JUDICIAL COMMITTEE REPORT – August 12, 2024

Martin Tait v. Commonwealth Land Title Insurance Company, 103 Cal.App.5th 271 (June 28, 2024).

This case analyzed what "diminution in value" means when determining "actual loss" under a Policy.

The Taits purchased residential property for $1.25M. Commonwealth issued an ALTA Homeowner's Title Policy of Insurance ("HOP") insuring the property. The Taits intended to subdivide the property and for several months engaged in informal talks with the town about it. The town was supportive of the subdivision and indicated a willingness to modify a building restriction and drainage easement that burdened the property (and which were excepted in Schedule B of the policy). The Taits were about to file their completed application when a 1988 maintenance easement was discovered that was not excepted in Schedule B of the policy. The maintenance easement covered the same land that the aforementioned drainage easement covered. The Taits tendered a claim stating that the maintenance easement would impact marketability and potential development of the property.

Commonwealth accepted the claim and obtained a diminution in value ("DIV") appraisal to assess loss under the Policy. The leading case on determining loss under a title insurance policy is *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal.App.2d 113 (1953) which states that loss, or diminution in value, is measured by the property's use on the date of discovery of the defect.

Commonwealth obtained an appraisal to determine the property's diminution in value as a result of the missed maintenance easement. The first appraisal assumed that the town would extinguish the building restrictions and drainage easement and that the maintenance easement would prohibit development in that area. The value of the land without the maintenance easement as of the discovery date was $1.3M ("as insured") and with it was $1.1M ("as is") for a difference in value, or loss, of $200K. Commonwealth asked the appraiser to revise the appraisal *not* assuming the town would extinguish the building restriction and drainage easement. The value of the land without the maintenance easement as of the discovery date was $1.3M ("as insured") and with it was $1,256,500 ("as is") for a difference in value, or loss, of $43,500.

The Taits obtained their own appraisal. The Tait's appraiser found that without the maintenance easement, the insureds could get the town to extinguish the building restrictions and drainage easement thereby allowing the Taits to subdivide the property into two lots. The value of the property – subdivided into two lots - without the maintenance easement ("as insured") was $2.08M and with the maintenance easement – one lot - ("as is") was 1.38M, for a difference in value, or loss, of $700,000.

The trial court granted Commonwealth's motion for summary judgment finding that the Tait's loss valuation did not comport with *Overholtzer* wherein proper valuation of loss under a title policy is the use to which the property is put as of date of discovery of defect, which here, was as a vacant one-lot residential piece of land. The Court of Appeals disagreed, finding that "highest and best use" of the property is a valid consideration when conducting DIV appraisals.

> *In short, if the highest and best use is sufficiently definite to make it just for a government entity to compensate a property owner for its loss, it is sufficiently definite to constitute a basis for determining the "actual loss" under a title insurance policy.*

Commonwealth's petition for re-hearing was denied on July 22, 2024.

In sum, highest and best use of property is a valid consideration for assessing "actual loss" under a title policy. Whether that highest and best use is viable or speculative is important. If highest and best use is speculative, it may not be a basis for loss valuation. If highest and best use is viable, as in the *Tait* case, it may be a basis for loss valuation (but the costs for attaining highest and best use must also be considered). Date of discovery remains the valuation date.