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Purchaser Lacks Claim Against Title Insurer for Property's Physical Defect

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In most real estate transactions taking place in Pennsylvania, title insurance is purchased in order to protect against "defects" in title that may affect the property's fair market value.

In a recent decision by the Superior Court of Pennsylvania in *Rood v. Commonwealth Land Title Insurance Company*, the appellate court clarified that physical defects to a property are not covered by title insurance.

The Case

In *Rood*, the homeowner purchased a property on the Main Line during the 1970s. Upon purchase, the homeowner obtained title insurance.

Almost 25 years later, the homeowner discovered that his property contained an abandoned septic tank in the front yard. The homeowner subsequently learned that the tank was documented at the township office in a public record titled "Record of Sanitary Drainage and Plumbing Fixtures."

The homeowner demanded reimbursement from the title insurance company for the cost of remediation on the grounds that the title insurance company never notified him of the tank's existence when he obtained title insurance. The homeowner claimed that the title insurance policy he had purchased protected him against any "defect, lien or encumbrance on the title of the estate," and the existence of the abandoned septic tank fell within this coverage. The title insurance company denied the homeowner's insurance claim.

The homeowner thereafter commenced a lawsuit against the title insurance company. When the trial court dismissed the lawsuit, the homeowner appealed to the Superior Court. The appeal centered on whether the trial court erred in refusing to interpret the term "defect" under the title insurance policy to

encompass the abandoned septic tank.

On appeal, the homeowner argued that his title was rendered unmarketable because he would have to disclose the presence of the abandoned septic tank were he to sell his house under Pennsylvania's Real Estate Seller Disclosure Law, and that such a disclosure would cause a reduction in the sale price.

The Decision

The Superior Court ultimately concluded that while the existence of the septic tank may cause a reduction in the fair market value of the property, the title to the property was not so affected.

Due to the dearth of cases in Pennsylvania addressing whether physical defects to a property are covered under a title insurance policy, the Superior Court relied on a litany of decisions rendered by courts outside of Pennsylvania.

The Superior Court first discussed the Massachusetts Appeals Court's ruling in *Chicago Title Insurance Co. v. Kumar*, where that state court addressed whether the release of hazardous materials was a defect in title within the meaning of a landowner's title insurance policy. The court in *Kumar* noted the difference between the condition of the title to land and the physical state of the law. According to the court, "[p]rotection as to the former is what the . . . title insurance policy coverage furnished when it provided coverage against defects in, or liens or encumbrances on, title." As such, the court in *Kumar* stated that title insurance protects against "defects" as "pertaining to the record title to the premises, not its physical makeup."

Notably, the court in *Kumar* also rejected the landowner's argument that title was unmarketable because of the possibility that a future lien may attach to the property due to the environmental hazard. The court in *Kumar* explained, "[o]ne can hold perfect title to land that is valueless; one can have marketable title to land while the land itself is unmarketable."

The Superior Court in *Rood* then cited *Logan v. Barretto*, a decision handed down by the New York Supreme Court, where purchasers sued multiple title insurance companies on the basis that they breached their contractual obligations by failing to disclose the existence of sanitary code violations in their title report. The state appellate court concluded that the violations were not encumbrances on the title and thus did not render the title unmarketable. The court in *Logan* stressed that the government regulations provided the manner in which the property could be used and did not impair title.

The Superior Court then pointed to the Supreme Court of Washington's ruling in *Lombardo v. Pierson*, in which a homeowner brought suit against a title insurance company for failing to disclose a document uncovered during a title search conducted prior to the purchase of her farm, which alluded to potential seepage problems. The court in *Lombardo* affirmed the trial court's dismissal of the title insurance company from the lawsuit because the document did not affect title or otherwise encumber the property.

Similar to the court decisions in Massachusetts, New York, and Washington, the Superior Court in *Rood* emphasized that title insurance does not protect against claims arising from the physical condition of

the property. In doing so, the Superior Court concluded that the homeowner was confusing the economic lack of marketability, which related to physical conditions affecting the use of the property, with title marketability, which related to defects affecting legally recognized rights and incidents of ownership.

The Superior Court pointed out, "[t]here are many items which might affect the ability of an owner to sell his property, i.e., it may be located in a flood plain, it may be unsound structurally, contain lead paint or asbestos, be situated over an abandoned coal mine or septic tank, have seepage of contaminants into the property, be in violation of the health code, or be adjoining a designated Superfund site, but none has anything to do with the title to the real property."

LESSON LEARNED

Title insurance companies across the commonwealth should let out a collective sigh of relief after reading the Superior Court's ruling in *Rood*. The court refused to increase the scope of covered "defects" in the title insurance context. Rather, it reasserted a title insurance company's role in a real estate transaction as the protector of the condition of title, not the physical condition of the property.

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