Title Insurance

No Policy Coverage for Future Taxes or Pending Tax Appeal

Princeton South Investors, LLC v. First American Title Ins. Co., 437 N.J.Super. 283, 97 A.3d 1190 (N.J.Super.A.D. 2014).

A pending but undecided appeal by the municipality asserting that property was under-assessed did not create an encumbrance on title or render title unmarketable, and neither the appeal nor the possible future tax triggered policy coverage, says a New Jersey appeals court.

Princeton South Investors bought a commercial building at a sheriff's foreclosure sale. There were no delinquent taxes at the time of the sale. First American Title issued a policy to Princeton South dated as of the foreclosure sale.

At the time of the sale, however, there was a pending appeal over the amount of the assessed value on which the taxes for the prior several years had been based. If the municipality won that appeal, it would have the right to impose a tax for those prior years. Princeton South sued First American, demanding that it be paid the amount of the potential prospective reassessment tax, whatever that might be. The trial court ruled in First American's favor, and the appeals court affirmed.

In New Jersey, like most states, the municipal assessor prepares an assessment parcel list. The tax becomes a lien against a parcel when it is assessed. Either the property owner or the taxing district may appeal the assessed valuation as being too high or low. If the municipality appeals and wins, the tax court will "enter judgment revising the taxable value of the property." Additional taxes are then assessed which give rise to a lien if they are not paid.

In this case, there were no taxes owed as of the policy date. The court held that, if the municipality wins its appeal about the 2009, 2010 and 2011 tax valuations, a new assessment will be entered that will create a new tax lien. Such a lien did not exist on the policy date, however.

In addition, New Jersey permits buyers to protect themselves against possible reassessments, by ordering a tax search. A statute says that the municipality must deliver a certificate listing all taxes owed or levied. A buyer of the property is protected against tax liens not disclosed in the tax search certificate. A 1938 decision held that a tax certificate also protects a buyer against an undisclosed pending appeal of a tax assessment.

The court examined the coverage of the 2006 ALTA Owner's policy issued to Princeton South. Covered Risk 2(b) of that policy protects against "[t]he lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid." In addition to the post-policy exclusion (3(d)), Exclusion 5 of the 2006 policy negates coverage for"[a]ny lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the [vesting] deed ....

The Princeton South policy also contained exceptions for the remaining unpaid installments of the 2011 taxes, which were due but not yet delinquent, and "added or omitted assessments pursuant to N.J.S.A. 54:4–63.1 et seq. not yet due and payable." Under the New Jersey tax system, an added assessment is for improvements under construction during the tax year, and an omitted assessment is a later assessment for a parcel that was accidentally not put on the tax list or roll.

The court read all of these policy provisions and concluded that:

> *It is clearly inferable from Exclusion 3(d), particularly read together with the other policy provisions that specifically address taxes, that the policy does not cover tax liens created after the policy was written.*

The court rejected Princeton South's argument that the pending tax appeal, by itself, created a defect in title or an encumbrance, and rendered title unmarketable because it "clouded" the title. The court said that Princeton South's argument "proves too much" because, if accepted, it would mess up title to a large but indeterminate number of parcels, without even a bright line test to determine which parcels had unmarketable title:

> *Accepting plaintiff's argument would mean that any time a property was assigned too low a value by the tax assessor, the property's title would be considered defective or unmarketable due to the risk of a tax appeal and a reassessment. But to intelligently insure against such a risk, a title insurer would have to research the assessed value of every property to be insured, and analyze its potential for a tax appeal and a higher revaluation. Plaintiff did not present an expert report to the trial court—and cites no legal authority on this appeal—to support the proposition that a title insurer has a duty to make such an analysis. Further, we consider it likely that imposing such a new obligation could drive up the cost of title insurance. See Shotmeyer, supra, 195 N.J. at 83, 948 A.2d 600 (stating that "because insurance premiums and coverage provisions are based on predictable levels of risk, title insurers need to rely on certain consistent conditions in order to calculate premium rates reliably").*

Further, the court said, the imposition of tax in the future is just a fact about every parcel:

> *Taxes do not actually become a lien on property until they are assessed. ... Until then, they are only a potential expense which the owner may have to pay in the future. Future assessments, however, cannot logically be considered a cloud on title, because taxes are a known, predictable, constantly-recurring phenomenon. Taxes will be assessed on plaintiff's property this year, next year, and on into the future ad infinitum. If a property's potential for the future assessment of taxes were considered a cloud on title, it would be impossible to pass marketable title to any property.*

Also, the court said, a tax appeal does not make title unmarketable because it is not "litigation ... concerning the title" to property, such as, for example, a suit to foreclose

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an existing lien, challenge a boundary, or to enforce a restrictive covenant. Rather, a tax appeal is litigation challenging the property's *valuation* for *tax* purposes.

Princeton South was able to cite one case that gave some credence to its argument that the policy should protect against a possible later reassessment of the property. In *Bel-Air Motel Corp. v. Title Insurance Corp. of Pennsylvania*, 183 N.J.Super. 551, 444 A.2d 1119 (Law Div.1981), a sewer assessment had been made and then invalidated before the policy date, but was reassessed several years after the policy date. The court held that such an assessment was already a lien, although its amount was not yet known. Because the later imposition of a tax lien was a certainty on the date of policy, and only its amount was not yet known, the *Bel-Air* court found policy coverage.

This court said *Bel-Air* was not binding on it, and it was distinguishable. In this case, there was no certainty of a future assessment. The tax appeal represented "additional taxes that have not been assessed and may never be assessed." Also, it said, possible future taxes are not clouds on title, but potential liens on property; the "fact that their imposition is 'inevitable' does not make them clouds on title for purposes of title insurance."

The court said the language of the 2006 policy coverage was very clear. Covered Risk 2(b) was "limited to the 'lien' of taxes which have already been assessed and are 'due and payable but unpaid.'" The court said that "potential additional taxes, which might be assessed if the municipality wins its tax appeals," do not fall under that coverage. Further, the policy contains both the general post-policy exclusion and the specific Exclusion 5 for future taxes. Also, the fact that the Princeton South policy contained a special exception for added or omitted assessments, which exception was no doubt invented to counteract *Bel-Air*, but did not contain a similar exception for possible reassessment on a tax appeal, did not amount to a coverage.

Finally, the court said that the reasoning of other courts in a number of states was persuasive. It cited decisions from Illinois, Utah, Colorado and Michigan that have held that a possible future tax is not a lien or encumbrance, and does not trigger policy coverage.

First American was ably represented by Robert L. Grundlock, Jr. of Rubin, Ehrlich & Buckley, PC, in Lawrenceville, New Jersey.