

## S.C. Supreme Court Holds Damages Arising Out of Title Insurance Suit Are to Be Measured From the Date of the Property's Purchase



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### Practice Areas:

- Insurance Coverage
- Workers' Compensation

On September 12, 2012, the South Carolina Supreme Court, on certification from the U.S. District Court for the District of South Carolina, held the insured's damages arising out of a title insurance suit should be measured as of the date of the insured's purchase of the property.

In *Whitlock v. Stewart Title Guarantee Company*[1], the plaintiff purchased a lot on the Intracoastal Waterway on October 30, 2006, for \$410,000. A title search failed to disclose a spoilage easement which allowed the Army Corp of Engineers to dredge and maintain the Intracoastal Waterway and placed dredged material on the plaintiff's lot at any time. In January 2012, the plaintiff sought a building permit to construct a home on the property. The building permit was rejected as a result of the spoilage easement. At issue was the date on which Plaintiff's damages should be measured. The parties did not dispute that the value of the property had decreased as a result of the downturn in the real estate market, in addition to the diminution in value cost by the title defect.

Certain title insurance contracts unambiguously identify a date for measuring the diminution in value of the property, or otherwise allow for the method of valuation. The title insurance policy at issue, however, merely referred to "actual loss." A title insurer is generally liable for losses or damages caused by defects in the property's title. Defects for which title insurance policies provide coverage are generally defined as liens and encumbrances that result in the loss in the title's value. The terms of the policies can control a method of valuation, but the purpose is to place the insured in the position he thought he occupied when the policy was issued. Generally, the measure of damages should compare the encumbered value with the value of the land without any encumbrances. Courts around the country have generally identified three points in time to measure an owner's actual loss: the date the property was purchased, the date the title defect was created, and the date the defect was first discovered.

The plaintiff argued her damages, as measured by the diminution in property value, should be measured as of the date the property was purchased. The defendant insurer argued the value of any loss should be measured as of the date of the discovery of the title defect, asserting that under a title policy the risk of a decline in the land's market value because of market conditions should be assumed by the purchaser, and the risk of the land's market value being impacted by a title matter should be assumed by the title insurance company. Having considered the parties' arguments, the court held, "We conceptually agree with Defendant, but we are construing a contract of insurance, not attempting to fashion an equitable remedy. The insurance policy here simply fails to identify the valuation date as the date of discovery of the title defect or otherwise provide clear language that would require a valuation date in line with Defendant's position." Recognizing the apparent inequity in the answer to the

certified question, the court noted the resolution of the question was not a matter of equity, but a matter of construing an insurance policy, and concluded the date the property was purchased was the proper valuation date.

Justice Pleicones dissented, indicating that, in his opinion, an insured suffers no actual loss until the defect is discovered: "Until that juncture, the insured's loss is unrealized. Since only a loss that is actualized as insured, I would find that the date of discovery of the title defect is the proper date upon which to measure the diminution in the property's value."

### **About Pete Dworjanyn**

Pete Dworjanyn is a shareholder and chair of Collins & Lacy's Insurance Coverage Practice Group and founding author of the South Carolina Insurance Law Blog. Pete also practices in workers' compensation. Following law school, Pete served as a law clerk for the Honorable Julius H. Baggett, Eleventh Judicial Circuit and as Assistant Solicitor in the Eleventh Circuit Solicitor's Office. Prior to joining Collins & Lacy in 1999, Pete was in private practice, focusing on civil litigation. Pete's reputation has earned him a BV rating by Martindale-Hubbell. He also is one of the Best Lawyers in America, the oldest and most respected peer-review publication in the legal profession.

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