

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FIRST AMERICAN TITLE INSURANCE)
COMPANY,)
)
Petitioner,)
)
vs.) Case No. 06-4456
)
OFFICE OF INSURANCE REGULATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on April 4, 2007, in Tallahassee, Florida, before Robert S. Cohen, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Richard J. Santurri, Esquire
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For Respondent: Jeffrey W. Joseph, Esquire
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STATEMENT OF THE ISSUE

Whether First American Title Insurance Company's ("First American" or "Petitioner") five Uniform Commercial Code policy forms and 17 endorsements, Filing Number 05-07521, should be approved.

PRELIMINARY STATEMENT

During the 2005 Legislative Session, the Florida Legislature approved HB 75, which amended Section 624.608, Florida Statutes, broadening the definition of title insurance. This amendment authorized licensed title insurers to write Uniform Commercial Code ("UCC") policies covering security interests in personal property. Subsection 624.608(2), Florida Statutes, provides that title insurance is insurance of owners and secured parties of "the existence, attachment, perfection, and priority of a Uniform Commercial Code Security Interest." On June 24, 2005, First American made a Form Filing with the Office of Insurance Regulation ("OIR" or "Respondent") identified as FCC 05-07521, in which First American sought the approval of five forms and 17 endorsements for use in Florida. On August 24, 2006, OIR issued a letter disapproving filing FCC 05-07521. On October 23, 2006, First American filed its First Amended Petition for a Section 120.57(1), Florida Statutes, Formal Administrative Hearing. On March 30, 2007, First American filed Petitioner's Prehearing Statement, in which it indicated it was only challenging OIR's denial of the Eagle 9® UCC Insurance Policy for Lenders and the associated endorsements.

At the hearing, Petitioner presented the testimony of Peter Rice and James Prendergast, and offered Exhibits 1 through 9 and 11, all of which were admitted into evidence. Respondent presented the testimony of Steven H. Parton, Esquire, and offered Exhibits 1 through 8, all of which were admitted into evidence.

The parties ordered a transcript of the proceedings, and agreed to submit their proposed recommended orders on May 25, 2007. The parties' submittals were timely made on that date.

References to statutes are to Florida Statutes (2006) unless otherwise noted.

FINDINGS OF FACT

1. OIR is an agency of the State of Florida charged with licensing and regulating certain businesses and professions, including the regulation of title insurance.

2. First American is a company duly-authorized by OIR to engage in the business of title insurance in the State of Florida.

3. During the 2005 Legislative Session, the Florida Legislature approved HB 75, which amended Section 624.608, Florida Statutes, broadening the definition of title insurance. Subsection 624.608(2), Florida Statutes, provides that title insurance is insurance of owners and secured parties of "the existence, attachment, perfection, and priority of security interests in personal property under the Uniform Commercial Code."

4. On June 24, 2005, First American made a form filing with OIR identified as FCC 05-07521.

5. In FCC 05-07521, First American sought the approval of five forms and 17 endorsements for use in Florida. The five forms are: The EAGLE 9® The Insured Search; the EAGLE 9® The Insured Filing™; the EAGLE 9® UCC Insurance Policy for Lenders; the EAGLE 9® UCC Insurance Policy for Buyers; and the EAGLE 9®

Insurance Vacation Interest Policy. The 17 endorsements are: the Sellers Lien Endorsement, the Tax Lien Endorsement, the Renewal Endorsement, the Tracking Endorsement, the Lender's Aggregation Endorsement, the Mezzanine Endorsement, the Pledged Equity Endorsement, the Change of Name of Insured Endorsement, the Waiver of Attorney Subrogation Rights Endorsement, the Springing Control Endorsement, the Post Policy Tax Lien Endorsement, the Endorsement for Issuance of Post Policy Date Judgment Lien Endorsement, the Borrower's Status Endorsement, the Buyers Aggregation Endorsement, the Increase In Tax Lien Coverage Endorsement, the Buyer's Equity Ownership Endorsement, and the Amendment to Buyers Policy Insuring Clause Coverage Limitation Endorsement.

6. On February 28, 2006, Peter Rice from OIR sent a letter to James Predergast of First American regarding Filing FCC 05-07521.

7. On April 4, 2006, James Prendergast sent a letter to Peter Rice in response to the February 28, 2006, letter, asking OIR for a clarification on the meaning of "existence" as the term is used in Subsection 624.608(2), Florida Statutes. OIR did not specifically respond to this letter.

8. On August 24, 2006, Peter Rice sent a letter to Douglas A. Mang, Esquire, disapproving Filing FCC 05-07521. That letter set forth the reasons for OIR's disapproval of the proposed forms.

9. The August 24, 2006 letter stated that the filing was denied for the following reasons:

- a) The forms violate the intent and meaning of Section 624.608(2), Florida Statutes, which requires that title insurance provide coverage for the existence, attachment, perfection, and priority of security interests in personal property under the Uniform Commercial Code;
- b) The forms violate the intent and meaning of Section 627.7485(1), Florida Statutes, which stipulates that a title insurer may not issue a title insurance commitment, endorsement, or title insurance policy until the title insurer has caused to be conducted a reasonable search and examination of the title or the records of the Uniform Commercial Code filing office, as applicable, has examined such other information as may be necessary, and has caused to be made a determination of the existence, attachment, perfection, and priority of a Uniform Commercial Code security interest, including endorsement coverages, with sound underwriting practices; and
- c) Since the forms do not comply with the meaning and intent of Sections 624.608(2) and 627.7485(1), Florida Statutes, the forms do not meet the definition of title insurance and, therefore, their issuance by First American Title Insurance Company would violate the meaning and intent of Section 627.786(1), Florida Statutes.

10. First American does not contest OIR's disapproval of the EAGLE 9® The Insured Search, the EAGLE 9® The Insured Filing, the EAGLE 9® UCC Insurance Policy for Buyers, and the EAGLE 9® Insurance Vacation Interest Policy.

11. The EAGLE 9® UCC Insurance Policy for Lenders was not approved because OIR concluded that the policy did not cover "existence."

12. The policy form does not specifically insure for the "existence" of a security interest, nor does it contain the term "existence."

13. OIR has no agency rules interpreting Subsection 624.608(2), Florida Statutes.

14. "Existence" is not defined under Florida law.

15. The four policy form disapprovals Petitioner chose not to contest at the hearing, the UCC Insurance Policy for Buyers, the UCC Insurance Vacation Interest Policy, the UCC Search Insurance Policy, and the UCC Filing Insurance Policy, each specifically insures for the "existence" of a security interest under the "Covered Risks" section of those proposed policies.

16. If the term "existence" appeared in the appropriate insuring agreement for EAGLE 9® UCC Insurance Policy for Lenders, the policy would have met the statutory requirement for approval.

17. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Sellers Lien Endorsement would have been approved if a page number was added to the form.

18. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Tax Lien Endorsement would have been approved if a page number was added to the form.

19. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Tracking Endorsement would have been approved if a page number was added to the form and a premium set.

20. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Lenders Aggregation Endorsement would have been approved if a page number was added to the form.

21. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Mezzanine Endorsement would not have been approved,

because OIR concluded that such coverage does not require the search of UCC filing office records.

22. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Pledged Equity Endorsement would not have been approved, because OIR concluded that such coverage does not require the search of UCC filing office records.

23. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Change of Name of Insured Endorsement would have been approved if a page number was added to the form.

24. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Waiver of Attorney Subrogation Rights Endorsement would have been approved if a page number was added to the form.

25. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Springing Control Endorsement would not have been approved, because OIR concluded that such coverage does not require the search of UCC filing office records.

26. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Post Policy Tax Lien Endorsement would have been approved if a page number was added to the form.

27. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Post Policy Date Judgment Lienholders Endorsement would have been approved if an exhibit, which was not included in the original submission, was approvable and if a rate was set for the endorsement.

28. If the EAGLE 9® UCC Insurance Policy for Lenders was approved, the Borrower's Status Endorsement would have been approved if a page number was added to the form.

29. Unlike traditional title insurance where priority is obtained by filing, some transactions under the UCC obtain priority by possession or control of the collateral.

30. To create a security interest in a general intangible such as a patent or contract, a security interest may only be perfected by the filing of a security agreement with the appropriate UCC filing office.

31. A security interest in inventory can be created by filing with the appropriate UCC filing office or by taking possession of the inventory.

32. A security interest in a depository account can be perfected by entering into a control agreement with the depository institution. Such an interest cannot be perfected by filing or possession.

33. Mezzanine lending is a specialized form of financing that fills the gap between the loan to value restrictions of a lender and the ultimate cost of the item being purchased. Typically, the subjects of such financing are large, highly-expensive buildings. Mezzanine financing involves the creation of a limited liability corporation (LLC) that holds as its primary asset a 100 percent interest in the building being purchased. The mezzanine lender extends credit to the partners or other equity owners of the LLC, with the lender taking a pledge of the parties' equity interests in the LLC. This allows the purchasers to borrow the full purchase price of a building. Since the purchasers are pledging their interest in the LLC and not specifically in collateral, the first mortgage holder avoids

any prohibition against pledging the collateral for a second mortgage or additional financing.

34. Many lenders as well as Moody's, a rating agency, now expect to see UCC insurance in all such transactions, which are also known as CMBS (collateralized mortgage-backed securities) transactions.

35. In mezzanine lending a security interest is perfected by possession or control of the certificated or un-certificated securities of the LLC.

36. No centralized UCC filing office exists that would allow a title insurer or lender to make a reasonable search and examination to discover an existing security interest that was perfected by possession or control.

37. First American currently sells the UCC EAGLE 9® Lenders Policy in all 50 states and an analogous product in Canada.

38. The coverage offered in the UCC EAGLE 9® Lenders Policy is currently being written by First American in about half the states as a property and casualty product and in the other half as a title insurance product.

39. First American believes it could currently write the policy at issue as a property and casualty product in Florida.

40. The current industry practice is to write this product out of a Delaware LLC.

41. UCC title insurance is typically written by attorneys who are exempt from licensure as a title insurance agent. If this product is written through a property and casualty company, attorneys will not be eligible to receive a commission unless

they are properly licensed through Respondent as property and casualty insurance agents.

42. First American is primarily a database company that insures the accuracy of its search of databases and the results of the search.

43. No mezzanine lender would use a form that includes the term "existence" in the insuring clause since most mezzanine lending is securitized. Neither the rating agencies nor law firms would deal with the policy if it is different from the standard form.

44. Petitioner takes the position that the term "existence" is superfluous to Section 627.7485, Florida Statutes.

45. A security interest is an interest in personal property. Petitioner asserts that a security interest cannot exist apart from the debtor having rights in the collateral. A security interest is an interest in personal property that secures the payment or performance of an obligation.

46. The term "existence" is not defined in the UCC. Petitioner asserts that the term is subsumed in the term "attachment."

47. Petitioner's interpretation of the UCC is that "creation," "existence," and "attachment" are thoroughly synonymous.

48. According to Mr. Prendergast, a security interest does not come into enforceable being until the elements of attachment are present. However, he admits it is possible to have a transaction where a security agreement is signed, thus creating a

security interest in the collateral, and the attachment date could be six months later.

49. By definition in the UCC, a security interest is created by a security agreement, not by attachment.

50. Respondent asserts that an enforceable security interest may not exist without attachment; an enforceable security interest may not exist without perfection; and an enforceable security interest may not exist without priority, but the amended statute lists these three elements plus a fourth, existence, in order to comply.

51. UCC insurance policies, such as the EAGLE 9® UCC Insurance Policy for Lenders, pays claims based upon the face value of the policy, the indebtedness outstanding, or the value of the collateral. There cannot be a claim under the policy unless there is collateral and an enforceable security interest. A security interest is not enforceable as a matter of law unless value has been given, the debtor has rights in the collateral, and there is a security agreement.

52. First American takes the position that it did not use the word "existence" in the EAGLE 9® UCC Insurance Policy for Lenders because it has no meaning different from attachment. Petitioner asserts that including the term "existence" in the policy would result in the policy having two insuring clauses insuring the same thing. Further, by this being the only policy in Florida containing the term "existence," Petitioner argues that it would not be received well by rating agencies and law firms that deal with the policies.

53. First American testified that it would continue to conduct a search of UCC filing office records even if it issued the EAGLE 9® UCC Insurance Policy for Lenders or any of the proposed endorsements to the policy.

54. An endorsement is not a stand-alone form, and can only be used as part of an existing insurance policy.

55. OIR, through General Counsel Steve Parton and others, was involved in the legislative process and provided input into the drafting of the statute at issue, as did representatives of the title industry. OIR has interpreted the statute as written to require that a valid UCC title insurance policy must address the four distinct elements listed in the statute, namely, "existence," "attachment," "perfection," and "priority."

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

57. In 2005, the Florida Legislature, through HB 75, amended Section 624.608, Florida Statutes, to broaden the definition of "title insurance" to include the sale of some, but not all, UCC title insurance products.

58. A new paragraph was added to the statute which provides, in part, "Title insurance is . . . insurance of owners and secured parties of the existence, attachment, perfection, and priority of security interests in personal property under the Uniform Commercial Code." (emphasis added)

59. House Bill 75 required the OIR to approve a title insurance form and corresponding rate for the UCC insurance described in Subsection 624.608(2), Florida Statutes, not later than January 1, 2006. Pursuant to this mandate, the OIR approved a UCC Insurance form for use by the industry that includes the elements found in the definition of UCC insurance. Petitioner's UCC Title Insurance Policy for Lenders is not in compliance with that form.

60. The Legislature also amended additional title insurance statutes to account for the new coverage, and particularly those sections that call for a title search and examination. The amended Section 627.7845, Florida Statutes, provides that:

A title insurer may not issue a title insurance commitment, endorsement, or title insurance policy until the title insurer has caused to be conducted a reasonable search and examination of the records of a Uniform Commercial Code filing office . . . , has examined such other information as may be necessary, and has caused to be made a determination of insurability of . . . the existence, attachment, perfection, and priority of a Uniform Commercial Code Security Interest, including endorsement coverage, in accordance with sound underwriting practices. (emphasis added)

61. The testimony and evidence produced at hearing by Petitioner clearly demonstrates that the First American EAGLE 9@ UCC Lenders Policy does not specifically insure for the "existence" of a security interest. The OIR asserts that a security interest is created when a security agreement is executed and such an event brings a security interest into "existence." Further, based upon the Legislature's inclusion of the term "existence" in the definition of UCC title insurance,

the OIR is obligated under its statutory grant of authority to review forms in a manner consistent with Florida law. First American argues that the existence of a security interest is covered under the policy, notwithstanding the lack of the specific word given the requirements of the UCC.

62. Petitioner's title insurance form insures "attachment, perfection, and priority" as required by the definition, but does not specifically insure the "existence" of a security interest. First American argues that the term "existence" is synonymous with the term "attachment" and that by insuring the "attachment" of a security interest, Petitioner is simultaneously insuring the "existence" of the same security interest. In the same breath, Petitioner argues that they are unable to specifically insure for the "existence" of the security interest because it is unfamiliar with the term, that the term has no meaning under the UCC, and that the term is not defined in Florida Statutes.

63. Florida's Supreme Court has spoken to the guiding principles of statutory construction in the review of title insurance statutes. In Hectman v. Nations Title Insurance of New York, 840 So. 2d 993, 996 (Fla. 2003), the court, citing Hawkins v. Ford Motor Co., 748 So. 2d 993 (Fla. 1999), held that "[i]t is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage."

64. "Legislative intent is the polestar by which a court must be guided in interpreting the provisions of a law."

Hechtman, 840 So. 2d at 996. See McLean v. State, 934 So. 2d 1248, 1258 (Fla. 2006); City of Clearwater v. Acker, 755 So. 2d 579 (Fla. 1999). "In ascertaining the legislative intent, a court must consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another." Hechtman, 840 So. 2d at 996. See M.W. v. Davis, 756 So. 2d 90 (Fla. 2000); and Hawkins v. Ford Motor Co., 748 So. 2d 993 (Fla. 1999).

65. Contrary to Petitioner's position that the term "existence" is mere surplusage, nothing more than a synonym for "attachment," OIR asserts that the term must have meaning separate and apart from the other terms in the statute, and must be interpreted in a manner that gives the term effect as a distinct element in the definition of UCC insurance.

66. By including the term "existence" in the definition of UCC title insurance found in Subsection 624.608(2), Florida Statutes, the Legislature intended for any title insurer writing such a product to provide coverage for this risk along with the other elements set forth. Ignoring the term because its meaning is not specifically defined in the statute, or, is arguably, not commonly used in a particular industry, or to treat it as mere surplusage would violate the most basic rules of statutory construction.

67. Steve Parton, OIR's General Counsel, was personally involved in the legislative process concerning the amendments to the title insurance law, which added the term "existence" to the required elements for insuring a security interest. It is the

OIR's position that a security interest is created by a security agreement. Therefore, "existence" is distinguished from "attachment" because the security interest comes into being when the security agreement is created, not when the security interest is attached. His position that a valid UCC title insurance policy must address the four distinct elements outlined in the statute is a reasonable conclusion based upon the basic principles of statutory construction, as well as the distinction drawn by petitioner between "existence" and "attachment."

68. Subsection 679.1021(1)(ttt), Florida Statutes, defines a "security agreement" as "an agreement that creates or provides for a security interest." It is the signing or entering into a security agreement that creates the security interest. Similarly, other provisions in the UCC contemplate that existence and attachment are separate and distinct issues. Subsection 679.2031(1), Florida Statutes, states, in part: "A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment." This contemplates a situation where a security agreement between the parties is created or comes into existence and the parties further agree that the time of attachment is postponed to a later date. Subsection 679.1021(1)(f)1., Florida Statutes, states, in part:

Oil, gas, or other minerals that are subject to a security interest that:

- a. is created by a debtor having an interest in the mineral before extraction;

and

b. attaches to the minerals as extracted .

. . .

Both of these are examples of circumstances contemplated by the UCC where a security interest "exists" prior to the attachment of the collateral.

69. The Florida Supreme Court, in the case of Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (1983), held that "the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless it is clearly erroneous." Respondent's construction of Subsection 624.608(2), Florida Statutes, is reasonable and supported by the greater weight of the evidence produced at hearing.

70. The simple fact that First American submitted four title insurance policy forms to OIR for approval (that were withdrawn for purposes of the final hearing) that included the term "existence" refutes its argument that such term is unknown to the company. Petitioner's claim that including the term "existence" in the UCC Lenders Policy would be imprudent and unwise is not borne out by the fact that the term is prominently featured in the "Covered Risks" section of the UCC Filing Insurance Policy, the UCC Insurance Policy for Buyers, the UCC Vacation Interest Policy, and the UCC Search Insurance Policy.

71. By including the term "existence" in the statute, the legislative intent was to limit the type of transactions that title insurers could cover. This new type of title insurance is limited to situations where buyers or lenders would be insured

against the existence of a pre-existing security interest in the collateral. Petitioner appeared comfortable in insuring against the existence of a security interest in the four forms withdrawn from consideration. If a concern exists for First American in offering the same coverage to lenders, the company can choose not to offer such a product. Offering the product, without the specific coverage for "existence" of the security interest, however, would violate the intent of the Legislature.

72. Petitioner's argument that the words of Subsection 624.608(2), Florida Statutes, are plain and clear, and, therefore, need no interpretation is not supported by the greater weight of the evidence. Petitioner's assertion that the specific words "existence, attachment, perfection, and priority" need not appear within a title insurance policy in order for the policy to be one of title insurance is contradicted by its own actions. As stated above, the four title insurance policy forms withdrawn from consideration by Petitioner in this matter prominently included the four explicit terms. No reasonable explanation was given by Petitioner as to why the term "existence" could not be included in the one remaining policy for consideration here. First American's argument that "existence" means "attachment" is not justified by Petitioner's own UCC expert's testimony or by the above examples taken from actual sections of the UCC which contemplate existence of a security interest before the collateral attaches. Accordingly, Petitioner's exclusion of the term "existence" from its UCC lenders policy provides a factual

and legal basis for OIR's disapproval of the policy and endorsements at issue.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Office of Insurance Regulation issue a Final Order disapproving the EAGLE 9® UCC Insurance Policy for Lenders and the associated endorsements.

DONE AND ENTERED this 3rd day of July, 2007, in Tallahassee, Leon County, Florida.

S

ROBERT S. COHEN
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.