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Actual Loss Under A Title Insurance Policy Is Calculated Based On The "Highest And Best Use" Of The Insured Real Property

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In a victory for all insureds who have title insurance policies, and possibly a victory for insureds under other real property related insurance policies, the California Court of Appeal in *Tait v. Commonwealth Land Title Insurance Company* (2024) 103 Cal.App.5th 271, 277 (rev. denied, 10/2/24), held that an insured's actual loss under a title insurance policy must be calculated based upon the highest and best use of the insured real property ("we agree with the Taits that the policy entitles them to reimbursement for the diminution in value of their property based on its highest and best use").

The Taits, in reliance upon the title insurance policy which they had paid for, purchased certain real property with the intent to develop it by first subdividing it into two (2) lots. However, as the Taits moved through the process of subdivision, the Taits discovered an undisclosed recorded maintenance agreement which materially adversely impacted the marketability and value of the insured real property and interfered with its potential development.

The Taits tendered a claim to their title insurer which was accepted. The title insurer then engaged an appraiser who purported to determine that the diminution in value of the insured real property was $43,500.00. The title insurer then cut a check to the Taits in that amount. In stark contrast, the Taits engaged an appraiser who determined that based on the "highest and best use" of the insured real property, the diminution in value was actually $700,000.00.

Based on these authors' experiences, a "battle of the appraisers" frequently occurs in title insurance cases and "lowball" appraisals are a common bad faith tactic used by title insurers to unreasonably withhold policy benefits from insureds. See, e.g., *First American Title Insurance Company v. David Ordin, et al.* (2011) 2011 Cal.App.Unpub.Lexis 6946 (insurer's appraisal $5,000; insured's appraisal $220,000; bad faith award against title insurer affirmed).

The California Court of Appeal, in reaching its opinion in *Tait*, distinguished the earlier opinion of *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 Cal.App.2d 113, by holding that, "The loss of the potential to achieve a property's highest and best use presents a smaller magnitude of loss than a completed building or other improvement, like in *Overholtzer,* but the nature of the insured's expectations and reliance interests is similar." *Tait*, 103 Cal.App.5th at 286.

The California Court of Appeal also tethered its "highest and best use" determination to established valuation procedures utilized in eminent domain actions by holding that, "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."

The term "actual loss" in the Taits' title insurance policy was not defined and the California Court of Appeal found it ambiguous in conformity with standard insurance law and construed the term "actual loss" in favor of the insured and against the insurer.

Based on these authors' experiences, undefined and ambiguous terms in title insurance policies are frequently misrepresented by title insurers to be "clear and explicit" in order to unreasonably withhold policy benefits from their insureds.

While title insurance policies have many provisions which are improperly interpreted by insurers to unreasonably withhold policy benefits, in whole or in part, the *Tait* opinion's approval of the highest and best use standard in connection with determining an insured's actual loss under a title insurance policy has now removed one such improper interpretation from the title insurer's arsenal.

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