogation and shall permit the Company to use the name of such insured claimant in any transaction or litigation involving such rights or remedies. If the payment does not cover the loss of such insured claimant, the Company shall be subrogated to such rights and remedies in the proportion which said payment bears to the amount of said loss, but such subrogation shall be in subordination to the insured mortgage. If loss of priority should result from any act of such insured claimant, such act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against hereunder which shall exceed the amount, if any, lost to the Company by reason of the impairment of the right of subrogation.

Liability Limited to this Policy

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the lien of the insured mortgage or of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.

No amendment of or endorsement to this policy can be made except by writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

Notices, Where Sent

All notices and statements permitted or required to be given

Mortgagee Policy of Title Insurance

OFFICERS

Robert D. Dorociak President and
Chief Executive Officer
Drake McKee Consultant
Robert Michael Clark Senior Vice President,
Secretary and General Counsel
Eugene L. Sheppard Senior Vice President
Harry A. Fisher Vice President and Treasurer
John Gray Vice President and Controller
Donna Comstock Vice President
Tess Goad Vice President
Catherine Gray Vice President
Curtis W. Gustafson Vice President
Sidney W. Terry Vice President

One of
The Nation's
Oldest
Title Insurance
Companies
Title Insurance throughout
Texas
Alabama
Arkansas
Arizona
California
Colorado
Georgia
Idaho
Louisiana
Mississippi
Missouri
Montana
Nevada
New Mexico
Oklahoma
Utah

Established in 1906

Commitment for Title Insurance

ADDENDUM No. 3

USLIFE Title Insurance Company of Dallas, Dallas, Texas, A Texas Corporation, herein called the Company, for valuable consideration, hereby commits to issue its policy or policies of title insurance, as identified in Schedule A, in favor of the proposed Insured named in Schedule A, as owner or mortgagee of the estate or interest covered hereby in the land described or referred to in Schedule A, upon payment of the premiums and charges therefor; all subject to the provisions of Schedules A and B and to the Conditions and Stipulations hereof.

This Commitment shall be effective only when the identity of the proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A hereof by the Company, either at the time of issuance of this Commitment or by subsequent endorsement.

This Commitment is preliminary to the issuance of such policy or policies of title insurance and all liability and obligations hereunder shall cease and terminate six (6) months after the effective date hereof or when the policy or policies committed for shall issue, whichever first occurs, provided that the failure to issue such policy or policies is not the fault of the Company. The Commitment shall not be valid or binding until countersigned by an authorized officer or agent.

IN WITNESS WHEREOF, USLIFE Title Insurance Company of Dallas has caused this Commitment to be signed and sealed as of the effective date of Commitment shown in Schedule A.



USLIFE TITLE INSURANCE Company of Dallas

Robert M. Clark

President & Chief Executive Officer

Robert Michael Clark

Attest: Senior Vice-President, Secretary and General Counsel

Don M. Parkerson

Authorized Countersignature



Prepared for: VALLEY MORTGAGE
Attn: Paul Thurston

SCHEDULE A

GF No. D 2643

Inquiries should be directed
to Kevin Parkinson

1. Effective date: April 15, 1983 @ 8:00 a.m.

2. Policy or Policies to be issued:

Amount

(a) ☐ ALTA Owners Policy —

Form _____ — 1970

\$ _____

Proposed Insured:

(b) ☒ ALTA Standard Loan Policy,

Coverage — 1970

\$ 101,500.00
(435.00)

Proposed Insured: VALLEY MORTGAGE

3. The estate or interest in the land described or referred to in this Commitment and covered herein is:

Fee Simple

4. Title to said estate or interest in said land is at the effective date hereof vested in:

F. KENT NANCE and PATRICIA J. NANCE, his wife, as joint tenants.

5. The land referred to in this Commitment is located in the County of Summit
State of Utah and described as follows:

BEGINNING 173.55 feet North and 1466.1 feet East of the Quarter Section Corner on the West line of Section 17, Township 3 South, Range 7 East, Salt Lake Base and Meridian, and running thence North 185.97 feet, more or less, to the South boundary line of State Road right-of-way; thence along said boundary South 69° 59' East 106.4 feet; thence South 148.78 feet; thence West 100 feet to the place of beginning.

ALSO BEING KNOWN and designated as Lot 3 of KAMP KILL KARE LOTS, according to the official plat thereof on file in the office of the County Recorder of Summit County.

TOGETHER WITH a right-of-way 20 feet wide being 10 feet on either side of the following described centerline, being on a point on the South Quarter boundary line of State Road right-of-way 632 feet North and 856.1 feet East of the quarter section corner on West line of said Section 17; thence South 468.5 feet East 1080 feet; thence North 40 feet, more or less, to the State Road right-of-way.

SCHEDULE B-II

II. Schedule B of the policy or policies to be issued will contain exceptions to the following matters unless the same are disposed of to the satisfaction of the Company:

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this Commitment.
2. Rights or claims of parties in possession not shown by the public records.
3. Any discrepancies, conflicts in boundary lines, shortage in area, encroachments, overlapping of improvements, or other boundary or location disputes.
4. Any roadway or easement, similar or dissimilar, on, under, over, or across said property, or any part thereof not shown by the public records.
5. Any liens for labor, services, or material, or claims to same which are not shown by the public records.
6. Any titles or rights asserted by anyone including, but not limited to, persons, corporations, governments, or other entities, to tidelands, or lands comprising the shores or bottoms of navigable streams, lakes, bays, oceans, or gulf, or lands beyond the line of the harbor or bulkhead lines established or changed by the United States Government or riparian rights, if any.
7. Any unpatented mining claims; reservations or exceptions in patents or in acts authorizing the issuance thereof; water rights, claims or titles to water.
8. Community property, dower, courtesy or homestead rights, if any, of any spouse of the insured.
9. The lien of all taxes and assessments for the year 19____, and thereafter.
10. Restrictive covenants affecting the property above described.

11. Taxes for the year 1982 were paid in the amount of \$338.66. Taxes for the year 1983 are now accruing as a lien but are not yet due or payable.
SERIAL NUMBER: KK-3 *OK*

OK
12. Said property is included within the boundaries of Weber Basin Water Conservancy District, South Summit Fire Protection District, South Summit Cemetery Maintenance District, Special District #7, and is subject to any charges and assessments levied by them as a result of services provided.

OK
13. Rights of way for any roads, ditches, canals or transmission lines now existing over, under or across said property.

2
Any and all outstanding oil, gas, mining and mineral rights, etc., together with the right of the proprietor of a vein or lode to extract his ore therefrom should the same be found to penetrate or intersect the premises, and the right of ingress and egress for the use of said rights.

14. WARRANTY DEED

Dated: January 29, 1953

Deeded To: MASON CONSTRUCTION, INC.

7
Book: U Page: 332

"As a part of the consideration for this Deed, the Grantee agrees not to use the above described property to conduct a business, trade or manufacture of any sort or nature, no buildings shall be erected thereon except one private dwelling house with a garage appurtenant thereto. Any violation of the above mentioned restrictions shall cause this Deed to become null and void."

16. DEED OF TRUST

Dated: September 18, 1981

Amount: \$97,000.00 Plus Interest

Trustor: F. KENT NANCE and PATRICIA JEANNE NANCE

Beneficiary: FIRST SECURITY BANK OF UTAH

Trustee: SECURITY TITLE COMPANY

Recorded: September 22, 1981

Entry No: 183798

Book: M198 Page: 699

96,610.93
4-3 Int 1 454.90
21.50
98892.33
86-234-260-8001747-A

4-3-83 PO Box 770
\$45.62 SCUT 84110

17. DEED OF TRUST

Dated: September 24, 1981

Amount: \$57,147.00

Trustor: F. KENT NANCE and PATRICIA J. NANCE

Beneficiary: THE CITIZENS BANK

Trustee: SECURITY TITLE COMPANY

Recorded: October 8, 1981

Entry No: 184407

Book: M200 Page: 312

Patricia

Curry Dist

18. JUDGEMENTS were checked against the names of the following and none were found to be of record:

F. KENT NANCE
PATRICIA J. NANCE

CONDITIONS AND STIPULATIONS

1. The term "mortgage," when used herein, shall include deed of trust, trust deed, or other security instrument.
2. If the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the Company in writing, the Company shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the Company is prejudiced by failure to so disclose such knowledge. If the proposed Insured shall disclose such knowledge to the Company, or if the Company otherwise acquires actual knowledge of any such defect, lien, encumbrance, adverse claim or other matter, the Company at its option may amend Schedule B of this Commitment accordingly, but such amendment shall not relieve the Company from liability previously incurred pursuant to paragraph 3 of these Conditions and Stipulations.
3. Liability of the Company under this Commitment shall be only to the named proposed Insured and such parties included under the definition of Insured in the form of policy or policies committed for and only for actual loss incurred in reliance hereon in undertaking in good faith (a) to comply with the requirements hereof, or (b) to eliminate exceptions shown in Schedule B, or (c) to acquire or create the estate or interest or mortgage thereon covered by this Commitment. In no event shall such liability exceed the amount stated in Schedule A for the policy or policies committed for and such liability is subject to the insuring provisions, the Conditions and Stipulations, and the Exclusions from Coverage of the form of policy or policies committed for in favor of the proposed Insured which are hereby incorporated by reference and are made a part of this Commitment except as expressly modified herein.
4. Any action or actions or rights of action that the proposed Insured may have or may bring against the Company arising out of the status of the title to the estate or interest or the status of the mortgage thereon covered by this Commitment must be based on and are subject to the provisions of this Commitment.

CERTIFICATE OF SERVICE

I hereby certify that on the 22d day of January, 1988,
I caused four true and correct copies of the foregoing BRIEF OF
APPELLANT VALLEY BANK AND TRUST COMPANY to be hand delivered to
the following counsel of record:

Steven H. Gunn
RAY, QUINNEY & NEBEKER
79 South Main St. #400
Salt Lake City, UT 84111



Attorney for Appellant