

1967

Prudential Federal Savings & Loan Association v.
The St. Paul Insurance Companies and First
American Title Insurance and Trust Company :
Respondent First American Title Insurance &
Trust Company's Petition For Rehearing & Brief In
Support Thereof

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Recommended Citation

Brief of Respondent, *Prudential v. St. Paul Insurance*, No. 10765 (1967).
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IN THE SUPREME COURT OF THE STATE OF UTAH

PRUDENTIAL FEDERAL SAV-
INGS & LOAN ASSOCIATION,
a corporation,

Plaintiff and Respondent,

vs.

THE ST. PAUL INSURANCE
COMPANIES,

Defendant and Appellant,

and

FIRST AMERICAN TITLE IN-
SURANCE AND TRUST COM-
PANY,

Defendant and Respondent.

Case No.
10765

RESPONDENT FIRST AMERICAN TITLE INSURANCE & TRUST COMPANY'S PETITION FOR REHEARING & BRIEF IN SUPPORT THEREOF

Appeal from Summary Judgment of the
Third Judicial District Court in and for Salt Lake County, Utah
Honorable A. H. Ellett, Presiding

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FILED

SEP 12 1967

State, Supreme Court, Utah

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**RESPONDENT FIRST AMERICAN TITLE
INSURANCE & TRUST COMPANY'S
PETITION FOR REHEARING & BRIEF IN SUPPORT THEREOF**

Comes Now the respondent, First American Title Insurance & Trust Company, and moves for a rehearing in the above-entitled matter upon the ground that this court erred as follows:

1. In premising its opinion upon a statement of fact that plaintiff's loss did not result from embezzled funds, which statement is without support in the record, and it is, in fact, without dispute that the loss resulted from an embezzlement from plaintiff.

2. In failing to consider or rule upon the provision in respondent's title insurance policy voiding the policy for losses caused by Prudential's own acts.

STATEMENT OF FACTS

If the facts were as stated by the court in its majority opinion, respondent could not seriously quarrel with the legal conclusions enunciated by the court. Two glaring omissions are apparent, however:

1. There is no dispute whatsoever that Rowley embezzled the money in question from Prudential, and that this dishonest act caused Prudential's loss. The Parkers desired to purchase the property from Rowley. To do so, they had to borrow funds, and Prudential agreed to loan them the funds provided the Parkers would give them the security of a first trust deed. In consideration of the Parkers signing a promissory note in the sum of \$16,300.00, Prudential agreed to pay off the first mortgage which Rowley earlier had placed against the property. The note was signed by the Parkers, and Rowley, in violation of his duty to pay off the first mortgage, instead drew a check to himself on Prudential's funds in the sum of \$15,992.51. \$14,612.29 of which should have been paid to retire

the first mortgage. (R. 1 & 2 - Complaint, R. 5 - St. Paul Answer admits) Rowley was charged in the United States Court with the embezzlement from Prudential of this very money, and, in fact, was convicted of embezzling this very money from Prudential (R. 40-42). The Information states:

"COUNT ONE

On or about December 27, 1962, in the Central Division of the District of Utah, DELMER D. ROWLEY, being an officer, that is, Loan Officer of the Prudential Federal Savings and Loan Association, Salt Lake City, Utah, an institution the accounts of which at all times herein were insured by the Federal Savings & Loan Insurance Corporation, an agency of the United States Government, with intent to injure and defraud said Association, did willfully misapply the sum of \$14,612.29 of the monies, funds, and credits of the said Association and entrusted to its custody and care, in that Delmer D. Rowley by reason of his position and virtue of the power, control and authority he had over the monies, funds, and credits of said Association as such Loan Officer, did disburse and caused to be disbursed check number 072109 of said Association in the amount of \$15,922.51 payable to himself upon delivery to said Association of a Deed of Trust in its favor covering property at 3643 Twinbrook, Salt Lake City, Utah, sold by DELMER D. ROWLEY to William Duane Parker, without first obtaining the release of a prior mortgage covering said property in the then unpaid amount of approximately \$14,612.29 held by First Federal Sav-

ings & Loan Association, Salt Lake City, Utah, which prior mortgage DELMER D. ROWLEY then knew was unpaid and outstanding, whereby the possession, control and use of the sum of \$14,612.29 of the monies, funds and credits of the Prudential Federal Savings and Loan Association were depleted and lost to it and were then converted and misapplied to the use and benefit of DELMER D. ROWLEY, in violation of Section 657, Title 18, United States Code.”

The appellant, St. Paul, does not claim that it has no liability because Rowley did not embezzle Prudential funds. St. Paul admits that Rowley embezzled Prudential funds (R. 1, 2, & 5) and, in fact, paid Prudential for the other embezzlements set forth in the Information referred to above (R. 36). In this action, it simply claimed that though it ordinarily would be responsible for the embezzlement, it questioned whether the provision in its policy with respect to “other insurance” made it only an excess carrier herein (R. 5, 6).

2. The court, though ruling upon the escape clause of the St. Paul policy, fails to consider or rule upon the escape clause of First American’s policy. It is without dispute or contest that the First American policy provides that there shall be no coverage under the policy for defects of the lien of the first mortgage “created, suffered, assumed or agreed to by the insured [Prudential] or known to the insured [Prudential] at the date such insured [Prudential] acquired an estate or interest” in the property (R. 104).

ARGUMENT

POINT I.

THE COURT ERRED IN PREMISING ITS OPINION UPON A STATEMENT OF FACT THAT PLAINTIFF'S LOSS DID NOT RESULT FROM EMBEZZLED FUNDS, WHICH STATEMENT IS WITHOUT SUPPORT IN THE RECORD, AND, IN FACT, IT IS WITHOUT DISPUTE THAT THE LOSS RESULTED FROM AN EMBEZZLEMENT FROM PLAINTIFF.

The court, in its opinion, states:

“Plaintiff's contention that its loss resulted from the embezzled funds is without merit since it was never intended that Prudential should have the funds, but any such loss would be borne by the Parkers * * * It is interesting to note that had Security Title examined the record as it was obliged to do, Prudential would have suffered no loss and Rowley would have escaped in part the penalty of his speculations.”

The majority opinion rides squarely upon these fact statements, and said statements are utterly without support of the record. Prudential's loss occurred the moment Rowley embezzled the money. If First American had never come into the picture, at the moment of the embezzlement Prudential would have suffered a loss in the sum of \$14,612.29. St. Paul, the fidelity surety, would at that moment have been liable to Prudential for the embezzled funds. Rowley at that

moment would have been guilty of the crime of embezzlement and would not have escaped in part or in whole the penalty of his peculations. If this court's statement of facts were correct, not only would St. Paul be entitled to escape liability on its fidelity bond, but Rowley was wrongfully convicted of the crime of embezzlement from Prudential Federal Savings and should be freed from prison where he was committed. Certainly, this court must follow and give credence to the judicial precedent of Rowley's conviction in the United States Court. 20 Am. Jur. 2d, Courts, Sec. 183, et seq., *Stare Decisis*.

The majority opinion apparently reasons that the money taken by Rowley did not belong to Prudential, but, in fact, belonged to the Parkers. If this is true, it also must follow that Prudential held said money as an escrowee upon a fiduciary trust to apply said money towards satisfaction of the first mortgage. A servant's wrongful taking of money held by its master as an escrowee is just as much embezzlement as taking the master's general funds. 26 Am. Jur. 2d, Embezzlement, Sec. 8, *Property Subject to Embezzlement*.

Most certainly as between the Parkers and Prudential, ignoring for the moment fidelity or title insurance coverage, Prudential would bear the loss of its loan officer's peculations. If it were otherwise, in this case, Prudential would not be responsible to the Parkers for the embezzled money; hence, St. Paul would have no liability to Prudential, there being no embezzlement.

and First American would have no liability to Prudential, there being no loss, and neither St. Paul nor First American would have any liability to the Parkers, there being no insurance contract between said parties. An absurd result.

POINT II.

THE COURT ERRED IN FAILING TO CONSIDER OR RULE UPON THE PROVISION IN RESPONDENT'S TITLE INSURANCE POLICY VOIDING THE POLICY FOR LOSSES CAUSED BY PRUDENTIAL'S OWN ACTS.

The majority opinion of the court states:

“The title policy covered plaintiff against any loss or damage from liens or encumbrances *not therein excluded.*” (Emphasis supplied)

The title policy clearly provides:

“3. EXCLUSION FROM THE COVERAGE OF THIS POLICY

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

* * *

(d) Defects, liens, encumbrances, adverse claims against the title as insured or other matters (1) created, suffered, assumed or agreed to by the insured claiming loss or damage; or (2) known to the Insured Claimant at the date such Insured Claimant acquired an estate or

interest insured by this policy and not known to the Company or not shown by the public records; or (3) resulting in no loss to the insured Claimant; or (4) attaching or created subsequent to the date hereof."

The court has apparently failed to give this provision of the title policy any consideration. The purpose of such an exclusion in a title policy is obvious. A title insurer does not intend to take the risk of insuring against defects dishonestly created by the insured itself.

Such exclusionary clauses are almost standard in title insurance policies, and the courts uniformly hold said clauses to be effective. See annotation, 98 ALR 2d 527, "Title Insurance: Exclusion of Liability for Defects, Liens, or Encumbrances, Suffered, Assumed or Agreed to by the Insured". See also *Feldman v. Urban Commercial, Inc.*, 87 N.J. Super. 391, 209 A. 2d 640.

There is no dispute that Prudential's trust deed failed to become a first lien solely because of Prudential's trusted employee's failure to discharge the prior first mortgage lien. How can it be said, despite the title company's neglect in issuing the policy, that the insured, through its trusted loan officer did not "create" the defect, "suffer" the defect to exist or "know" of its existence.

It is respectfully submitted that a failure of this court to correct its erroneous fact conclusion as set

forth in Point I, and to consider the exclusionary clause discussed in Point II leaves to the trial court, upon remand, the dilemma of concluding whether Prudential, in fact, suffered any loss, and whether the Parkers, who are not parties to this proceeding, should, in fact, bear the loss of Rowley's speculations.

CONCLUSION

It is respectfully submitted that the court should reconsider its opinion and vacate same.

Respectfully submitted,

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