

1994

Attorney Liable for Bad Title Opinion Despite Warranty

Judith Gorske

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

Recommended Citation

Judith Gorske *Attorney Liable for Bad Title Opinion Despite Warranty*, 6 Loy. Consumer L. Rev. 124 (1994).

Available at: <http://lawcommons.luc.edu/lclr/vol6/iss4/6>

This Recent Case is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Attorney liable for bad title opinion despite warranty

In *Avco Fin. Serv., Inc. v. Ramsey*, 631 So.2d 940 (Ala. 1994), the Supreme Court of Alabama held that a lender may recover damages from an attorney who pursuant to a title search, issued a warranty deed guaranteeing property with an outstanding mortgage as being free and clear of encumbrances. Additionally, the supreme court determined that the lender was not required to proceed against the property's grantor for breach of warranty of title prior to seeking a judgment against the attorney.

A Faulty Title Opinion and Bankrupt Debtors

In 1990, Fred and Rosemarie Kilcrease applied for a loan from Avco Financial Services, Incorporated. Part of the Kilcreases' loan was to be secured by Alabama real estate which they had received from Mrs. Kilcrease's mother. Avco retained attorney Richard H. Ramsey IV to perform a title search and issue a title opinion regarding any existing encumbrances on the property from Mrs. Kilcrease's mother. Ramsey concluded that the property was free and clear of encumbrances. Relying on Ramsey's title opinion, Avco approved a \$16,000 loan to the Kilcreases, and issued what it believed to be a first mortgage on their property as a security for the loan.

The Kilcreases paid Avco on their loan monthly for approximately one year. After a year, they defaulted on their mortgage. Subsequently, Avco received notice that the Kilcreases had filed a bankruptcy petition. Avco first learned about the existence of a prior mortgage on the Kilcreases' property during the Kilcreases' bankruptcy proceeding. The first mortgage was executed by Mrs. Kilcrease's mother to

First Alabama Bank in 1989. This prior mortgage encumbered Avco's creditors' rights in bankruptcy against the Kilcreases. As a result, Avco filed suit against Ramsey pursuant to the Alabama Legal Services Liability Act, Ala. Code Section 6-5-570 (1975), seeking damages for harm proximately resulting from his failure to discover and disclose the pre-existing mortgage on the Kilcreases' property.

Trial Court Finds Avco Failed to Mitigate Damages

The trial court determined that Ramsey did not act in accordance with legal professional standards when he neglected to disclose the pre-existing mortgage on the Kilcreases' property. Additionally, the court found that Avco relied on Ramsey's title opinion in its decision to render the Kilcreases a loan. Nonetheless, the court entered a judgment against Avco, holding that Avco failed to mitigate damages. Thus, the trial court prevented Avco from collecting damages against Ramsey.

The trial court based its decision on an expert conclusion that Avco could have stopped bankruptcy proceedings against the Kilcreases and foreclosed on the second mortgage on their property. The expert also testified that the deed from Mrs. Kilcrease's mother to the Kilcreases guaranteed title of the property against any mortgage not listed on its face. Thus, the deed's failure to disclose a first mortgage to First Alabama Bank constituted a breach of warranty. The expert further maintained that foreclosure by Avco on the property would invest in Avco the right to sue Mrs. Kilcrease's mother for breach of warranty.

Avco subsequently appealed the trial court's decision to the Supreme Court of Alabama.

The Duty to Mitigate Damages

The Supreme Court of Alabama began its analysis of the trial court's opinion by stating that all parties who seek

damages from another possess a duty to mitigate their losses. However, the rule of mitigation applies only if a court can infer from the evidence presented that a claimant failed to act as an ordinarily prudent person would have acted under similar circumstances to minimize her losses.

The supreme court next outlined the criteria for evaluating whether a claimant has complied with her duty to mitigate damages. First, an injured party must take all reasonable steps to reduce loss. Second, when evidence presented is susceptible to conflicting interpretations, a court deciding whether a claimant has complied with her duties to mitigate must base its holding on the facts of the case before it. Finally, the rule of mitigation does not apply in the absence of substantial evidence supporting an inference that the claimant could have decreased her damages through reasonable efforts and expense and without undue risk.

Based on its evaluation of the duty to mitigate, the Alabama Supreme Court unanimously agreed with Avco's contention that the trial court erroneously utilized this three-step mitigation analysis in the case at bar. The supreme court found that the evidence presented at trial did not support an inference that Avco could have decreased its damages through reasonable efforts and expense, and without undue risk.

Mitigation Against Mortgagees Not Prerequisite for Action Against Title Guarantor

According to the trial court's application of the three-step mitigation analysis, Avco should have done the following to mitigate its damages: halt the Kilcreases' bankruptcy proceeding; foreclose on the Kilcreases' second mortgage; and proceed against Mrs. Kilcrease's mother for breach of warranty of title. The Alabama Supreme Court questioned the legal propriety of these mitigation possibilities. Furthermore, the supreme court found that even

if the mitigation options were legally proper, the trial court's conclusion that Avco possessed a duty to mitigate its damages against the Kilcreases constituted an unreasonable prerequisite to Avco's right to sue Ramsey for his faulty title opinion.

Additionally, the supreme court explained that the three mitigation options offered by the trial court were incomplete, risky, time-consuming, and expensive. The court concluded that "(t)he law of mitigation does not impose upon the damaged party the duty to expend good money to chase the bad; nor does it impose upon the damaged party the duty to first exhaust all other remedies." Accordingly, the Alabama Supreme Court reversed the trial court's decision, finding in favor of Avco.

—*Judith Gorske*

Uninsured motorist coverage notice held satisfactory

In *Breithaupt v. USAA Property and Casualty Ins. Co.*, 867 P.2d 402 (Nev. 1994), the Supreme Court of Nevada held that USAA Property and Casualty Insurance Company (USAA) provided customers with satisfactory written notice regarding the availability of uninsured motorist coverage. In so doing, the court refused to overrule legal precedent imposing a greater duty of notice on the insurer. The court also declined to apply retroactive disclosure laws upon insurers because such measures would not improve consumer awareness of the benefits of purchasing optional uninsured/underinsured motorist coverage.

The Notice Requirement

On April 4, 1988, Barbara Breithaupt suffered severe and permanent injuries in an automobile accident. While she recovered the maximum amount from

the other driver's insurance company, this amount did not fully compensate for her injuries. Breithaupt carried uninsured/underinsured motorist (UM) coverage with USAA in the amount of \$15,000 per person and \$30,000 per accident for both of her vehicles. She also carried bodily injury coverage of \$300,000 per person and \$500,000 per accident. In order to provide Breithaupt with maximum coverage, USAA allowed her to stack the UM coverage on her two vehicles and paid her \$30,000, the full amount of her UM coverage.

Breithaupt filed suit against USAA under a Nevada statute, NRS 687B.145(2), seeking reformation of her automobile insurance contract. She alleged that USAA failed to comply with pre-1990 statutory language requiring the insurer to notify its customers that they could purchase UM coverage equal to the limits of bodily injury coverage. In dispute was USAA's insurance renewal notice that included a flyer describing both the nature of UM coverage and the minimum coverage which an uninsured motorist was required to purchase by law. The flyer contained a section entitled: "Higher limits are available." The higher limits section discussed factors that an insured should consider in determining the appropriate amount of coverage to purchase. The notice also stated:

"If you want to increase your UM coverage, give us your order on the order form on the back of this folder. Available limits are listed in the box to the right.

"IMPORTANT: The UM policy limits you select may not exceed the Bodily Injury (BI) liability limits in your policy. If you want to increase your UM to a limit higher than your present BI, please use the order form on the back to increase your BI liability limit."

To the right of this statement, USAA listed "UM Limits Available." The list included UM coverage of \$300,000 and \$500,000.

Breithaupt contended that the insurance renewal notice failed to satisfy the notification requirement under the Nevada statute because it was unclear and ambiguous. She claimed that as a result of these deficiencies, the court should reform her contract with USAA to allow the UM limits of the policy to equal the limits for bodily injury. Under a reformed contract, USAA would provide Breithaupt with UM coverage of \$300,000 per person for each of her two vehicles. Stacking this coverage would entitle Breithaupt to \$600,000 of UM coverage, allowing her to recover an additional \$570,000 for damages sustained in her accident.

The trial court granted summary judgment for USAA, holding that the contract should not be reformed because the written notice satisfied the state law requirements. Breithaupt then appealed to the Nevada Supreme Court.

Court Finds Full Disclosure of UM Coverage

The Supreme Court of Nevada rejected Breithaupt's contention that the insurance renewal notice was unclear, ambiguous, and did not satisfy statutory requirements. It agreed that USAA could have made a clearer affirmative statement to Breithaupt that UM coverage equaling her bodily injury coverage was available. However, the court found that the notice was sufficient to inform "the average layman who is untrained in the law or the field of insurance" that UM coverage equal to bodily injury coverage was available.

In addressing the issue of notification, the court examined the language of the pre-1990 version of the applicable state law. In relevant part, the statute provided that insurers "must offer uninsured motorist coverage equal to the limits of bodily injury coverage sold to the individual policyholder." The court acknowledged that "must offer" was susceptible to a variety of interpretations, each imposing a different duty of notice upon the insurer. In its discus-