

Title Policy Protects Purchaser Against His Own Tax Lien

By Harris Ominsky*

A recent case held that a title policy can be read to protect a purchaser even against his own tax lien. In the case of Archambo v. Lawyers Title Ins. Corp., 2002 WL 31013194 (Mich. App.), Michigan's Court of Appeals interpreted a title insurance policy so that a standard exclusion against those liens "created or suffered" by the insured did not let the title company off the hook.

Missed Lien

In that case Archambo had been a shareholder in a solar heating company and the IRS filed a tax lien against the corporation and all of its shareholders, including Archambo. When he changed careers and became a homebuilder, he was forced to buy back a house he had built, and he took title in his own name. Lawyers Title Insurance Company missed the IRS lien when it did the search on the purchase of his property, so the liens did not appear as an exception in the title policy it issued to him. The lien was finally discovered when Archambo sold the house and was forced to borrow money to pay off the lien. He then sued Lawyers Title to get that money back.

The Michigan Supreme Court remanded the case to the Court of Appeals two times. In its last remand the Supreme Court pointed out that Archambo knew about the tax lien, but he testified that he thought the lien had expired because an IRS agent told him that this lien would be "valid" for only five years.

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Also, that Court pointed out how the earlier lien became a lien against the purchased property. Some readers may not be aware that Federal tax liens are afforded the special status of attaching to “after-acquired real estate.”

“Created” or “Suffered”

The title company defended by arguing that the tax lien was excluded from policy coverage under Section 3(a) of the listed exclusions as a matter “created” or “suffered” by the insured. The Court of Appeals ruled against the title company and noted that the policy does not define those words. Therefore, it based its decision on a summary of cases in an ALR article it cited on this exclusion. It summarized that ALR commentary this way:

“That annotation states that generally the provision has not barred coverage for liens that were brought about by the insured’s negligence... Conversely, where the lien has resulted from the intentional misconduct of the insured, the clause will bar coverage. ... While none of these foreign cases deal with a federal tax lien, other states have consistently held that an insured must intentionally act in order to be deemed to have come within the terms of the exclusion.... The word ‘suffered’ within the exclusion has been deemed to be synonymous with the word ‘permit’ and to imply power to prohibit or prevent.... An insured is not barred from coverage if he was merely negligent.”

The court found that Archambo neither created nor suffered the lien because all the evidence “established that plaintiff had no responsibility for the payment of taxes in the corporation and in no way agreed to the placement of a lien.” That analysis was based on

the evidence that he had not been in charge of the corporate books of the solar heating company, and testified that he did not know that the company had failed to pay the federal taxes.

This case, which interprets a standard title policy exclusion used all over the country, will undoubtedly be used as a precedent for many claimants who seek to avoid the exclusion when they are responsible in some way for liens against properties that they purchase or finance. The “created, suffered, assumed and agreed to” exclusion is invoked by title insurers more than any other exclusion from coverage in the standard ALTA policy.

Section 3(a) excludes coverage for “Defects, liens, encumbrances, adverse claims or other matters” that are “created, suffered, assumed or agreed to by the insured claimant.”

As discussed by the court in the Archambo case, several courts have recently construed the exclusion narrowly, and have interpreted the “created” and “suffered” language to require intentional, as contrasted with negligent, unintentional or mistaken, conduct on the part of the insured.

Policy Issues

However, several commentators have suggested that the word “created” should be interpreted to include all acts of the insured that cause defects, including intentional and unintentional acts. Otherwise, title insurance companies will be insuring against those liens that are the insureds’ own fault. Some commentators believe that it should be contrary to public policy to allow an insured to obtain insurance against its own tax obligations. In this case, the tax lien was Archambo’s debt even though it stemmed from a corporate obligation,

and he knew about the lien. If the lien had resulted from Archambo's failure to pay his own taxes, it seems that the court would not have held the title company liable under the policy.

One of the issues in the case is whether someone can "create" or "suffer" something without intending to do so. For example, if you do not pay your debts, or you are an officer in a company that does not pay its debts, can it be said that you did not have anything to do with creating a lien that resulted from your failure to pay? A reasonable argument can be made that the words "created" and "suffered" should be interpreted to include even unintended, but careless or negligent acts.

The drafters of the policy form could have done a better job in writing this exclusion. In its everyday use, the word "suffered" might include just about every encumbrance visited on an insured. For example, a desk version of The Random House Dictionary defines "suffer:" "1. to undergo or feel (pain or distress). 2. to undergo or experience (any action or condition). 3. to tolerate or endure. 4. to allow or permit."

None of these definitions require the recipient to intentionally create the pain, distress, action or condition to "suffer" it.

The case does not discuss the related issue of what happens if the title company is forced to pay the tax lien. Since it is paying Archambo's lien, shouldn't it be entitled to subrogation of the IRS's lien against him or against the solar heating company that owed the taxes in the first place?

Archambo paid the lien and made a claim under the title policy. Under those circumstances a title company would have to invoke a subrogation right for a payment made

directly to its own insured. That would seem to be a more difficult claim to support than if the company paid the IRS lien and took an assignment of it.

Also, what about the customary title affidavit which is usually taken by an insured party? That provides that the insured has no other liens or encumbrances against him, other than those listed in the title report. Under those circumstances, when an unexpected lien later shows up, couldn't the insured be sued by the title company for damages suffered from a false affidavit?

In light of the Archambo case and other recent cases which have narrowed the scope of this exclusion 3(a) of the ALTA policy, it would not be surprising if the title industry now adopted a clearer definition of that exclusion so that title companies will not be insuring buyers against their own debts.