

1989

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

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

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VALLEY BANK AND TRUST COMPANY,
a Utah corporation,

Plaintiff-Appellant,

vs.

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

Defendant-Respondent.

89-0017 CA

Case No. 87-0358

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BRIEF OF RESPONDENT U.S. LIFE TITLE INSURANCE
COMPANY OF DALLAS

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

FILED

JAN 27 1989

COURT OF APPEALS

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IN THE SUPREME COURT
FOR THE STATE OF UTAH

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VALLEY BANK AND TRUST COMPANY, :
a Utah corporation, :
Plaintiff-Appellant, :
vs. :
U.S. TITLE INSURANCE COMPANY : Case No. 87-0358
OF DALLAS, a Texas corporation, :
Defendant-Respondent. :

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to Article VIII, § 4 of the Utah Constitution, § 78-2-2(3), Utah Code Annotated (1953) (1987 Replacement), and Rule 3(a), Rules of the Utah Supreme Court.

NATURE OF PROCEEDINGS

This is an appeal from a final judgment entered by the Honorable Homer F. Wilkinson, District Court Judge, Third Judicial District Court of Salt Lake County, Utah, in favor of U.S. Life Title Insurance Company of Dallas (hereinafter referred to as "U.S. Life Title")(incorrectly referred to in plaintiff's complaint as "U.S. Title Insurance Company of Dallas") which dismissed the Complaint of Valley Bank and Trust Company ("Valley Bank" or "the Bank") with prejudice.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this case:

1. Did Valley Bank's placing of its "SBA Trust Deed" on property covered by a title insurance policy insuring a subsequent trust deed "create" a defect, lien or encumbrance within the meaning of a policy exclusion?
2. Did U.S. Life Title owe a duty to Valley Bank to disclose in its commitment of title insurance or its policy the existence of the prior trust deed held by Valley Bank?

3. May Valley Bank for the first time on appeal raise the issue of equitable estoppel?

4. Inasmuch as the first trust deed lien on the subject property has been released, has Valley Bank suffered any loss as a result of the existence of that trust deed at the time of the issuance of the Title Insurance Policy?

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

U.S. Life Title believes that Valley Bank's brief accurately reflects the nature of the case and the course of proceedings below.

Statement of Facts

1. Valley Bank, a Utah corporation, is a wholly owned subsidiary of Valley Utah Bancorporation. (Brief of Appellant, p. 3; T. 3.) Valley Mortgage Corporation ("Valley Mortgage") is also a wholly owned subsidiary of Valley Utah Bancorporation.

d.) Valley Mortgage often acts as an agent for Valley Bank in arranging for and closing Valley Bank mortgage loans (T. 18).

2. On or about April 1, 1983, the department of Valley Bank charged with making loans guaranteed by the Small Business Administration of the United States ("the SBA Department") made a loan in the sum of \$65,000.00 to F. Kent Nance and Patricia J. Nance. (Hereinafter the said loan will be referred to as the "SBA Loan" and the trust deed which secured payment of that loan will

be referred to as the "SBA Trust Deed".) The SBA Loan was secured by a trust deed lien on the Nances' residence located in Summit County, Utah, and by a security interest in certain personal property. (Valley Bank Complaint, ¶ 7, R.3; T. 98; plaintiff's exhibit 6.) The SBA Trust Deed was recorded April 5, 1983. (Plaintiff's exhibit 6.)

3. A few weeks after obtaining the SBA Loan the Nances contacted Valley Bank or Valley Mortgage for the purpose of obtaining a conventional mortgage loan, ostensibly for the purpose of paying off a prior mortgage held by another lender, First Security Bank. (T. 25-26.) The Nances apparently did not disclose to the loan officer that they had recently obtained the SBA Loan from Valley Bank. (T. 40.)

4. The loan officer with whom the Nances dealt in applying for their conventional mortgage loan (hereinafter referred to as the "Residential Loan") was Paul Thurston, an employee of Valley Mortgage, who was acting as agent for Valley Bank in closing mortgage loans. (T. 17, 18.) When the loan was finally made, however, the lender was Valley Bank and the loan was made using Valley Bank forms. (T. 44; plaintiff's exhibit 1.)

5. Preparatory to the making of the Residential Loan Valley Mortgage, acting as agent for Valley Bank, contacted Mountain View Title, an agent of U.S. Life Title, and requested a commitment for title insurance. (T. 23, 24.)

6. In response to Mr. Thurston's request, Mountain View Title produced and delivered to him the requested Commitment for Title Insurance ("the Commitment") showing the "proposed insured" as "Valley Mortgage". (Plaintiff's exhibit 2 (a copy of which is attached to this Brief as Addendum 2).) The Commitment was apparently prepared by Mountain View Title from an earlier commitment prepared by another title insurer, Utah Title, as part of the documentation of the SBA Loan. (T. 130, 155.)

7. The Commitment describes in its Schedule B-II a number of matters which were to be excepted from coverage under the policy of title insurance which was to follow. Significantly, the list of excepted matters did not include the SBA Trust Deed. The reason for this omission was apparently that the earlier commitment produced by Utah Title upon which the Mountain View commitment was based had not listed the SBA Trust Deed as an exception.

8. The Residential Loan was closed on approximately April 26, 1983. The amount of the loan was \$101,500.00. Thereafter the Residential Loan trust deed ("the Residential Trust Deed") was recorded on April 26, 1983. (Plaintiff's exhibit 1; T. 4.)

9. After the Residential Loan closed Mountain View Title, acting as agent for U.S. Life Title, issued a "mortgagee policy of title insurance" ("the Policy"). (Plaintiff's exhibit 3.) (The Policy is attached to this Brief as Addendum 3.) Even though

Mountain View Title had discovered the SBA Trust Deed following the issuance of the Commitment, the Policy did not show that prior lien as a described exception to the coverage. Mountain View Title's failure to list the SBA Trust Deed as an exception in the Policy was due to the fact that it believed that Valley Bank intended to release the SBA Trust Deed. (T. 127-128.)

10. Subsequent to the closing of the Residential Loan--apparently for administrative convenience--Valley Bank assigned the Residential Trust Deed to Valley Mortgage who, in turn, sold the loan, and assigned the Trust Deed, to Federal Home Loan Mortgage Corporation ("Freddie Mac"). (T. 37-39; plaintiff's exhibits 4, 5.)

11. On November 18, 1983, Intermountain Thrift & Loan, a subsidiary of Valley Utah Bancorporation, loaned the Nances the sum of \$10,000.00 and took as collateral a trust deed on the same property described in the SBA and Residential Trust Deeds, as well as an adjacent lot owned by the Nances. (T. 7; plaintiff's exhibit 18.)

12. During the period between March and June of 1984, the Nances defaulted on the SBA, Residential, and Intermountain Thrift loans. (T. 80, 98.) As a consequence, Valley Bank, Freddie Mac, and Intermountain Thrift, respectively, each filed notices of default as part of the nonjudicial trust deed foreclosure procedure provided by Utah law. (Plaintiff's exhibits 8, 19, 20; T. 54-55, 58-59.)

13. No trustee's sale on the SBA and Residential Trust Deeds was ever held. (T. 85, 107.) Instead, a trustee's sale was conducted on or about April 4, 1985, pursuant to the foreclosure of the Intermountain Thrift Trust Deed which was subordinate to the liens of the SBA and Residential Trust Deeds. (Plaintiff's exhibit 8A; T. 60.) (The trustee's deed is attached as Addendum 4.)

14. The successful bidder at the Intermountain Thrift trustee's sale was Valley Bank who "credit bid" the sum of \$11,941.45. (T. 63, 74.) By a Trustee's Deed dated April 4, 1985, Valley Bank as trustee under the Intermountain Thrift Trust Deed conveyed fee title to itself as the successful bidder at the trustee's sale. (Plaintiff's exhibit 8A.)

15. After it discovered the existence of the SBA Loan Freddie Mac demanded that Valley Bank repurchase the Residential Loan or that it remedy the Nances' default in the payment of their monthly installments. (T. 81; plaintiff's exhibit 10.) In response Valley Bank, through Valley Mortgage, brought all payments current. (T. 82.) Eventually, however, Valley Bank decided to pay off the loan. Accordingly, in December of 1986, Valley Bank paid Freddie Mac the sum of \$103,912.78 in complete satisfaction of its repurchase obligation. (T. 82.)¹ Although

¹Although Freddie Mac was paid with a Valley Mortgage check, the latter merely acted as a servicing agent and received reimbursement for the payment from Valley Bank. (T. 87.)

Valley Bank paid Freddie Mac the payoff on the loan--apparently pursuant to a recourse agreement--the loan was not assigned to Valley Bank by Freddie Mac. Instead, Freddie Mac requested that the trustee under the Residential Trust Deed reconvey the Trust Deed, thus releasing the lien. (T. 95-96.) As of the date of the trial, the deed of reconveyance had not yet been recorded. (Id.)

16. Subsequent to its discovery of the existence of the SBA Trust Deed and while it still owned the Residential Loan Freddie Mac made demand upon U.S. Life Title to defend Freddie Mac's interest under its Trust Deed. On November 22, 1985, subsequent to Valley Bank's purchase of the property at the Intermountain Thrift trustee's sale, U.S. Life Title denied coverage under the Policy and refused Freddie Mac's tender of defense. (Plaintiff's exhibit 11.)

17. As noted above the SBA Trust Deed was never foreclosed upon. At trial an employee of the SBA Department of Valley Bank offered the following explanation for the Bank's failure to pursue its foreclosure to completion:

Q. [W]as there ever a foreclosure sale on the SBA Loan? On the subject property?

A. No.

Q. Why not?

A. Because our lien was superior to any of the others that were being foreclosed upon.

Q. But your lien was in default. Didn't you customarily foreclose on loans in default?

A. Yes sir. We normally would.

Q. Why didn't you in this case?

A. Because it was, you know, another entity of Valley Bank & Trust Company, on a sister company so to speak, and in talking with SBA we worked out an agreement with SBA to let them go ahead and foreclose it and go through the expense rather than have our department and SBA sharing expenses.

Q. So SBA, that is the SBA Department of Valley Bank agreed not to foreclose on its loan, is that correct?

A. Yes.

(T. 106-107.) The SBA Trust Deed was subsequently released by a deed of reconveyance dated December 23, 1986. (Defendant's exhibit 25.)

18. Several months after its purchase of the insured property, together with the adjacent lot, at the trustee's sale in the Intermountain Thrift foreclosure, Valley Bank sold the property to Gary and Shauna Weaver for \$55,000.00. Purchase of the property was financed by Valley Bank who gave the Weavers a warranty deed and took back a trust deed to secure payment of a note in the sum of \$40,000.00. (T. 101- 102; plaintiff's exhibits 9, 21, 22.)

19. The Policy contains the following "Exclusions From Coverage":

. . .

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

(Plaintiff's exhibit 3 (second page).)

SUMMARY OF ARGUMENTS

U.S. Life Title has endeavored to organize its arguments to roughly correspond to those of Valley Bank as contained in its Brief. Accordingly, Points I.A., B., and C. address the issues raised in Valley Bank's Arguments II.B, C, and D, respectively. (U.S. Life Title does not dispute the general proposition proposed in Valley Bank's Argument I that this court may review the trial court's conclusions of law.) Point II addresses the issues raised in Valley Bank's Argument II.A and Point III sets forth U.S. Life Title's response to Argument IV.

Inasmuch as the appellant's Argument III does not appear to be based upon any particular legal theory--it merely asserts the proposition that enforcement of the terms of the Policy would not be fair to Valley Bank--no specific response has been attempted. Rather, U.S. Life Title has dealt with the arguments raised in Argument III in the context of its response to the other Arguments.

Point IV of this Brief deals with the general question of whether Valley Bank has met its burden of proving that the existence of the SBA Trust Deed damaged Valley Bank. The argument contained in Point IV is based upon the evidence which shows that the Residential Trust Deed was lost by merger of that trust deed into the fee title acquired by Valley Bank subsequent to the

foreclosure sale of the Intermountain Thrift Trust Deed. The evidence also shows that the SBA Trust Deed was never foreclosed, that it was subsequently released, and that during the time it was in existence the SBA lien did not prevent Valley Bank from foreclosing on the Residential Trust Deed and would not have interfered with any marketing of the property following foreclosure. Thus there was no loss to Valley Bank which was covered by the Policy.

ARGUMENT

POINT I:

THE SBA TRUST DEED LIEN IS EXCLUDED FROM COVERAGE UNDER THE POLICY BECAUSE VALLEY BANK "CREATED" THAT LIEN.

As noted above in the Statement of Facts, Valley Bank caused the subject property to be encumbered with the lien of the SBA Trust Deed on April 5, 1983. Since the Policy specifically excludes from coverage any "defects, liens, [or] encumbrances . . . created . . . by the insured claimant . . .", the court below concluded that "the lien of the SBA Trust Deed is excluded from coverage under the Policy by paragraph 3(a) of the Exclusions From Coverage." (R. 107; Addendum 1.) Valley Bank disputes the trial court's conclusion on three grounds: (1) in obtaining the SBA Trust Deed Valley Bank did not intend to defraud the insurer. (2) U.S. Life Title knew of the existence of the SBA Trust Deed. (3) Valley Bank did not have knowledge of the existence of the SBA

Trust Deed. These arguments will be considered in subpoints A, B, and C of this Point.

A. VALLEY BANK CONSCIOUSLY AND DELIBERATELY CAUSED THE SBA TRUST DEED TO COME INTO EXISTENCE.

Under the rubric "Exclusions From Coverage" the Policy states:

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

1. . . .
2. . . .
3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant . . .

Relying on the above language and on evidence that the SBA Department of Valley Bank caused the SBA Trust Deed lien to be placed on the subject property, the court below concluded that the lien was excluded from coverage under the Policy because Valley Bank had "created" a lien or encumbrance on the property. In this appeal Valley Bank argues that it did not "create" the SBA Trust Deed lien because it did not deliberately act to create that lien² and because Valley Bank was not guilty of fraud or misconduct.³ For the reasons stated below those arguments are untenable.

²"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." (Brief of Appellant, p. 26.)

³"In the absence of fraud or misconduct on the part of Valley Bank, the exclusion for defects created by the insured should not apply." (Brief of Appellant, p. 17.)

1. Valley Bank Created The Lien.

Valley Bank's argument that it did not "create" the SBA Trust Deed lien appears to be based upon the following syllogism: (major premise) the word "create" implies deliberate rather than inadvertent causation; (minor premise) Valley Bank did not intend to cause the existence of the SBA Trust Deed; (conclusion) therefore Valley Bank did not "create" the Trust Deed.

As a general proposition the word "create" appears to require only causation, not deliberate causation. Thus BLACKS LAW DICTIONARY (5th ed. 1979) defines the word "create" as follows: "To bring into being; to cause to exist; to produce; as, to create a trust, to create a corporation." Nevertheless courts which have interpreted the word "created" as used in the standard title insurance policy exclusion have required intentional causation. Thus, in American Savings & Loan Association v. Lawyers Title Ins. Corp., 793 F.2d 780, 784 (6th Cir. 1985), the court stated:

The term "created" has generally been construed to require a conscious, deliberate and sometimes affirmative act intended to bring about the conflicting claim, in contrast to mere inadvertence or negligence.

Accord, Hansen v. Western Title Ins. Co., 220 Cal. App. 2d 531, 33 Cal. Rptr. 668, 671 (1963); Feldman v. Urban Commercial, Inc., 87 N.J. Super. 391, 404, 209 A.2d 640, 648 (App. Div. 1968).

The weakness of Valley Bank's reasoning lies in its minor premise that it did not deliberately cause the SBA Trust Deed to

exist. Such an argument is particularly difficult to understand when one considers that Valley Bank freely admits that "[t]he Small Business Administration Department is a department of Valley Bank" (Brief of Appellant, pp. 27-28) and "the SBA Department created the SBA Trust Deed." (Brief of Appellant, p. 29.) If the SBA Department is a department of Valley Bank and if that department created the SBA Trust Deed, then under well-recognized principles of agency it would follow that Valley Bank "created" the SBA Trust Deed. Thus it has been stated:

Any person who is sui juris and has capacity to affect his legal relationships by the giving of consent to a delegable act or transaction may authorize an agent to act for him with the same effect as if he were to act in person. The principal may be either a natural person or an artificial one.

3 Am.Jur.2d Agency § 9, pp. 516-17 (1962).

The "quibble" in Zions' argument appears to lie in the fact that the mortgage department of Valley Bank which made the Residential Loan did not know of the existence of a loan made by another department of the Bank, the SBA Department. But as more fully discussed in Point I.C., below, the knowledge of the agent (the SBA Department) imparts knowledge to the principal, Valley Bank. Thus Valley Bank knew of the existence of the SBA Trust Deed when it closed the Residential Loan.

The real issue in this case is not whether the mortgage department of Valley Bank knew of the existence of the SBA Trust Deed, rather, it is whether the SBA Department--an agent of Valley

Bank--consciously and deliberately intended to bring into existence the SBA Trust Deed. If it did not--if it created that Trust Deed by inadvertence or mistake--then the lien is unenforceable and could never have caused any diminution in the value of the Residential Trust Deed. On the other hand, if the SBA Department truly did intend to place a trust deed lien on the subject property, then, as the SBA Department's principal, Valley Bank intentionally and deliberately caused that Trust Deed to come into existence. Indeed, Valley Bank does not seriously argue that the SBA Trust Deed was created through inadvertence or mistake. It merely asserts that the Mortgage Department did not know about the loan. Nevertheless, the evidence clearly demonstrates that the SBA Department, and hence Valley Bank knew about and created the SBA Trust Deed.

2. The Policy Exclusion For Liens Created By The Insured Does Not Require That The Insured Be Guilty Of Fraud Or Misconduct.

Argument II.B. of the Brief of Appellant is devoted to the proposition that more than deliberate causation is required to exclude a lien or encumbrance "created" by the insured under a policy of title insurance. Instead, says the Appellant, the insurer must demonstrate that the insured has been guilty of fraud or misconduct. Thus Valley Bank states, "[T]he exclusion should not be enforced in the absence of fraud or misconduct on the part of the insured." (Brief of Appellant, p. 20.)

Valley Bank's argument flies in the face of the well-recognized rule that the word "created" requires only "a conscious, deliberate and sometimes affirmative act intended to bring about the conflicting claim . . ." American Savings & Loan Association v. Lawyers Title Ins. Corp., supra, 793 F.2d at 784. The argument appears to be based upon a misunderstanding of cases which have attempted to interpret the standard exclusion for liens "created, suffered, assumed or agreed to by the insured claimant".

Unlike the present case, most such cases have involved fact situations in which it was not clear whether there had been deliberate causation of the prior lien or encumbrance by the insured. Thus, for example, in American Savings, supra, a case discussed at some length in the Brief of Appellant, the court was called upon to decide whether the insured lender's underfunding of a construction project and the resulting creation of mechanics' liens demonstrated that the lender had "suffered, assumed or agreed to" the creation of the mechanics' liens. Although the court in dictum discussed the meaning of the word "created", it specifically noted that counsel for the title insurance company had "conceded that American ha[d] not created or agreed to the mechanics' liens within the meaning of the policy." Id. at 784 n.1. Reversing a magistrate's decision the Court of Appeals found that the mere underfunding of the project did not show that the insured lender had assumed or agreed to the creation of the mechanics' liens.

By contrast in Brown v. St. Paul Title Ins. Corp., 634 F.2d 1103 (8th Cir. 1980) and in Banker's Trust Co. v. Transamerica Title Ins. Co., 594 F.2d 231 (10th Cir. 1979), the courts found that the failure of insured lenders to disburse committed funds, thereby causing unpaid materialmen and suppliers to file mechanics' liens, demonstrated that the insured had created or suffered the existence of those encumbrances.

It should be noted that in none of those cases, and, indeed, in none of the cases cited by Valley Bank in its Brief, did the court find that a prior encumbrance consciously and deliberately created by the insured was outside of the exclusionary language of the policy. For example, in American Savings the court found that the lender neither intended to create mechanics' liens nor caused (suffered) them to be created. Similarly, in Hansen v. Western Title Ins. Co., 220 Cal.App.2d 531, 33 Cal.Rptr. 668 (1963) (discussed at pp. 23-24 of Brief of Appellant) the court held that execution by the insured of an ambiguous document which created a cloud on the title did not fall within the exclusionary language of the policy because the signing of the document did not involve "conscious, deliberate causation" of the defect. 220 Cal. App. 2d at 535. Thus in Hansen there was neither intentional causation nor misconduct by the insured.

By contrast, all of the other cases relied upon by Appellant deal with insureds to whom coverage was denied because of their fraud or misconduct. Significantly, Valley Bank is

unable to direct the court's attention to a single instance where a court has held that the exclusion in question would not apply because the insured's creation of an encumbrance was innocent, albeit deliberate.

Illustrative of the principle that the word "created" requires only deliberate causation, not fraud or misconduct, is the case of Safeco Title Ins. Co. v. Moskopoulos, 172 Cal.Rptr. 248, 116 Cal.App. 3d 658, 18 A.L.R.4th 1301 (1981). There the insured, Moskopoulos, had been sued by an earlier owner of the subject property seeking rescission or imposition of a constructive trust based upon the alleged improper clouding of the previous owner's title by Moskopoulos. He tendered defense of the claim to his title insurer, Safeco, who denied coverage. In upholding the decision of the trial court which found against Moskopoulos the appellate court held that the alleged defect was not in existence on the date that the policy was issued. In addition, in dictum, the court stated that under policy language identical to that under consideration in this case coverage of the defect arising from the action filed by the prior owner was, in reality, "created by the insured." The court stated:

In the instant case the interpretation [of the evidence] most favorable to appellant is "conscious, deliberate causation on the part of appellant. Appellant testified, and the trial court found, that appellant's conduct throughout the entire transaction was intentional and deliberate and not inadvertent or mistaken. Accordingly, the exclusionary provisions are applicable for the reason that appellant

"created" the "adverse claim" against which he seeks to have Safeco defend him. Since the exclusion applies, there is no duty to defend."

18 A.L.R.4th at 1309 (emphasis added).

It is significant to note that the court in Safeco Title did not emphasize any misconduct on the part of the insured, even though there appeared to have been such, but rather based its conclusion on the fact that the actions of the insured constituted "conscious, deliberate causation." The obvious inference is that the court believed that application of the "created" exclusion requires a showing of "intentional and deliberate" causation, not the mere absence of fraud or misconduct.

Since in this case it is clear that Valley Bank's SBA Department intended to "create" the SBA Trust Deed, that lien was excluded from Policy coverage.

B. U.S. LIFE TITLE'S KNOWLEDGE OF THE EXISTENCE OF THE SBA TRUST DEED IS IRRELEVANT TO A DETERMINATION OF WHETHER VALLEY BANK "CREATED" THAT LIEN.

In Argument II.C. of its Brief, Appellant suggests the novel theory that the "created" exclusion found in paragraph 3(a) of the Policy is only applicable if the insurer has no knowledge of the title defect.⁴ As authority for this proposition

⁴The heading to Appellant's Argument II.C. states, "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 cites the cases of Hansen v. Western Title Ins. Co., supra, and Ginger v. American Title Ins. Co., 29 Mich. App. 279, 185 N.W. 2d 54 (1970). A close reading of those cases reveals, however, that Valley Bank's reliance on them is misplaced.

As noted above, in Hansen the defect in the title which the insured was supposed to have "created" consisted of an ambiguity in a recorded document signed by the insured and drafted by the insured's attorney. In response to the insurer's contention that the title defect had been "created" by the insured within the meaning of the policy exclusion the court recited the rule that the word "created" implies "an intentional doing by the insured". 220 Cal.App.2d at 536. The court went on to suggest, however, that even where the lien had been created by inadvertence, the exclusion might still apply if the insurer had no notice of the defect, but the insured did. It said:

Although we would be inclined to make an outright restriction of the word "created," as used in the policy, to an intentional doing by the insured, nevertheless, because of our unwillingness to decide more than we must in a case so lacking in precedent, we limit our ruling to a case in which the insured did not intentionally produce the claim and in which the insurer itself had opportunity to know the defect. It is conceivable that a case could arise where the insured's inadvertence or mistake would produce a defect which would be outside the power of the insurer reasonably to find; but such a case is far removed from this.

Id. (emphasis added).

Thus, far from standing for the proposition that the exclusionary language is inapplicable where the insurer was aware of the defect, Hansen suggests a possible exception to the general rule requiring an intentional act by the insured, if the title insurer could not reasonably have known of the defect.

By contrast, Ginger v. American Title involved not only interpretation of the "created" exclusion, but also a second standard exclusion as to defects, liens, and encumbrances "known to the insured . . . and not shown by the public records, unless disclosure thereof in writing by the insured shall have been made to the company [insurer] . . ."⁵ As to the applicability of the two exclusions the court stated:

The defect in this case was the fraudulent character of the purported conveyance. Such defect was known to plaintiff but not disclosed to his insurer. We hold that this defect was expressly excluded from coverage in the policy under . . . [both clauses].

Id. at 56.

Although the court in Ginger did not further describe the facts which gave rise to application of each exclusion, the logical inference is that the insured's failure to disclose the fraudulent conveyance to the title insurer was relevant only to the applicability of the second exclusion (which is identical to

⁵An identical provision appears in the Policy as Exclusion 3(b).

paragraph 3(b) of the Policy), since it specifically requires that the insured give notice of defects to the title insurer.

Furthermore, the language of the Policy gives no support to the notion that a lien is not "created" by the insured if the title insurer knows of its creation. Indeed, since Exclusion 3(a) makes no mention of notice to the insurer, while Exclusion 3(b) specifically requires that such notice be given, the clear implication is that knowledge or notice is not a prerequisite to the application of subparagraph (a). This fact, coupled with the absence of any authority which supports Valley Bank's theory, must lead to the rejection of that theory.

C. VALLEY BANK KNEW OF THE EXISTENCE OF THE SBA TRUST DEED.

In Argument II.D. of its Brief Valley Bank suggests that the exclusion of paragraph 3(a) is inapplicable because "Valley Bank did not have knowledge of the SBA Trust Deed". (Brief of Appellant, p. 25.) As discussed in Point I.A.1. of this Brief, the argument erroneously focuses upon Valley Bank's knowledge, rather than its intent. Nonetheless, since knowledge and intent are closely related, it may be useful to examine the evidence and applicable legal principles which demonstrate that Valley Bank did in fact have knowledge of the existence of the SBA Trust Deed.

At the outset it must be conceded that although there was a dispute in the evidence on the issue, the trial court found that the loan officer for Valley Bank who made the Residential Loan,

Paul Thurston, did not know of the existence of the SBA Trust Deed. (See Finding 5., R. 105.)⁶ If, therefore, knowledge of the existence of the SBA Trust Deed could only be imparted to Valley Bank through Mr. Thurston, one would have to concede that Valley Bank did not have knowledge of the encumbrance.

The flaw in Valley Bank's reasoning lies in the fact that the Bank had other agents who had knowledge of the existence of the SBA Trust Deed, namely, the employees of its SBA Department. Indeed, Appellant freely admits that "the SBA Department created the SBA Trust Deed." (Brief of Appellant, p. 29.) The significance of this fact is, of course, that an agent of Valley Bank--the SBA Department--knew of the existence of the SBA Trust Deed because it took that Trust Deed as collateral for a loan which it made to the Nances. Accordingly, Valley Bank, as principal, had knowledge by virtue of the knowledge of its agent. This principle was long ago recognized by this court:

Ordinarily notice to an agent touching the subject-matter of his agency or in regard to the transaction in which he is engaged is notice to his principal.

B.T. Moran, Inc. v. First Security Corporation, 82 Utah 316, 24 P.2d 384, 387 (1933). See also, RESTATEMENT (SECOND) OF AGENCY, § 272 (1958).

⁶"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."

From the foregoing it is clear that even if paragraph 3(a) of the Exclusions requires knowledge of the defect by Valley Bank, the Bank did, in fact, have such knowledge by virtue of the knowledge of the existence of the SBA Trust Deed by the employees of Valley Bank's SBA Department.

POINT II:

U.S. LIFE TITLE HAD NO DUTY TO DISCLOSE THE EXISTENCE OF THE SBA TRUST DEED ON THE POLICY OR THE COMMITMENT.

Valley Bank argues in Argument II.A. of its Brief that the Policy contains an implied warranty of title, which U.S. Life Title breached by failing to list the SBA Trust Deed as an exception on Schedule B. For the reasons set forth in subpoints A and B below, Valley Bank's argument must be rejected. In any case, as discussed in Point IV below, Valley Bank has suffered no loss as a result of the omission of the SBA Trust Deed from the list of exceptions contained in the Policy.

A. U.S. LIFE TITLE HAD NO DUTY UNDER THE POLICY TO LIST THE SBA TRUST DEED.

Valley Bank contends that, as a general principle, title insurers have a duty to their insureds to list all encumbrances on the insured property. Valley Bank's argument is based upon a misunderstanding of this court's decision in the case of Bush v. Coult, 594 P.2d 865 (Utah 1979), in which the court noted that "the policy of title insurance is in the nature of a warranty"

(quoting Research Loan & Investment Corp. v. Lawyers Title Ins. Corp., 361 F.2d 764 (8th Cir. 1966)) (emphasis added). In Bush v. Coult the court had to determine whether an insured had the obligation to investigate the accuracy of certain information indicating a possible cloud on title and to disclose that information to the insurer. This court held that "the law imposes no duty upon one who seeks title insurance to perform the responsibilities of the insurer to ascertain the state of title." Id. at 867. The court supported that conclusion by pointing out that it is the title insurer's duty, not the insured's, to research the status of the title. The court did not say, however, that the policy itself contained implied covenants against encumbrances. Such a view would, in effect, impose upon a title insurer the duties of an abstracting company.

This precise issue was raised in the case of Houston Title Co. v. Ojeda De Toca, 733 S.W. 2d 325 (Tex. App.--Houston 1987) where the court stated:

The duties owed by a title insurance company to its insured have been well documented and are more easily understood in terms of the relationship between the two. The title insurance company is not, as is an abstract company, employed to examine title; rather, the title insurance company is employed to guarantee the status of title and to insure against existing defects. Thus, the relationship between the parties is limited to that of indemnitor and indemnitee.

Id. at 327.

Similarly in Lawrence v. Chicago Title Ins. Co., 237 Cal.

Rptr. 264 (Cal.App. 1987) the court stated:

The insurer does not represent expressly or impliedly that the title is as set forth in the policy; it merely agrees that, and the insured only expects that, the insurer will pay for any losses resulting from, or he will cause the removal of, a cloud on the insured's title within the policy provisions. . . . A title policy is not a summary of the public records and the insurer is not supplying information; to the contrary he is giving a contract of indemnity. The title insurer, as any other insurer, can and does assume the risk of its policy. Every insurer can and does contract to indemnify against specific risks . . . Accordingly, when the contingency insured against under the policy occurs, the title insurer is not, by that fact alone, liable to the insured for damages in contract or tort, but rather is obligated to indemnify the insured under the terms of the policy.

Id. at 267 (emphasis in original text).

The language of the Policy itself supports the interpretation of title insurance policies offered by these courts. The front page of the policy states:

Subject to the Exclusions From Coverage, the exceptions contained in Schedule B and the provisions of the Conditions and Stipulations hereof, U.S. Life Title Insurance Company of Dallas . . . insures, as of the Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and the costs, attorney's fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

. . . .

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

(Plaintiff's Exhibit No. 3, first page.) Thus, the Policy is a contract to indemnify Valley Bank for any loss suffered as a result of any encumbrances not excluded or excepted from the Policy. The Policy is not a warranty that no other encumbrances exist, and by its very terms the Policy does not cover a loss arising from U.S. Life Title's failure to list such an encumbrance. It follows that Valley Bank may only recover damages from U.S. Life Title if the SBA Trust Deed falls within the coverage of the Policy. Since, as demonstrated in Point I, above, the SBA Trust Deed is excluded from coverage, Valley Bank is without a remedy.

B. EVEN IF THE POLICY IMPOSES THE DUTIES OF AN ABTRACTOR
ON U.S. LIFE TITLE, ENCUMBRANCES CREATED BY VALLEY BANK
NEED NOT BE REPORTED.

If, as Valley Bank contends, the Policy imposes on U.S. Life Title an implied duty to disclose encumbrances on the insured property, that duty is nonetheless circumscribed by the written provisions of the Policy. Thus, if one assumes that coverage under the Policy includes the duty to disclose encumbrances, it must also be true that the Policy's "Exclusions From Coverage" are applicable. That conclusion is consistent with the language of paragraph 3 of the "Conditions and Stipulations" of the Commitment which states:

In no event shall such liability [i.e., the liability of the insurer under the Commitment] 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 incorporated by reference and are made a part of this Commitment except as expressly modified herein.

(Plaintiffs' Exhibit 2 last page.) (Emphasis added.)

Thus, we come full circle: whether Valley Bank's theory is based upon the written provisions of the Policy or upon implied duties, the Bank must still show that it did not consciously or deliberately create the SBA Trust Deed. Since, as demonstrated in Point I, above, it cannot meet that burden, the Bank's argument must be rejected.

POINT III:

U.S. LIFE TITLE IS NOT ESTOPPED FROM RELYING UPON THE EXCLUSIONS OF THE POLICY.

As discussed in Argument IV of its Brief, Valley Bank contends that application of the doctrine of equitable estoppel would prohibit U.S. Life Title from raising paragraph 3(a) of the Exclusions as a defense to this action. While it is tempting to debate whether the facts of the case support the Bank's assertion, in reality such a discussion is unnecessary because Valley Bank's knowledge of the existence of the SBA Trust Deed and its failure to plead or argue the estoppel issue at trial preclude the Bank from raising the issue before this court. Those two grounds will be discussed separately in the subpoints which follow.

A. THE DOCTRINE OF EQUITABLE ESTOPPEL IS INAPPLICABLE BECAUSE VALLEY BANK KNEW OF THE EXISTENCE OF THE SBA TRUST DEED.

As has been demonstrated in Point I.C., supra, Valley Bank knew of the existence of the SBA Trust Deed from its inception because that lien was obtained from the Nances as collateral for the SBA Loan. It is well recognized that such knowledge disqualifies the possessor from asserting the doctrine of equitable estoppel against another. 28 Am Jur 2d Estoppel and Waiver § 95 (1966). Thus, this court has stated:

The doctrine of equitable estoppel does not operate in favor of one who has knowledge of the essential facts or who has convenient and available means of obtaining such knowledge.

Morgan v. Board of State Lands, 549 P.2d 695, 697 n.4 (Utah 1976).

Inasmuch as Valley Bank had knowledge of the existence of the SBA Trust Deed, it follows that it may not seek application of the doctrine of equitable estoppel against U.S. Life Title.

B. VALLEY BANK MAY NOT ASSERT THE DOCTRINE OF EQUITABLE ESTOPPEL BECAUSE IT FAILED TO RAISE THE ISSUE BELOW.

This court adheres to the well-recognized view that:

[W]here a party neither raises an issue in its pleadings nor presents it to the trial court, the issue cannot be considered for the first time on appeal.

Park City Utah Corp. v. Ensign Co., 586 P.2d 446, 450 (Utah 1978);

Hanover Limited v. Fields, 568 P.2d 751, 753 (Utah 1977).

This principle applies to Valley Bank's theory of equitable estoppel. Unless estoppel is pleaded or a claim

regarding estoppel is made before the trial court, an appellate court may not consider that theory. Currie v. Great Central Insurance Co., 374 So.2d 1330, 1333 (Ala. 1979); Peterson v. Moulton, 144 A.2d 717, 720 (Vt. 1958); Valley Loan Service v. Neal, 235 P.2d 932, 935 (Okla. 1951).

In this case, neither Valley Bank's Complaint (R. 2) nor its unsuccessful Motion for Summary Judgment and Memorandum (R. 31, 33) make any mention of equitable estoppel or of any reliance upon representations by U.S. Life Title. Correspondingly, the opening statement at trial of Valley Bank's attorney, Mr. Haslam, contains no mention of the words "equitable estoppel" or "estoppel". It is therefore clear that Valley Bank's theory of equitable estoppel was neither raised in the pleadings nor presented at trial. For that reason, the Bank may not now raise this issue for the first time before this court.

POINT IV:

VALLEY BANK HAS SUFFERED NO INJURY AS A RESULT OF THE EXISTENCE OF THE SBA TRUST DEED.

Paragraph 6 of the Policy ("Determination and Payment of Loss") provides that the liability of U.S. Life Title is the lesser of (i) "the actual loss of the insured claimant"; or (ii) "the amount of insurance stated in Schedule A . . ."; or (iii) "the amount of the indebtedness secured by the insured mortgage . . . at the time the loss or damage insured against

. . . occurs . . .". The issue raised by the evidence in this case is whether any loss attributable to the existence of the SBA Loan ever occurred. Relevant to that issue, the evidence adduced at trial was that the SBA Trust Deed was never foreclosed, that Valley Bank had decided not to foreclose the Trust Deed, and that subsequent to the discovery of the SBA Loan by the mortgage department of the Bank the Trust Deed was released.

An insured is not entitled to recover damages from the title insurer for all losses which he may suffer, but rather only for those losses directly attributable to the failure of title. Thus, it has been stated:

[W]hile the contract of insurance was breached at the time the policy was delivered and the title company became immediately liable to the insured, it was only liable for the loss that the mortgagee actually suffered and for such loss as was due to failure of title.

Narberth Building & Loan Association v. Bryn Mawr Trust Co., 126 Pa. Super. 74, 190 A. 149, 151 (1937).

There is no clear evidence that any loss which Valley Bank may have suffered was due to a failure of title. Indeed, the Bank appears to have treated the SBA Loan, the Residential Loan and the Intermountain Thrift Loan as a single transaction. Thus, for example, in explaining why the Bank had never foreclosed on the SBA Loan a bank officer testified that the SBA Department did not want to foreclose sale on "a sister company". (T. 107.) Furthermore, at the time of the foreclosure on the Intermountain

Thrift Trust Deed Valley Bank, the holder of two superior liens, "credit bid" and took title to the property. Thereafter, Valley Bank sold the property and the proceeds of sale were applied against the SBA Loan. Subsequently, the SBA Trust Deed was released and the balance of the loan charged off. (T. 105.) Thus, at best, the evidence is unclear as to whether the SBA Trust Deed in any way reduced the value of the insured mortgage: the Residential Trust Deed.

In most instances an insured's loss arising from an undiscovered prior encumbrance is measured by the amount which he must pay in order to cure the defect. Thus, it has been said, "the kind of loss contemplated by such a policy is that loss or damage sustained when, 'because of a defect in the title, the insured was bound to pay something to make it good'". Grunberger v. Iseon, 75 A.D. 2d 329, 429, N.Y.S. 2d 209, 211 (1980) (quoting Empire Development Co. v. Title Guarantee & Trust Co., 225 N.Y. 53, 121 N.E. 468).

An enumeration of the ways in which an insured may be required to "make it good" is suggested by COUCH ON INSURANCE as follows:

A mortgagee has been held entitled to recover, within the limit of his policy, the amount of a prior lien which was not disclosed by the policy where--

--he has discharged such lien.

--he foreclosed his mortgage and bought the property subject to such lien.

--the existence of such lien was not discovered until after he had foreclosed his mortgage and bought the property.

15A COUCH ON INSURANCE 2d § 57:191 (1983).

In this case it is clear that Valley Bank has not been required to pay anything "to make it good": (1) it has not been required to pay off another lien holder for the discharge of its lien; (2) it has not foreclosed the Residential Trust Deed and bought the property subject to the SBA Lien; and (3) it did not discover the existence of the SBA Trust Deed subsequent to foreclosure. In short, Valley Bank has suffered no diminution in the value of the Residential Trust Deed as result of the existence of the SBA Trust Deed. On the contrary, Valley Bank lost its trust deed lien by merger of the Trust Deed into the fee title estate which the Bank purchased at the Intermountain Thrift foreclosure sale.

This court has described the doctrine of merger as follows:

Ordinarily when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter, but if it was the intention to keep the mortgage alive, or, if it is to the interest of the mortgagee, and it can be done without prejudice to the rights of the mortgagor or third persons, the doctrine of merger, as between them will not apply Where such intention is not expressed, the court must endeavor to ascertain it by the circumstances connected with the transaction or must indulge in some presumption by which prima facie its existence may be determined.

O'Reilly v. McLean, 84 Utah 551, 37 P.2d 770, 773 (1934).

In this case the evidence showed that Valley Bank purchased the fee title to the subject property on April 4, 1985, as part of the foreclosure of the Intermountain Thrift Trust Deed. (Plaintiff's Exhibit 8A--attached as Addendum 4.) Valley Bank's subsequent actions make it clear that it intended to merge the SBA and the Residential Trust Deeds into the fee title estate it acquired through the Intermountain Thrift foreclosure:

--It terminated the pending foreclosure proceedings for both the SBA Trust Deed and the Residential Trust Deed.

--It subsequently released both the SBA and the Residential Trust Deeds.

--It conveyed the property to the Weavers by a warranty deed. By its use of a warranty deed Valley Bank warranted to the Weavers that there were no encumbrances on the property. Section 57-1-12 Utah Code Ann. (1953) (1986 Replacement).

Since the evidence clearly establishes that the Residential Trust Deed was extinguished by merger in April of 1985, it is obvious that the loss of value of the Residential Trust Deed was not caused by the existence of the SBA Trust Deed.

Under circumstances similar to those in this case, the court in Grunberger v. Iseson, supra, found that the loss to an insured was not compensable by the title insurer. In that case, the insured obtained coverage for its fourth priority mortgage. Through inadvertence the insurer insured over a third mortgage. When the owner of the property subsequently defaulted in his obligations under the fourth mortgage the insured undertook

judicial foreclosure proceedings. Upon discovering the adverse claim of the third mortgage holder, the insured then commenced a declaratory judgment action for the purpose of determining the priority of liens and the liability of the title insurer. Before judgment could be entered the holder of the second mortgage conducted a foreclosure sale which resulted in a deficiency and an extinguishment of the third and fourth mortgages. Thereafter, the title insurer moved for summary judgment on the ground that the insured had suffered no loss as a result of the existence of the third mortgage. The trial court held for the title insurer and the appellate court affirmed the lower court's decision holding that "there was no damage to plaintiff within the terms of the policy." 429 N.Y.S.2d at 211.

The same result is mandated in this case. The extinguishment of the Residential Trust Deed was not caused by the existence or the foreclosure of the SBA Trust Deed; rather, its loss was a product of the merger of the Residential Trust Deed into the fee title estate acquired by Valley Bank. For that reason, Valley Bank has suffered no loss that requires compensation under the Policy.

CONCLUSION

The parties in this case are parties to a contract. That contract requires that U.S. Life Title indemnify Valley Bank for any loss incurred by the Bank as a result of title defects not excluded from coverage. The trial court correctly ruled that the

SBA Trust Deed fell within the exclusion for liens "created" by Valley Bank. The language of the Policy is clear and unequivocal. It is understandable that Valley Bank wishes to escape from the clear exclusionary language of the Policy. However:

Neither of the parties, nor the court has any right to ignore or modify conditions which are clearly expressed merely because it may subject one of the parties to hardship, but they must be enforced in accordance with the intention as manifested by the language used by the parties to the contract.

Ephraim Theatre Company v. Hawk, 7 Utah 2d 163, 321 P.2d 221, 223 (1958).

The lower court recognized that the exclusionary language of the policy was clear and unequivocal. This court should affirm that decision.

DATED this _____ day of March, 1988.

RAY, QUINNEY & NEBEKER

Steven H. Gunn
Attorneys for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 1988, I caused four true and correct copies of the foregoing Brief of Respondent U.S. Life Title Insurance Company of Dallas to be hand-delivered to the following:

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Salt Lake County Utah

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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,	:	
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
	:	
v.	:	
	:	Civil No. C-86-2379
U.S. TITLE INSURANCE COMPANY OF DALLAS, a Texas corporation,	:	(Judge Wilkinson)
Defendant.	:	

—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.

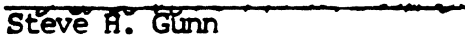
E. Because the SBA trust deed is excluded from coverage under the Policy, it is unnecessary for the Court to determine what loss plaintiff incurred as the result of the existence of the said trust deed or to determine whether plaintiff breached the Policy as alleged by Defendant in its Supplemental Answer.

DATED THIS 2 day of July, 1987.

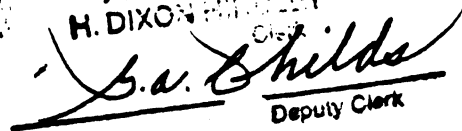
BY THE COURT:


HOMER F. WILKINSON
District Court Judge

Approved as to form:


Steve H. Gunn


Roy G. Haslam

ATTEST
H. DIXON PHILLIP
Clerk

B.A. Shields
Deputy Clerk

Commitment for Title Insurance

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 W. Brown

President & Chief Executive Officer

Robert Michael Clark

Attest: Senior Vice-President, Secretary and General Counsel

Debra 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*

01 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.

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

2 14. 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.

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 1-459.90
21.50
98092.33
#86-234-860-8001747-A
4-3-83 PO Box 720

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

4-3-83
\$45.62
SCLT
84110
Canyo 12/1

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.

Mortgagee Policy of Title Insurance

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. Brown

President & Chief Executive Officer

Robert Michael Clark

Attest Senior Vice-President, Secretary and General Counsel

Richard D. Hendry
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 a 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.

2. (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;

tality, 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 or defense.

SCHEDULE A

Effective 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:

- . Taxes for the year 1982 were paid. SERIAL NUMBER: KK 3
- . 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.
- . 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.

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 W. Brown

President & Chief Executive Officer

Robert A. Michael Clark

Attest: Vice President, Secretary and General Counsel

Richard A. [Signature]

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



Robert Michael Clark

President & Chief Executive Officer

Robert Michael Clark

Attest: Vice President, Secretary and General Counsel

[Signature]
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



President & Chief Executive Officer

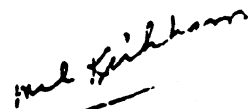


Attest Senior Vice-President, Secretary and Treasurer

Countersigned:



5186



(Conditions and stipulations continued and concluded from reverse of policy face)

(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 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.

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 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 conditions of this policy, the loss or damage shall be payable within 30 days thereafter.

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, 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 without prior written consent of the Company.

Reduction of Liability

(1) 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.

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

Mortgage 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
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California

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Mississippi

Missouri

Montana

Nevada

New Mexico

Oklahoma

Utah

Established in 1906

WHEN RECORDED MAIL TO:
ALFRED J. NEWMAN, Attorney at Law
629 East 4th South
Salt Lake City, Utah 84102

TRUSTEE'S DEED

EXHIBIT

8 A

56484

VALLEY BANK AND TRUST COMPANY (herein called Trustee) as Trustee under the trust deed hereinafter particularly described, does hereby Bargain, Sell and Convey, without warranty, to VALLEY BANK AND TRUST COMPANY
135 S. Main (AD. Box 60) Heber City, UT 84032 (herein called Grantee) all of the real property situate in the County of SUMMIT, State of Utah, described as follows:

(See attached Exhibit "A", for legal description, attached hereto and by this reference made a part hereof.)

Recorded: 4-8-85
at 3:15

Entry No.	232626
REQUEST OF	UTAH TRUST & SAVINGS
FEE	7.00
By	Summit
RECORDED CONFERRED UPON TRUSTEE BY THE	

This conveyance is made pursuant to the trust deed between F. KENT NANCE AND PATRICIA J. NANCE as Trustor, the Trustee herein, and INTERMOUNTAIN THRIFT AND LOAN as Beneficiary, recorded November 18, 1983, as Entry No. 213204 in Book 279, at Page 60, Summit County, Utah Records, and after fulfillment of the conditions specified in said trust deed authorizing this conveyance as follows:

(a) Default occurred in the obligations for which such trust deed was given as security and the Beneficiary made demand upon said Trustee to sell said property pursuant to the terms of said trust deed. Notice of default was recorded as Entry No. 227277, in Book 320, at Page 382, County Records (and in the office of the Recorder of each other county in which the property described in said Trust Deed, or any part thereof, is situated), the nature of such default being as set forth in said notice of default, and copy of such notice was mailed by certified mail to each person who recorded a request therefore. Such default still existed at the time of sale.

(b) More than three months after recordation of said notice of default, Trustee gave notice of the time and place of the sale of said property by certified mail by posting in a conspicuous place on the property to be sold, and in three public places of each city or county in which the property, or some part thereof, is situated, and by publishing in a newspaper having a general circulation in each county in which the property is situated.

(c) The provisions, recitals and contents of the Notice of Default referred to in paragraph (a) supra, shall be and they are hereby incorporated herein and made an integral part hereof, for all purposes as though set forth herein at length.

(d) All requirements of law regarding the mailing, posting, publication and recording of notice of default, and notice of sale, and of all other notices have been complied with.

(e) Trustee, at the time and place of sale fixed by said notice, at public auction, in one parcel, struck off to Grantee, being the highest bidder therefore, the property herein described, for the sum of \$ 11,941.45, subject however, to all prior liens and encumbrances. No person or corporation offered to take any part of said property less than the whole thereof for the amount of principal, interest, advances and costs.

IN WITNESS WHEREOF, the grantor, pursuant to a resolution of its Board of Directors, has caused its corporate name to be hereunto subscribed by its and its corporate seal to be affixed this 4th day of April, 1985

337mc404

VALLEY BANK AND TRUST COMPANY, Trustee

BY Clair J. Norton
Assistant Vice President & Manager

STATE OF UTAH Wasatch) ss.
COUNTY OF SAGGWEAR)

On the 4th day of April, 1985, personally appeared before me Clair J. Norton, who being by me duly sworn, did say that he, the said Clair J. Norton is the Assistant Vice President & Manager of VALLEY BANK AND TRUST COMPANY, Trustee, the corporation that executed the foregoing instrument as such Trustee by authority of a resolution of its board of directors, and said Clair J. Norton, duly acknowledged to me that said corporation executed the same as such Trustee.

Notary Public

My Commission expires: August 3, 1987
Residing in: Midway, Utah

EXHIBIT A

PARCEL 1:

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 KAMP KILL KARE LOTS, according to the plat thereof on file in the office of the County Recorder of Summit County, Utah.

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 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.

PARCEL 2:

COMMENCING North 376.35 feet and East 1419.9 feet from the West one quarter corner of Section 17, Township 3 South, Range 7 East, Salt Lake Base and Meridian; thence South 69°59' East 49.17 feet; thence South 85.97 feet; thence West 71.0 feet; thence North 13°33'48" East 105.75 feet to the point of **beginning**.

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RECORDER'S MARK
LEGIBILITY OF WRITING, TYPING OR
PRINTING UNSATISFACTORY IN THIS
DOCUMENT WHEN RECORDED