No. 305465

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

THELMA, KARL, LORI and KARIN KLOSTER,

Appellants/Cross-respondents.

v.

SCHENECTADY ROBERTS, ET AL

Respondent

FIRST AMERICAN TITLE INSURANCE COMPANY and

AMERITITLE, INC.,

Respondents/Cross-Appellant.

BRIEF OF RESPONDENTS/CROSS-APPELLANT

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I. INTRODUCTION

This case was filed on April 22, 2005. Final judgment, however, was not entered fully adjudicating the case until February 1, 2012. At least 37 orders were entered in the case before trial and hundreds of thousands in attorney's fees and costs expended by the parties getting to judgment involving a $38,000 sale of real property. On appeal, the Klosters have designated Clerk's Papers totaling 4,627 pages. Yet, as the trial court found, many of the Klosters' causes of action had no basis in fact and the Klosters had dramatically over-pled and over-litigated the case. (RP 4209; RP 1336.)

The overwrought character of this proceeding should not imply complexity. The case is straightforward as to First American and AmeriTitle. First American's coverage decision denying the Klosters' claim is the central issue in the trial court and on appeal because most issues are resolved on that determination. From the trial court's perspective, the issue of coverage turned on one issue involving a partial plat map attached to the Klosters' First American title policy. The court erred in finding coverage, and the numerous issues the Klosters identify on appeal are only derivative of the coverage determination.

Accordingly, First American addresses its cross-appeal first in this opening brief. The issues the Klosters raise on appeal are then addressed,

although they become moot in the event First American's cross-appeal is sustained.

II. RESTATEMENT OF FACTS

The short restatement of facts provided below is an effort to simplify. The Klosters' claims against First American and AmeriTitle focus on whether an invalid easement was covered under the Klosters' First American title policy and First American's subsequent administration of the Klosters' claim under the policy. The restated facts show (1) why there was never an easement over the northern 30 feet of the adjoining Rickey parcel and that the Klosters had no right to use the area for access, and (2) the short timeframe during which the Klosters' claim was received, analyzed, and properly denied.

A. Short Plat WS-146 Was Created in 1978.

In August 1978, Alvin Fred Heany, Jr. and Joan Heany applied to create a short subdivision on an approximately 23-acre parcel in Klickitat County, Washington. (Trial Ex. 107, Michael Moore First American claim file ("Moore Claim file") at 501-513.) Short plat WS-146 was approved in September 1978 and recorded under Klickitat County Auditor's File No. 167997. (Id.) Plat WS-146 consisted of four tracts. (Id. at 504.) Each tract was subject to building and use reservations and easements recorded under Klickitat County Auditor's File No. 165309, as

well as easements and use reservations reserved within the short plat. (Id. at 514-518.)

The easement reservations (Klickitat County Auditor's File No. 165309) were executed by Donald Ramsey, Leora Ramsey, and Douglas Ramsey on March 27, 1978 (the "Ramsey Easement Reservations"). (Id. at 508-512.) It is undisputed by the Klosters that the Ramsey Easement Reservations did not create any access easement along the northern boundary of Tract 2 (WS-146).

B. Heany Subsequently Sold Tract 2 of Plat WS-146 to Michael Fester.

On May 22, 1981, by real estate contract, Heany sold Tract 2 (WS-146) to Michael Fester (Trial Ex. 52) and in July 2003 issued a warranty fulfillment deed to Fester (Trial Ex. 107, Moore Claim file at 528). Heany's conveyance to Fester was subject to the easement reservations under the WS-146 short plat and the Ramsey Easement Reservations, but it was not subject to any other easements. In 2000 the Rickeys purchased Tract 2 of short plat WS-146. (Id. at 497.)

C. In 1981, Pacific Rim Estates Was Created.

On December 1, 1981, the long subdivision Pacific Rim Estates was created, consisting of eight lots, recorded in Book 5, pages 31 and 32, Klickitat County Records. (Trial Ex. 98 (Pacific Rim Estates plat map).) Lots 1, 2, and 8 had previously been part of the WS-146 short plat. Only Tracts 2 (owned by the Rickeys) and 3 remained of the WS-146 short plat.

(Id.) It is undisputed that the creation of Pacific Rim Estates did not encumber Tract 2 of plat WS-146, because Tract 2 had previously been sold to the Rickeys and thus Heany could no longer encumber Tract 2 with appurtenances for the benefit of the adjoining Pacific Rim Estates.

D. In 2005, Roberts Sold Lot 1 of Pacific Rim Estates to the Klosters.

By Statutory Warranty Deed dated February 10, 2005, Schenectady Roberts conveyed Lot 1 of Pacific Rim Estates to the Klosters. (Trial Ex. 101.) As part of the transaction, First American issued a standard ALTA owner's title policy to the Klosters, insuring land described as:

> Lot 1, Pacific Rim Estates, according to the plat thereof, recorded in Book 5, page 31, Klickitat County plat records.

(Trial Ex. 95, Kloster First American Title Policy, Schedule A, § 4.) (Appendix B.)

The Klosters attempted to access Lot 1, Pacific Rim Estates, using a 30-foot-wide strip on the northern boundary of the Rickey parcel. The Rickeys, however, objected to the Klosters' use of the road and blocked their access. A sketch map utilized for pretrial motion practice and at trial illustrates the relative positions of the Klosters' Lot 1, Pacific Rim Estates, and the Rickeys' Tract 2, WS-146. (Trial Ex. 133 at Slide 52 (Appendix A).)

The court later found the Klosters did have legal vehicular access without the need to use the northern 30 feet of the Rickey parcel. (CP 2762.) Nonetheless, the Klosters' claim on the First American title policy would focus on whether the invalid easement over the northern 30 feet of the Rickey parcel was insured.

E. The Klosters' Demand on Their First American Title Policy Is Denied on the Basis That There Is No Affirmatively Insured Easement Across the North 30 Feet of the Rickeys' Parcel.

On March 24, 2005, the Klosters made demand to AmeriTitle on their First American title policy, alleging that the Rickeys, Fester's successor on Tract 2 of the WS-146 short plat, were preventing the Klosters from using a 30-foot-wide strip at the northern boundary of the Rickeys' parcel. (Trial Ex. 147 (Stryker letter to Trummel dated March 24, 2005); Trial Ex. 95 (First American Title Policy) (Appendix B).) The Klosters demanded that legal action be filed to defend their alleged right to use the Rickeys' land for access. (Id.)

On March 31, 2005, First American responded to the Klosters' demand, indicating that the Klosters' title policy did not include any appurtenant easements in the legal description of the land insured and that examination showed no valid easement across the northern 30 feet of the Rickeys' property. (Trial Ex. 104 (Moore's March 31, 2005 letter to Klosters' counsel denying Klosters' claim).) The Klosters' title policy provided coverage against loss by reason of a lack of a right to access to

and from their parcel, and the Klosters had a legal right of access across the southern 30 feet of Lot 2 and the eastern 30 feet of Lots 5, 6, and 7 of Pacific Rim Estates. Accordingly, the Klosters' claim was denied. (Id.)

F. Moore and the Klosters' Counsel Further Discuss the Klosters' Claim.

Moore subsequently discussed the denial of coverage with the Klosters' counsel. Moore agreed to reconsider the denial based on the Klosters' counsel's representation that Moore should review the documentation associated with the Schedule B Exception from Coverage No. 8 in the Klosters' title policy. (Trial Ex. 105 (Klosters' counsel's letter dated April 6, 2005 to Moore requesting examination of Schedule B, Exception from Coverage No. 8).)

The Klosters' counsel's request that Moore review an exception to the coverage was unhelpful. (RP 808.) The Schedule B Exception from Coverage No. 8 excepted from coverage easements within Pacific Rim Estates, as did Exception No. 5 for the adjoining WS-146 plat. Thus the Klosters' counsel had suggested no additional useful information. (Id.)

The Klosters filed the present suit on April 25, 2005. The Klosters made no further request for review of the denial of their claim.

G. Procedural Posture.

While expressly adopting First American's interpretation of the Klosters' title policy, the trial court found an ambiguity related to a partial sketch map attached to the title policy, finding that a reasonable person

could have assumed that access could be provided outside Pacific Rim Estates through the Rickey parcel as purportedly shown on the sketch. (Trial Ex. 95) (Appendix B). (CP 2911) (Appendix C). On the basis of the ambiguity, the trial court found access coverage under the title policy for the northern 30 feet of Tract 2, WS-146 for the benefit of the Kloster lot.

After ruling on coverage, the case went to trial. Before submitting the case to the jury, the trial court granted First American's and AmeriTitle's CR 50(a) Motion for Judgment as a Matter of Law dismissing all of the Klosters' claims except coverage. The jury was instructed on damages only on the Klosters' coverage claim against First American. (CP 3714-3716.) (Appendix D.)

The jury also was instructed on an alternative measure of damages for the cost to cure. Id. The Kloster misrepresentation claim submitted to the jury against Pacific Rim (but not First American) included a measure of damages based upon the difference in value between the price the Klosters paid for the property and its actual market value, or the cost to cure by building a road for the Klosters, whichever was less. The cost to cure would be a fault based measure related to the Klosters' misrepresentation claim against Pacific Rim. (RP 1218.)

Accordingly, the jury would have the difference in value and cost to cure alternative measures for damages, but the jury would not be asked

to allocate any damages to First American or Pacific Rim. Rather, the trial court stated before submission of the case to the jury:

> "When the jury comes back with the verdict form, if it has assessed damages under either measure, then it is up to the Court to ferret out First American's exposure based upon its contract and Pacific Rim's exposure, you know, based upon the tort measure based upon whatever the jury decides in terms of negligent misrepresentation."

(RP 1218.)

The jury awarded no damages under the difference in value measure prescribed under the Klosters' title policy, but did award $9,000 as a cost to cure. (CP 3714.) The jury also, however, allocated 100% fault to the Klosters. (CP 3715.)

After the jury verdict, the trial court entered judgment against First American on the $9,000 cost to cure and awarded the Klosters their attorneys' fees and costs under Olympic Steamship based upon finding coverage under the Klosters' title policy. (CP 4449.) (Appendix G.)

III. CROSS-APPEAL

A. Assignments of Error for Cross-Appeal.

1. The trial court erred in ruling that there was coverage under the Klosters' First American title policy for a purported access easement. (CP 4612-4613 (Appendix C) Court's Pretrial Ruling on Title Policy Ambiguity filed August 1, 2011; CP 4451-4455 (Appendix F) Findings of

Fact, Conclusions of Law and Order on Entry of Judgment, in particular those portions underscored; CP 4449-4450 (Appendix G) Judgment Against First American Title Insurance Co.)

2. The trial court erred in granting attorney's fees and costs to the Klosters on entering its findings of fact, conclusions of law, and judgment against First American. (CP 4451-4455 (Appendix F) Findings of Fact, Conclusions of Law and Order on Entry of Judgment, in particular those portions underscored; CP 4449-4450 (Appendix G) Judgment Against First American Title Insurance Co.)

3. The trial court erred in allocating $9,000 as a cost of cure against First American in its post-trial ruling, findings of fact, conclusions of law, and judgment against First American. (CP 4207-4211 (Ruling of Court on Attorney's Fees After Jury Verdict filed November 23, 2011); CP 4449-4455; CP 4451-4455 (Appendix F) Findings of Fact, Conclusions of Law and Order on Entry of Judgment, in particular those portions underscored; CP 4449-4450 (Appendix G) Judgment Against First American Title Insurance Co.)

B. Statement of Issue for Cross-Appeal.

1. Did the trial court err in ruling that an average person could reasonably conclude that the Klosters' title policy covered a void easement outside Pacific Rim Estates because the title policy depicts the easement on the partial plat map attached to the policy, even though the partial plat

map includes an express disclaimer that the partial plat map is not part of the policy and the Klosters did not rely upon the claimed ambiguity?

2. Did the trial court err in granting attorney's fees and costs to the Klosters under Olympic Steamship when there is no coverage under the Klosters' First American title policy?

3. Did the trial court err in allocating against First American the $9,000 cost to cure tort damages when the Klosters' title policy provides for indemnity only on a difference in value measure for which the jury allocated zero damages, and the jury considered no tort claims against First American and allocated 100% fault to the Klosters?

C. Argument on Cross-Appeal.

1. First American Correctly Determined That There Was No Coverage Under the Klosters' First American Title Policy for the Void Easement Outside Pacific Rim Estates.

As explained below, the trial court adopted First American's interpretation of the Klosters' First American title policy, but went on to find an ambiguity on which the Klosters did not rely in making decisions about insuring title and access. If the partial plat map became part of the Klosters' title policy, the disclaimer on the partial plat map should be read to obviate any possible ambiguity as to the map's use. Certainly, Karl Kloster agreed ("I know the difference between a sketch and a short plat map, and I know that is a sketch. That's provided as a courtesy to locate the property, and that is it."). (RP 1074.)

a. General Standards for Interpretation of a Title Insurance Policy Under Washington Law.

Title insurance policies are interpreted and constructed like any insurance policy. The determination of whether any insurance policy is ambiguous is a question of law, which the appellate court reviews de novo. Farmers Ins. Co. of Wash. v. Grelis, 43 Wn. App. 475, 477, 718 P.2d 812 (1986) (citing Beedle v. Gen. Inv. Co., 2 Wn. App. 594, 469 P.2d 233 (1970)). The policy should be given a fair, reasonable, and sensible construction. Roller v. Stonewall Ins. Co., 115 Wn.2d 679, 682, 801 P.2d 207 (1990); overruled on other grounds, Butzberger v. Foster, 151 Wn.2d 396, 408, 89 P.3d 689 (2004). The entire policy must be construed together, so as to give force and effect to each clause. Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys., 111 Wn.2d 452, 456, 760 P.2d 337 (1988).

A clause in a policy is ambiguous when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable. Baehmer v. Viking Ins. Co. of Wis., 65 Wn. App. 301, 304, 827 P.2d 1113 (1992) (citing Greer v. Nw. Nat'l Ins. Co., 109 Wn.2d 191, 198, 743 P.2d 1244 (1987)). The policy should be interpreted as it would be understood by an average person. N.H. Indem. Co. v. Budget Rent-A-Car Sys., Inc., 148 Wn.2d 929, 933, 64 P.3d 1239 (2003).

b. The Klosters Have the Burden to Establish That the First American Title Policy Is Ambiguous and to Offer a Reasonable Interpretation of the Title Policy That Would Lead to Coverage of Their Claim.

Determining whether coverage exists under an insurance policy is a two-step process. First, the insured must show the loss is within the scope of the policy's coverage. If such a showing is established, the insurer nevertheless can avoid liability by showing the loss is excluded by specific policy language. See Nat'l Clothing Co. v. Hartford Cas. Ins. Co., 135 Wn. App. 478, 582, 145 P.3d 394 (2006) (citing Overton v. Consol. Ins. Co., 145 Wn.2d 417, 431-32, 38 P.3d 322 (2002)).

The Klosters never articulated a comprehensive interpretation of the First American title policy. Ultimately, the trial court rejected the Klosters' partial interpretation of the First American title policy in favor of its own. (CP 2907-2910.) The Klosters have not appealed the trial court's ruling rejecting their interpretation of the title policy and even argued in favor of the trial court's interpretation. (CP 3179-3181.)

c. First American's Interpretation of Its Title Policy Is Reasonable and Coherent Considering the Policy as a Whole.

As explained below, in its interpretation of the Klosters' First American title policy, the court adopted First American's analysis of the Klosters' claim as accurate and reasonable, but focused on one additional issue as creating an ambiguity that the court ruled led to coverage. First

American's interpretation of the Klosters' title policy included the following propositions:

1. The title policy's insuring clauses extend coverage for specific types of losses, Schedule A of the policy describes the interest in land affirmatively insured, and Schedule B exceptions exclude certain interests from coverage.

2. Insuring Clause 4 provides coverage against loss or damage by reason of a lack of a right of access to and from the land. Owners are thus insured against loss resulting from the lack of a right to access their land from a public road. Courts and commentators are virtually unanimous that Insuring Clause 4 addresses only legal access.

3. Insuring Clause 4 is only invoked in the event the land lacks legal access to a public road. Insuring Clause 4 never insures any specific easement.

4. The Klosters have legal access to their land across the southern 30 feet of Kingsford-Smith Lot 2 and the eastern 30 feet of Lots 5, 6, and 7 of Pacific Rim Estates. As even the Klosters' expert, Tennyson Engineering, agreed, a 30-foot-wide driveway is more than adequate under the Klickitat County Code (Tennyson having designed a 20-foot-wide driveway as the Klosters' testifying expert).

5. Schedule A includes the description of the land insured by the policy and does not include any property beyond the bounds of the

area described or referred to in Schedule A, nor does it include any right in abutting streets or roads.

6. Schedule A does not describe any specific easement, even though it refers to the Pacific Rim Estates plat. The purported easement over the northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is outside the Pacific Rim Estates plat.

7. Schedule B, Section Two, of the Klosters' First American title policy excludes all specific easements in Pacific Rim Estates and short plat WS-146. While legal access is insured under Insuring Clause 4, there is no coverage for any specific easement.

8. Thus, interpreting the Klosters' First American title policy under Insuring Clause 4, Schedule A, and the Schedule B exemptions clearly shows that the Klosters' claim to the northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is not covered under their policy.

(CP 2787-2788.) (RP 804-806 (First American's regional underwriter Moore's affirmation of the above analysis).)

Significantly, in the court's pretrial ruling on title policy ambiguity, the court stated:

> The court agrees with First American's analysis paragraphs 1-7, on pages 6 and 7 of its brief in support of the motion. **[CP 2787-2788 set out above.]** However, an ambiguity is created, when viewing the contract as a whole, by virtue of the unfortunate plat map appended to the policy.

(CP 2912 (Appendix C) Court's Pretrial Ruling on Title Policy Ambiguity at 2.)

The partial plat map attached to the Kloster First American title policy contains the following disclaimer:

> ANY SKETCH ATTACHED HERETO IS DONE SO AS A COURTESY ONLY AND IS NOT PART OF ANY TITLE COMMITMENT OR POLICY. IT IS FURNISHED SOLELY FOR THE PURPOSE OF ASSISTING IN LOCATING THE PREMISES AND FIRST AMERICAN EXPRESSLY DISCLAIMS ANY LIABILITY WHICH MAY RESULT FROM RELIANCE MADE UPON IT.

(Trial Ex. 95 (Appendix B) Kloster First American Title Policy.)

The disclaimer expressly states that the partial plat map is not part of the policy and its use is conditional only in locating the property. Even if the language on the partial plat map were part of the policy, it should be construed plainly to mean what it says. First American did not promise that the matters depicted on the partial plat map would be specially insured. Instead, the insured is informed that the partial plat map should be used only to locate the property and should not otherwise be relied upon.

The question presented is whether a reasonable insured would consider the attached partial plat map as part of the title policy when the attachment expressly states that it is not. It is undisputed that the parties

did not bargain for any sort of map to be attached; the partial plat map was attached unilaterally and, on the basis of the legend quoted above, conditionally.

Of the Kloster plaintiffs, only Karl Kloster and his mother, Thelma Kloster, testified at trial. Karl was adamant that he did not rely on the partial plat map attached to the preliminary commitment to determine access, in part, because it had a disclaimer. (RP 1064; RP 1074-1075.) Karl explained why he did not rely on the partial plat map attached to the preliminary commitments:

> Well, for one, because it has a disclaimer on the top. The one that I looked at didn't have a disclaimer. It had all of the monuments found and the surveyor's name signed in there, and I know the difference between a sketch and a short plat map, and I know that is a sketch. That's provided as a courtesy to locate the property, and that is it.
>
> The short plat map is entirely different. When you find a short plat map that is - - has very recorded monuments, they circle the monuments and the names are signed on the plat, and that is not what I relied upon. You're trying to confuse me. I have never relied upon that document, at all, and I never would.

(RP 1074.)

Likewise, Thelma did not review the preliminary title commitment:

> Q. In terms of the title commitment, did

you have an opportunity to review that before the matter was closed?

A. I don't think that I did too much, no.

(RP 1083.)

While Thelma provided contradictory testimony with regard to whether she relied upon the title policy, the title policy was issued after closing and she could not have relied upon it in making any decision with regard to coverage proposed in the preliminary title commitment. (Cf. RP 1083 with RP 1109 (claiming she never had the title policy to review, but later asserting she relied upon it in some unspecified way).)

Karl's characterization of the conditional status of the partial plat map attached is consistent with First American's interpretation of the policy. A conditional plat map is consistent with (1) the scope of Insuring Clause 4 (satisfied because the Klosters have access), (2) the fact that the purported easement is not described in Schedule A, and (3) exclusion of all specific easements in the Pacific Rim Estates and WS-146 plats under Schedule B, Section Two. (Trial Ex. 95, Schedule B, Section Two, Special Exceptions Nos. 5 (WS-146) & 8 (Pacific Rim Estates).) (RP 714-716.)

Accordingly, the trial court should be reversed in ruling there was coverage under the First American Title Policy for a purported access

easement. This case should be remanded to the trial court for dismissal of the Klosters' coverage claim with prejudice.

2. Because There Was No Coverage Under the Klosters' First American Title Policy, the Court Erred in Awarding Attorney's Fees and Costs Under Olympic Steamship.

The only basis on which the Klosters were awarded attorney's fees was Olympic Steamship Co. v. Centennial Insurance Co., 117 Wn.2d 37, 811 P.2d 673 (1991), allowing reasonable attorney's fees incurred in a legal action to require the insurer to provide benefits under an insurance contract. Because the trial court erred in finding an ambiguity under the Klosters' First American title policy leading to coverage, Olympic Steamship is not a basis to award the Klosters attorney's fees or costs. The trial court should be reversed in making the award.

3. The Trial Court Erred As a Matter of Law in Allocating $9,000 for the Cost to Cure Against First American Contrary to the Specific Terms of the Title Policy.

In rendering its special verdict, the jury found $9,000 under a cost to cure measure of damages, but allocated 100% fault to the Klosters (CP 3715 (Appendix D) Jury Verdict Form.) The jury awarded zero damages under the difference in value measure prescribed in the Klosters' title policy. Post trial, the trial court erred as a matter of law in entering judgment for the $9,000 against First American, erroneously finding that

the jury's verdict on the cost to cure represented an "actual loss" under the Klosters' title policy. (CP 3714-3716 (Appendix D) Jury Verdict Form.)

a. Title Policies Are Indemnity Contracts, and the Obligation to Pay Requires an Indemnable Loss.

A title insurance policy is an indemnity contract obligating an insurer to reimburse the insured for losses incurred or to pay sums the insured is legally obligated to pay to others. Sec. Serv., Inc. v. Transamerica Title Ins. Co., 20 Wn. App. 664, 669, 583 P.2d 1217 (1978) (title insurer agreed to indemnify or reimburse insured for any loss due to causes insured against in an amount not exceeding policy limits; it did not guarantee or insure a clear title or that there would be no losses).

> "The contract is one of indemnity against defects in or unmarketability of title, or liens, or encumbrances. The risks of title insurance, although they may be referable to the contingency of future loss, are only designed to save the insured harmless from loss through defects in or unmarketability of title, or liens, or encumbrances, that may affect or burden his title when he takes it.
>
> . . . .
>
> *Since the contract is one of indemnity only, the insured must show actual loss sustained before recovery can be had.*"

Id. at 669-70 (emphasis in original) (quoting 1 Warren Freedman, Richards on Insurance § 32, at 108-09 (5th ed. 1952)).

The Klosters' First American title policy sets out a specific measure of loss or damage as the difference in value as insured and as subject to the defect causing loss or damage. (Trial Ex. 95 (Appendix B) Kloster First American Title Policy § 7(a) (Determination, Extent of Liability and Coinsurance).)

The First American title policy further excludes coverage of any defect resulting in no loss or damage to the insured as measured under the policy:

EXCLUSIONS FROM COVERAGE

> The following matters are expressly excluded from the coverage of this title policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> . . . .
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> . . . .
>
> (c) resulting in no loss or damage to the insured claimant[.]

(Id., (Appendix B) First American Title Policy § 3(c) (Exclusions from Coverage).)

The jury allocated zero damages for the difference in value measure, but allocated $9,000 for the cost to cure. Accordingly, the jury rejected any award of damages under the measure expressly provided in

the title policy. Because the jury refused to award damages under the contract measure, the trial court erred in its allocation because the Klosters had failed to establish a claim for coverage because loss or damage was required to trigger indemnity. (CP 4207-4211 (Appendix E) Court's Ruling on Attorney's Fees After Jury Verdict.)

b. The Cost to Cure Submitted to the Jury Was a Fault-Based Measure That Related to the Cost to "Build a Road."

In Olmsted v. Mulder, 72 Wn. App. 169, 863 P.2d 1355 (1993), the court applied the benefit of the bargain measure, or a lesser cost to cure, based upon a residential seller's failure to disclose defects concerning a drainage system. 72 Wn. App. at 179 (substantial evidence existed that defects in the drainage system were not adequately disclosed); see also Lyall v. DeYoung, 42 Wn. App. 252, 258-60, 711 P.2d 356 (1985) (applying difference in value or cost to cure, whichever is less, for home seller's breach of express warranty).

Pacific Rim relied upon this line of cases to develop a measure of damages to address the Klosters' misrepresentation claims against the company assuming cost of building a road to be a cost to cure. Cost to cure was a fault measure of damages, not one of indemnification. (RP 1214-1219.)

The cost to cure never applied to the Klosters' claim for access coverage under their title policy. Neither the trial court nor the jury found

First American had an obligation to "build a road" for the Klosters as part of any obligation to indemnify.

At trial, the Klosters' tort claims against First American and AmeriTitle were dismissed under CR 50(a). With no claims remaining against it, AmeriTitle was dismissed. Only the title policy coverage claim for indemnification remained against First American. The Klosters still needed to establish loss or damage under the policy. The jury would address the issue on the special verdict form. (CP 3714 (Appendix D).)

To accommodate the Klosters, the damage questions were moved on the special verdict form to first position. The Klosters' counsel agreed. (RP 1220-1221.) The jury was instructed that the court had found access coverage based upon an ambiguity related to the partial plat map attached to the Klosters' title policy. The jury was given the opportunity to assess damages for diminution in value. The jury found there was no difference in value and assessed no damages under that measure. (CP 3714 (Appendix D).)

The Klosters and Pacific Rim submitted expert testimony with regard to the cost to build a road. (RP 965-967; 971-978.) The cost to cure measure was submitted to the jury as part of the jury's consideration of the Klosters' negligent misrepresentation claim against Pacific Rim. The jury assigned $9,000 in damages for the cost to cure, but then allocated 100% fault to the Klosters and declined to find negligent misrepresentation against Pacific Rim. (CP 3714-3715 (Appendix D).)

Certainly the trial court well understood before submission of the case to the jury that any damages assessed against First American based upon coverage would have to be in accordance with the terms of the contract and not upon any tort measure related to negligent misrepresentation:

> "When the jury comes back with the verdict form, if it has assessed damages under either measure, then it is up to the Court to ferret out First American's exposure based upon its contract and Pacific Rim's exposure, you know, based upon the tort measure based upon whatever the jury decides in terms of negligent misrepresentation."

(RP 1218.)

Just as the trial court could not assess the $9,000 cost to cure against Pacific Rim because of the Klosters' failure to establish negligent misrepresentation, the trial court also could not assess the $9,000 cost to cure against First American contrary to the terms of the policy. To state a claim for coverage the policy requires proof of loss or damage measured as a diminution in value. Moreover, the cost to cure is a fault measure of damages that the jury allocated 100% to the Klosters.

The Klosters may argue that the $9,000 be cast as compensating for "benefit of the bargain" (which is a difference in value measure to which the jury refused to award any damages) or consequential damages. Of course, the cost to cure measure in no way is a "consequential"

damage. Indeed, Jury Question No. 3 provided the jury the opportunity to award consequential damages (the cost of the water connection and easement survey). The jury declined. (CP 3715 (Appendix D) Jury Verdict Form, Question 3.)

The trial court should be reversed in allocating $9,000 as a cost to cure against First American in its post trial ruling, findings of fact, conclusions of law and judgment against First American. The jury awarded no damages for indemnity under the title policy.

IV. FIRST AMERICAN'S AND AMERITITLE'S RESPONSE TO THE KLOSTERS' ISSUES ON APPEAL

A. AmeriTitle Is Not an Insurer, and It Did Not Make the Decision Denying the Klosters' Claim, but Acted Only as Agent as Authorized Under Washington Law.

Where the issue is proper construction of a statute such as the Washington Insurance Code ("WIC"), the trial court's conclusion is reviewed de novo. King Cnty. Fire Prot. Dists. No. 16, 36 & 40 v. Hous. Auth. of King Cnty., Wash., 123 Wn.2d 819, 825, 872 P.2d 516 (1994). In the present case, the trial court should be affirmed in concluding that under the WIC AmeriTitle did not act as an insurer on issuance of the First American title policy to the Klosters.

1. AmeriTitle Is a Licensed Title Agent in the State of Washington and a Party to an Agency Contract with First American.

Insurers have a duty of good faith to their policyholders. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 484, 78 P.3d 1274 (2003). To be subject to a bad-faith claim, however, a party must be an insurer with a contractual obligation to provide benefits under an insurance policy upon establishment of coverage. RCW 48.01.030 (insurer must act in good faith in all insurance matters); WAC 284-30-300 (setting forth regulations for insurers regarding claims settlement practices).[1] The Unfair Claims Settlement Practices Act is applicable only to insurers, not to the insurers' employees or agents. See Rice v. State Farm Mut. Auto. Ins. Co., No. C05-5595RJB, 2005 WL 2487975 (W.D. Wash. Oct. 7, 2005).

As previously established, the Klosters had no contact with AmeriTitle prior to closing, other than through the issuance of the preliminary commitment for title insurance. (RP 716-717.) After closing, there is no dispute AmeriTitle did not make any coverage decision, nor did it otherwise administer the Klosters' title policy claim. This was the exclusive province of First American.

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[1] The Washington Insurance Code has been substantially revised since the Kloster First American title policy was issued, effective February 15, 2005. See, e.g., Laws of 2009, ch. 162 § 13 and Laws of 2007, ch. 117 § 1. Nonetheless, we apply the Washington Insurance Code as it existed on February 15, 2005 in ascertaining AmeriTitle's status as a title agent and the actions of the Washington Insurance Commissioner and First American regarding AmeriTitle's authorizations.

As a matter of law, the Klosters cannot state a claim against AmeriTitle as an insurer, because the only contract of insurance is the title policy between First American and the Klosters; there is no other contract of insurance between AmeriTitle and the Klosters. Wash. Ins. Guar. Ass'n ex rel. Bloch v. Dep't of Labor & Indus., 122 Wn.2d 527, 532-33, 859 P.2d 592 (1993) (insurance contract is an essential element subjecting relation to the WIC). To be an insurer, a party must be "engaged in the business of making contracts of insurance." RCW 48.01.050. The Revised Code of Washington defines "insurance" as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. At no time did AmeriTitle undertake to indemnify the Klosters or to pay them a sum of money upon the occurrence of certain events. (CP 2760-2764.) An agreement or contract between the insurer and the insured is an essential element of the insurance relationship. There is no contractual privity whatsoever between AmeriTitle and the Klosters on the Klosters' title policy. (Id.)

RCW 48.17.010 defines "agent" as "any person appointed by an insurer to solicit applications for insurance on its behalf." AmeriTitle holds a title agent's license issued by the State of Washington's Office of the Insurance Commissioner (the "OIC"). (CP 4628-4631 (Declaration of Craig Trummel in Opposition to the Klosters' Motion for Partial Summary Judgment on Extra Contractual Claims dated April 2, 2007).) First

American appointed AmeriTitle as its agent pursuant to an appointment certificate, also issued by the OIC. (Id.)

In 2002, First American and AmeriTitle executed an agency contract (the "Agency Contract"). (CP 2762.) The Agency Contract referred to First American as "Principal" and AmeriTitle as "Agent." (CP 1246-1251.) The parties expressly stated that AmeriTitle would function in the capacity of a title insurance agent in relation to its Principal, First American. The Agency Contract further emphasized that all policies would be issued in the name of the Principal, First American. As the appointed, authorized agent of the insurer, First American, AmeriTitle is not an insurer within RCW 41.01.050.

2. The Requirement That AmeriTitle Pay First American a Portion of Any Loss up to $3,500 Does Not Make AmeriTitle a Title Insurer.

The Klosters allege that the Agency Contract transfers liability from First American to AmeriTitle for the first $3,500 of loss in certain policyholder claims. (CP 1249.) According to the Klosters, the shifting of $3,500 worth of risk from First American to AmeriTitle is sufficient to convert AmeriTitle into an insurer under RCW 48.01.040 and 48.01.050.

In Title Insurance Co. of Minnesota v. State Board of Equalization, 4 Cal.4th 715, 842 P.2d 121, 14 Cal.Rptr.2d 822 (1992), the California Supreme Court considered whether title insurers should pay income tax on those portions of title insurance claims paid by title agents. The State

Board of Equalization (the "Board") argued that the title insurer realized income when the title agent paid its share of claims paid out under the title policy, and that the arrangement between the title insurer and the title agent was an illegal contract of insurance.

The court rejected the Board's contention, noting that the essential elements of insurance were the (1) shift of the risk of loss from one party to another and (2) distribution of the risk among similarly situated parties. 842 P.2d at 127. The agreement between the title insurer and the title agent did not distribute the risk of loss (the total loss under the policy) among similarly situated parties. In other words, the agency contract between the title agent and title insurer does not distribute the risk among similarly situated title insurers. The agency contract did not transform the title agent into a party to the title policy issued to the insured.

The court also looked to whether the assumption of risk by the title agent was related to the "'principal object and purpose'" of the contract with the title insurer. Id. (quoting Transp. Guarantee Co. v. Jellins, 29 Cal.2d 242, 174 P.2d 625, 629 (1946)). The court found that the main purpose of the agreement between the title insurer and the title agent was to require the title agent to perform its services as carefully as possible preparatory to issuance of the policy by the title insurer. The indemnification provisions of the arrangement between the title insurer and the title agent were secondary to its main object and purpose. Id. at 128.

The primary purpose of the Agency Contract between AmeriTitle and First American was to memorialize the terms and conditions under which AmeriTitle, as title agent, would provide services to First American. The indemnification provisions are secondary to the main purpose of the Agency Contract and do not transform AmeriTitle's status into that of an insurer.

Accordingly, AmeriTitle never insured the Klosters and did not make a decision to deny the Klosters' claim. As the licensed insurer, First American agreed to indemnify the Klosters and upon proper analysis denied the Klosters' claim. The trial court should be affirmed in dismissing the Klosters' claims against AmeriTitle arising under the WIC and associated regulations.

B. The Klosters Failed to State a Claim for Negligence.

No Kloster testified that he or she had communications with First American or AmeriTitle before closing the transaction, other than Karl Kloster's receipt of the two preliminary commitments for title insurance. (RP 1066-1067.) (Trial Exs. 93 & 94 (AmeriTitle Preliminary Title Commitments dated February 1, 2005 and February 4, 2005).)

Preliminary commitments for title insurance are not abstracts of title, and, conversely, abstracts of title are not preliminary commitments for title insurance. See RCW 48.29.010(3) (defining terms "title policy," "abstract of title," and "preliminary report" under Washington law).

A preliminary commitment is a statement submitted to the potential insured establishing the terms and conditions on which the title insurer is willing to issue a title policy. RCW 48.29.010(3)(c); see Barstad v. Stewart Title Guar. Co., 145 Wn.2d 528, 536, 39 P.3d 984 (2002).

The preliminary commitment was not a representation of the condition of title, but only a "'statement of terms and conditions upon which the [title insurer] is willing to issue its title policy, if such offer is accepted.'" Barstad, 145 Wn.2d at 536 (quoting RCW 48.29.010(3)(c)).

AmeriTitle did perform a title examination for the purpose of issuing a preliminary title commitment constituting an offer to insure title on the terms of the commitment. (RP 702-703.) Under Barstad, 145 Wn.2d at 536, it is undisputed that there is no general duty to disclose title defects as a matter of law. There is no evidence AmeriTitle undertook anything more. (RP 718.)

Thus, AmeriTitle undertaking to perform under the agency contract with First American to conduct a title examination for the purpose of issuing a preliminary title commitment does not, as a matter of law, give rise to a special duty AmeriTitle owed to the Klosters. AmeriTitle's statutory and contractual authority went no further. The trial court should be affirmed in dismissing the Klosters' claims for negligence against AmeriTitle

C. The Klosters Failed to Establish a Claim for Bad Faith as a Matter of Law.

1. The Elements of a Bad-Faith Claim Under Washington Law.

a. Insurers Have a Duty of Good Faith to Their Policy Holders.

Insurers have a duty of good faith to their policyholders, and violations of that duty may give rise to tort actions for bad faith. Smith, 150 Wn.2d at 484. To establish a breach of the duty of good faith, the insured bears a heavy burden. Ellwein v. Hartford Accident & Indem. Co., 142 Wn.2d 766, 775-76, 15 P.3d 640 (2001), overruled in part on other grounds by Smith, 150 Wn.2d at 484-86. Ultimately, an insured must show that the insurer's breach of the insurance contract was "'unreasonable, frivolous, or unfounded.'" Smith, 150 Wn.2d at 484 (quoting Overton, 145 Wn.2d at 433); Miller v. Ind. Ins. Cos., 31 Wn. App. 475, 479, 642 P.2d 769 (1982) (bad faith requires showing of frivolous and unfounded denial of benefits). An order on summary judgment dismissing a bad-faith claim is reviewed de novo. Smith, 150 Wn.2d at 483.

An insured does not establish bad faith when the insurer denies coverage based on a reasonable interpretation of the insurance policy. Am. Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398, 412, 229 P.3d 693 (2010); Ranes v. Paul Revere Life Ins. Co., 32 F.3d 1393 (9th Cir. 1994) (applying Washington law; holding that denial of coverage alone

does not constitute bad faith necessary for violation of Consumer Protection Act). Debatable questions concerning coverage do not give rise to a bad-faith claim. Miller, 31 Wn. App. at 479.

2. The Klosters Failed to Establish That First American's Interpretation of Their Title Policy Was Unreasonable or Frivolous.

As previously explained, the trial court adopted First American's interpretation of the title policy and analysis of the Klosters' claim, except for the issue related to the partial plat map attached to the preliminary commitments. Even so, in indentifying the ambiguity the court called it a "close question." (CP 3281 (Court's Ruling: Various Pretrial Motions; Pretrial Order).)

Accordingly, the court also correctly ruled under CR 50(a) that the Klosters did not establish bad faith when First American denied coverage based upon a reasonable interpretation of the title policy. (CP 4205-4206.) The Klosters have not even suggested how it could be otherwise.

3. The Klosters Failed to Establish That First American Failed to Reasonably and Adequately Investigate and Process Their Claim.

The timeline for First American's investigation and denial of the Klosters' claim is:

March 24, 2005 Klosters' claim on their title policy to AmeriTitle manager Craig Trummel. (Trial Ex. 147.)

March 31, 2005	First American regional underwriter Moore's letter to Klosters' counsel providing his analysis and denial of the Klosters' claim. (Trial Ex. 148.)
April 6, 2005	Klosters' counsel's follow-up letter requesting additional analysis. (Trial Ex. 105.)
April 11, 2005	Following further review, Moore and the Klosters' counsel hold telephone conversation; Moore affirms First American's denial of the Klosters' claim. (RP 793-796; RP 806-809.)

There is no reasonable dispute that Moore conducted an adequate and timely investigation of the Klosters' claim, both before and after his March 31 letter denying their claim for coverage. The Klosters' assertion that at the time Moore denied the Klosters' claim he had not seen or considered the legal descriptions of, or the title documents for, the Kloster parcel is frivolous. There was no additional information that would have changed Moore's decision. (RP 808-809.)

Finally, the Klosters mislead in attempting to assert that in administration of the Klosters' claim, First American had identified AmeriTitle as being in some way at fault in its title examination. This is erroneous. Theresa Beatty, an assistant to Moore and John Dahl, who administered title claims for First American's Seattle office, testified that she coded the claim based on the Klosters' allegation, and not on any assessment of the merits or the claim. (RP 750-757.) Beatty's attempts to characterize the Klosters' claim were purely administrative and had no relation to First American's determination to accept or deny the claim. (RP 760-762.)

The trial court should be affirmed in dismissing the Klosters' bad faith claim.

D. The Trial Court's Rulings on the Klosters' Claimed Damages Should Be Affirmed.

1. The Trial Court Properly Dismissed the Klosters' Claim for Emotional Distress Damages Against First American and AmeriTitle.

a. The Klosters Sought Emotional Distress Damages Based upon Events Unrelated to First American or AmeriTitle.

While emotional distress damages are a possible remedy for insurance bad faith, the Klosters must present competent evidence that they suffered emotional distress as a direct result of First American's or AmeriTitle's actions. Werlinger v. Clarendon Nat'l Ins. Co., 129 Wn. App. 804, 809, 120 P.3d 593 (2005) (while emotional distress damages may be sought for insurance bad faith, only distress suffered as direct result of insurer's actions may be claimed).

In Werlinger, Dean Werlinger died at the scene of a vehicle accident caused by Michael Warner. The Werlinger estate sued Warner for wrongful death, but he was protected from personal liability due to a discharge in bankruptcy. However, the bankruptcy court allowed the Werlingers to sue Warner for the policy limits of his automobile policy. The Werlingers, as Warner's assignee, sued Warner's insurer for bad faith

after the insurer contested coverage and delayed tendering the policy limits. Id. at 806.

The Werlingers sought emotional distress damages in their bad-faith action, pointing to evidence that the Warners were emotionally distressed by the fatal accident. The court, however, found that the insurer did not cause the accident and that there was no evidence of any emotional distress as a direct result of the insurer's actions. Because harm is an essential element of a bad-faith claim and there was no evidence that the Warners suffered harm, the trial court's summary judgment of dismissal was affirmed. Id. at 810.

In the present case, the Klosters sought damages for emotional distress based in part on the actions of neighbors reporting trespass and administering verbal abuse, among other interactions. (CP 1150-1152; CP 1156-1157.) Of course, none of these actions was alleged to have been undertaken by First American or AmeriTitle, and any distress the Klosters may claim through interaction with their neighbors is not a direct result of any action taken in administering the Klosters' claim on their title policy. Indeed, the actions of the neighbors would have taken place no matter what First American or AmeriTitle did in response to the Klosters' title claim.

b. In Any Event, the Klosters Failed to Present Competent Evidence of Emotional Distress Damages.

In the trial court, the Klosters failed to produce evidence to a reasonable medical probability with regard to the medical cause of Karl Kloster's purported emotional distress or related symptoms. The Klosters submitted Karl's testimony in support of his own emotional distress claim and the testimony of Dr. Lynnea E. Lindsey. (CP 1867-1870; CP 1975-1976.) None of the submitted testimony was competent to address causation to a reasonable medical probability. See Miller v. Staton, 58 Wn.2d 879, 886, 365 P.2d 333 (1961) (medical opinion testimony must establish causal relation to a reasonable medical probability).

2. The Trial Court Also Should Be Affirmed in Dismissing Certain of the Klosters' Claimed Economic Damages.

a. Indemnity Under the Klosters' First American Title Policy Is Limited.

An owner's title policy is a contract of indemnity against defects in or unmarketability of title, or any liens or encumbrances. Sec. Serv., 20 Wn. App. at 669 (citing Freedman, supra, § 32, at 108-09). Because a title policy is one of indemnity only, the insured must show actual loss sustained before recovery can be had. The title policy does not impose upon the insurer a duty to "clear title," nor does the policy "guarantee" that there will be no loss. Id. Thus, in a suit upon a policy of title

insurance, the measure of recovery for actual losses due to defects insured against may never exceed the policy limits. Id. at 670-71.

Because a title insurance policy is a contract of indemnity, a loss under the policy is not a "breach of contract" but an indemnable event. Thus, damages are measured pursuant to the terms of the title policy, and not in accordance with an expectation measure of damages under a breach of contract theory.

When the partial failure of title results from an encumbrance, an encroachment or a loss of a portion of the insured property, the majority rule is that the insured should recover the difference in value of the insured property interest with and without the encumbrance or loss, up to the policy limits. See Miebach v. Safeco Title Ins. Co., 49 Wn. App. 451, 456, 743 P.2d 845 (1987).

In fact, the Klosters' First American title policy incorporates the standard measure of loss:

> **7. DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE.**
>
> This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.
>
> (a) The liability of the Company under this policy shall not exceed the least of:
>
> (i) the Amount of

Insurance stated in Schedule A; or

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(Trial Ex. 95 (Appendix B) First American Title Policy at § 7 (Termination, Extent of Liability and Coinsurance).)

Accordingly, any loss must be measured as prescribed by the terms of the policy.

b. Consequential Damages Are Not Recoverable Under the Title Policy.

The Klosters' First American title policy specifically provides that liability of First American under the policy shall not exceed the face amount of the policy or the difference in value due to the title defect. Thus, the parties did not contemplate any loss or damage to broadly encompass all damages causally related to a defect in title. Brown's Tie & Lumber Co. v. Chi. Title Co. of Idaho, 115 Idaho 56, 764 P.2d 423, 428-29 (1988) (terms of title policy restricted scope of "actual loss" and barred recovery of consequential damages).

In their claimed damages related to their property, the Klosters sought the purchase price of their property, including the cost of acquisition, the expenses related to clearing of the land (skidder use plus labor), an unexplained "unusable water connection," the expense of an

easement survey, and the loss of interest on the purchase price of the property.

The Klosters' claimed costs incurred do not comport with the measure of damages prescribed in their title policy. The Klosters' burden is to prove actual loss by showing the difference in value of the property both before and after discovery of the alleged title defect. Any claim for indemnity under the title policy must be analyzed under the policy's exclusive method for determination of the amount of loss. None of the Klosters' claimed damages related to their property provides such a value.

Of course, the purchase price of the land, acquisition costs, and land clearing and preparation all benefit the party holding title to the land and continue to do so regardless of the existence of a title defect. As a matter of law, the Klosters cannot seek compensation for these amounts (even if proven) and still continue to hold title to the land. This would result in a windfall to the Klosters.

The Klosters also sought damages for loss of business opportunity in the development of their property. The Klosters allege that they purchased the property for the purpose of constructing a single family residence and as a result of the claimed title defect, are unable to do so. Thus, the Klosters claim they should have their future profit.

In Sullivan v. Transamerica Title Insurance Co., the plaintiff purchased approximately 164 acres of land for $243,561, obtaining a title insurance policy in the transaction. 35 Colo. App. 312, 532 P.2d 356, 356

(1975). Two years later, the plaintiff contracted to sell the property for the sum of $474,786. However, a high-pressure gas main easement traversing the property was discovered. The prospective buyer rejected title and refused to purchase the property. The plaintiff filed suit on the title policy. The trial court entered a judgment in favor of the plaintiff for $231,225, plus interest and costs, representing the plaintiff's profit had the transaction closed. Id. at 357.

In reversing the trial court's judgment, the Sullivan court ruled the plaintiff had been awarded a windfall:

> Plaintiff's claim, stated in its simplest form, was that he would have sold the property to Wood Bros. for a $231,225 profit, had it not been for the error made by the title insurance company. Since the trial court's award was based upon this approach to damages, it cannot stand. The effect of such an award is to give to plaintiff the "benefit of his bargain," while leaving him in possession of the property.

Id.

The same holds in the present case. The Klosters are not entitled to damages for any loss of business opportunity on the purchase and development of the property while retaining title.

Trial court should be affirmed in entering its order granting First American's and AmeriTitle's Motion in Limine entered September 1, 2009 (CP 1291-1292) and the trial court's April 19, 2011 order as to specific items of damages (CP 2760-2764).

E. First American's Duty to Defend Never Arose Under the Klosters' Title Policy, as the Klosters Were Never Sued by Any Third Party.

The trial court's ruling on First American's duty to defend is renewed de novo. Farmers Ins. Co. of Wash., 43 Wn. App. at 478. Section 4 of the Klosters' First American ALTA owner's policy addresses both the duty to defend and the scope of First American's discretion when a covered claim for indemnity is submitted. Section 4(a) of the Klosters' title policy addresses the duty to defend; Section 4(b) addresses First American's discretion in taking any necessary or desired action in response to a covered claim.

The Klosters' First American title policy provides:

> **4. Defense and Prosecution of Actions; Duty of Insured Claimant To Cooperate.**
>
> a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any

> fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy

(Trial Ex. 95, Kloster First American Title Policy § 4(a).)

The First American ALTA owner's policy issued to the Klosters has two obligations: one of indemnity and a duty to defend. Campbell v. Ticor Title Ins. Co., 166 Wn.2d 466, 470, 209 P.3d 859 (2009). The duty of indemnity depends upon actual coverage under the policy. See James E. Torina Fine Homes, Inc. v. Mut. of Enumclaw Ins. Co., 118 Wn. App. 12, 18, 74 P.3d 648 (2003), rev. denied, 151 Wn.2d 1010 (2004); Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

The duty to defend is broader than the duty to indemnify and is triggered if the insurance policy conceivably covers the allegations in the complaint, whereas the duty to indemnify exists only if the policy actually covers the insured's liability. See Am. Best Food, 168 Wn.2d at 404; Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52-53, 164 P.3d 454 (2007). Of course, the phrase "allegations in the complaint" refers to the complaint alleged against the insured, not the insured's complaint against the insurer seeking coverage. Am. Best Food, 168 Wn.2d at 403 (insured sued by third party based upon allegation that restaurateur had duty to take reasonable precautions to protect him against criminal conduct).

Under the Klosters' policy, First American will "provide for the defense of an insured in litigation in which any third party asserts a claim

adverse to the title or interest as insured." In other words, for the duty to defend to arise, the insured must be sued by a third party. Absent a lawsuit, there is no duty to defend. It makes no difference how broad the duty to defend is beyond that of indemnity if it never arises.

It is undisputed that in the present case, the Klosters were never sued by a third party. Certainly they engaged in a dispute with the Rickeys, their neighbors to the south, with regard to the use of the northern 30 feet of the Rickeys' parcel. The Rickeys, however, never sued.

By contrast, Section 4(b) provides the terms of First American's discretion on a claim for indemnity separate and apart from whether a third party has sued the insured. As explained below, in response to a claim for indemnity, First American has no affirmative obligation to take action in a manner analogous to the duty to defend. There is no broader obligation arising from the Klosters' claim absent actual coverage under the policy. Section 4(b) provides:

> **4. Defense and Prosecution of Actions; Duty of Insured Claimant To Cooperate.**
>
> . . . .
>
> b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to

> prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(Trial Ex. 95, Kloster First American Title Policy § 4(b).)

In Securities Service, the court held that it was improper for the trial court to rewrite the insurance contract so as to impose a duty on the title insurer to "clear title" when the title policy stated no such obligation, but only an obligation to indemnify—that is, to reimburse the insured for losses not exceeding the policy limits. 20 Wn. App. at 669-70 (Transamerica had no duty to clear title and consequently no duty to bargain or attempt settlement).

As in Securities Service, the Klosters' First American policy did not impose an affirmative duty on First American to initiate any suit on behalf of the Klosters to clear any alleged impediment to use of the purported easement on the Rickeys' parcel. Holmes Dev., LLC v. Cook, 2002 UT 38, 48 P.3d 895 (Section 4.b of policy stating insurer "may" take appropriate action renders decision wholly discretionary with insurer and does not impose affirmative duty); Cohn v. Commonwealth Land Title Ins. Co., 678 N.Y.S.2d 268 (N.Y. App. Div. 1998) (title policy did not impose on insurer a duty to prosecute lawsuit on behalf of insured to clear title).

The Klosters submitted a claim under their title policy. First American had the obligation to investigate the claim, determine coverage, and communicate that decision to the Klosters in writing. First American did so. Had there been coverage, however, First American had no affirmative obligation to file suit. Had First American chosen to do so, it could have taken any action that in its opinion was necessary or desirable to establish the title to the estate or interest insured, or to prevent or reduce loss or damage to the insured. In no event was First American required to file suit to defend or clear title on the Klosters' submission of a claim.

Moreover, there was no conflict of interest based upon the fact that First American insured both the Klosters and the Rickeys. In reviewing the matter, First American's underwriter, Moore, had to determine if there existed coverage for either the Rickeys or the Klosters. (RP 791.) He also determined that because there was no valid easement over the Rickeys' property, there was no coverage to them for mis-easement. He further determined that the Klosters had no interest in that property. Because the Klosters had access to their Lot 1, there was no loss by reasonable lack of a right of access to their land. Thus, neither the Klosters nor the Rickeys had a claim under their respective title policies. (Id.) Any effort to relate a purported conflict of interest to bad faith is unavailing.

F. The Klosters' Motion for Attorney's Fees and Costs Should Be Limited on the Basis of Defendants' CR 68 Offer.

On January 11, 2008, defendants (including Roberts, Pacific Rim, AmeriTitle, and First American) tendered a CR 68 offer following the parties' first mediation. (CP 4225-4228.) The offer included a cash payment to the Klosters of $40,000, and defendants' facilitation, at their expense, of a 30-foot easement across the northern portion of Lot 2, WS-146, for the benefit of the Klosters for ingress, egress, and utilities. (Id.) Defendants' offer was inclusive of taxable costs and attorney's fees accrued.

Defendants' CR 68 offer lapsed on its own terms when the Klosters did not accept it within the required 10-day period. If the offer is not accepted within the 10-day period, it is withdrawn by operation of CR 68. If the non-accepting party (the Klosters) receives a judgment for less than the amount in the offer of judgment, CR 68 requires the non-accepting party to pay the offering party's costs incurred after the offer was made. In the present case, this would include First American's costs. Costs awardable under CR 68 are ordinarily statutory costs under RCW 4.84.030, et seq.

As an additional consequence, rejection of a CR 68 offer requires the offeree (the Klosters) to bear their own post-offer costs, including attorney's fees, if the amount of the offer exceeds the amount of the judgment. See Minger v. Reinhard Distrib. Co., 87 Wn. App. 941, 943

P.2d 400 (1997) (effect of CR 68 in civil rights case is to require offeree to bear its own post-offer costs, including attorney's fees, if amount of offer exceeds amount of judgment); Magnussen v. Tawney, 109 Wn. App. 272, 34 P.3d 899 (2001) (pre-offer attorney's fees and costs should be added to jury verdict award and then compared to CR 68 offer to determine if party had improved position at trial).

As described below, an insured is entitled to recover reasonable attorney's fees incurred in a legal action to require the insurer to provide benefits under the insurance contract. Olympic S.S., 117 Wn.2d at 53. Under CR 68, "costs" include attorney's fees if the statute or agreement so provides. See Magnussen, 109 Wn. App. at 275; Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 707, 9 P.3d 898 (2000).

Olympic Steamship is an equitable ground to recover necessary expenses, part of which are reasonable attorney's fees. See Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001) (insured must be compensated for all of the expenses necessary to establish coverage including attorney's fees that are reasonable). In other words, an insured pursuing coverage stands in a position similar to that of the Minger civil rights plaintiff.

So, under Olympic Steamship, an insured who rejects a CR 68 offer must bear their own post-offer costs, including attorney's fees, if the amount of the offer exceeds the amount of the judgment. In the present case, the Klosters rejected defendants CR 68 offer that was inclusive of

taxable costs and attorney's fees accrued as of January 21, 2008, when the offer lapsed.

The Klosters cannot establish that the amount of their pre-offer attorney's fees on their coverage claim against First American is more than the $40,000 offered under defendants' CR 68 offer of judgment. The jury's verdict of $9,000 for the cost to cure is less than defendants' $40,000 cash offer, assuming the $9,000 cost to cure survived the jury's 100% allocation of fault to the Klosters.

Moreover, any purported ambiguity in defendants' CR 68 offer must be construed against defendants to include attorney's fees. See Hennessy v. Daniels Law Office, 270 F.3d 551, 554 (8th Cir. 2001), cited with approval in Seaborn Pile Driving Co. v. Glew, 132 Wn. App. 261, 269, 131 P.3d 910 (2006) (if the parties offer no extrinsic evidence with respect to the meaning of an offer, any ambiguity is construed against the drafter). Whether defendants had $40,000 cash to pay on acceptance or could perform on any other term of the CR 68 offer becomes irrelevant on the Klosters' rejection.

In summary, defendants made a valid CR 68 offer to the Klosters that included attorney's fees and costs. The Klosters rejected the offer, and the offer lapsed as of January 11, 2008. As a consequence, First American became entitled to its costs and the Klosters were required to bear their own post-offer costs, including attorney's fees, because the $40,000 cash offer exceeded the amount of their judgment against First

American. The trial court should be affirmed in its ruling on the Klosters' motion for attorney's fees and costs against First American.

V. CONCLUSION

On First American's cross-appeal, the trial court erred in finding coverage based upon a purported ambiguity in the Klosters' First American title policy, in awarding the Klosters' attorney's fees and costs under Olympic Steamship, and in allocating $9,000 in damages to First American based upon a cost to cure that the jury allocated 100% to the Klosters and that does not represent a loss under the terms of the title policy. The Klosters' judgment against First American should be reversed and the Klosters' coverage claim against First American dismissed with prejudice.

The trial court otherwise should be affirmed on all issues raised by the Klosters on appeal.

Dated: September 14, 2012.

STOEL RIVES LLP

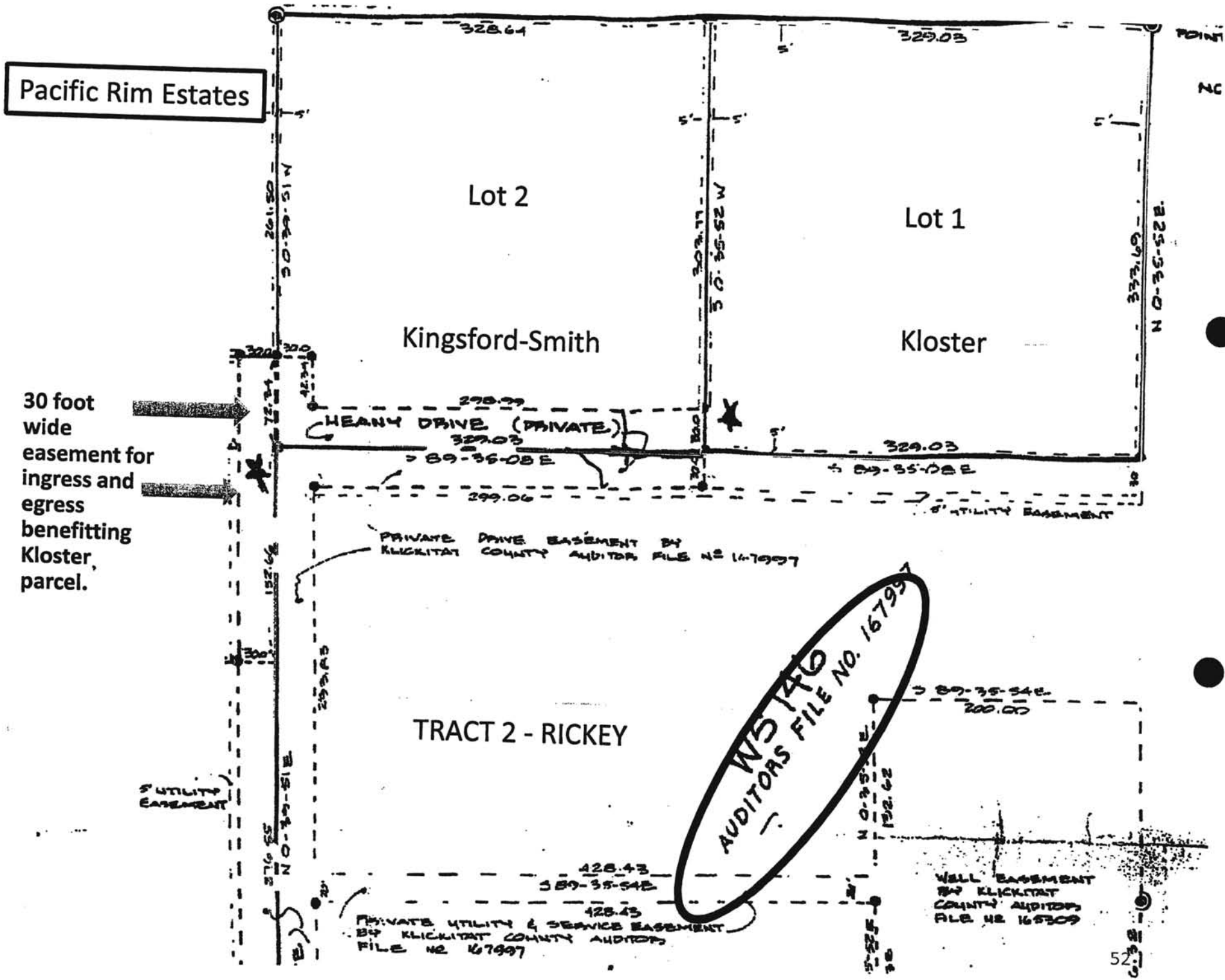
D. Jeffrey Courser, WSB #15466
Of Attorneys for Respondents/Cross-Appellant

APPENDICES

Appendix A	Demonstrative Sketch Map (Slide 52 of Trial Exhibit 133)
Appendix B	First American Title Policy (Trial Exhibit 95)
Appendix C	Court's Pretrial Ruling on Title Policy Ambiguity (dated 8/1/11) (CP 2911)
Appendix D	Jury Verdict Form (dated 11/3/11) (CP 3714-3716)
Appendix E	Court's ruling on Attorney's Fees After Jury Verdict (dated 11/23/11) (CP 4207)
Appendix F	Findings of Fact, Conclusions of Law and Order Granting Klosters' Motion for Judgment, Award of Attorney Fees and Expenses Against First American and Granting First American's Motion For Judgment of Costs (dated 2/1/12) (CP 4451)
Appendix G	Judgment Against First American Title Insurance Co. (dated 2/1/12) (CP 4449)

Appendix A

Demonstrative Sketch Map (Slide 52 of Trial Exhibit 133)


Pacific Rim Estates
Lot 2
Lot 1
Kingsford-Smith
Kloster
30 foot wide easement for ingress and egress benefitting Kloster parcel.
HEANY DRIVE (PRIVATE)
PRIVATE DRIVE EASEMENT BY KLICKITAT COUNTY AUDITOR FILE Nº 147997
TRACT 2 - RICKEY
WS 140
AUDITORS FILE NO. 167997
5' UTILITY EASEMENT
PRIVATE UTILITY & SERVICE EASEMENT BY KLICKITAT COUNTY AUDITOR FILE Nº 167997
WELL EASEMENT BY KLICKITAT COUNTY AUDITOR FILE Nº 165309

Appendix B

First American Title Policy (Trial Exhibit 95)

Form No. 1402.87
(10-21-87)
ALTA Owner's Policy

POLICY OF TITLE INSURANCE

ISSUED BY

First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

AmeriTitle
165 NE Estes
P.O. Box 735
White Salmon, WA 98672
(509) 493-1965
Fax: (509) 493-1905

A Policy-Issuing Agent of First American Title Insurance Company

First American Title Insurance Company

BY Gary L. Kennett PRESIDENT

ATTEST Mark L. Arnold SECRETARY

H300745

Date 10-18-05 Exhibit # 9
Case Klosterv. Roberts
Deponent Michael Moore
Reporter CYNTHIA A. KENNEDY
Naegeli Reporting Corporation
(800) 528-3335 FAX (503) 227-7123

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on the land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmental protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
   (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.
2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage any taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.
3. Defects, liens, encumbrances, adverse claims or other matters:
   (a) created, suffered, assumed or agreed to by the insured claimant;
   (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
   (c) resulting in no loss or damage to the insured claimant;
   (d) attaching or created subsequent to Date of Policy; or
   (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

(b) "insured claimant": an insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule (A), and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule (A), nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also include environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE.

The coverage of this policy shall continue in force as of Date

the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals therefrom, adverse to the title as insured.

(c) The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

All payments under this policy, except payments made for costs, attorneys' fees and expenses, shall reduce the amount of the insurance pro tanto.

11. LIABILITY NONCUMULATIVE.

It is expressly understood that the amount of insurance under this policy shall be reduced by any amount the Company may pay under any policy insuring a mortgage to which exception is taken in Schedule B or to which the insured has agreed, assumed, or taken subject, or which is hereafter executed by an insured and which is a charge or lien on the estate or interest described or referred to in Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

12. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

13. SUBROGATION UPON PAYMENT OR SETTLEMENT.

(a) The Company's Right of Subrogation.

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in the Company unaffected by any act of the insured claimant.

of Policy in favor of an insured only so long as [redacted] insured retains an estate or interest in the land, or holds [redacted] indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by this policy which constitutes

Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other [redacted] to make the payment required, shall terminate, including [redacted] liability or obligation to defend, prosecute, or continue any litigation, and the policy shall be surrendered to the Company for cancellation.

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or,

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:

(i) where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the amount of Insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or (ii) where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.

The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. APPORTIONMENT.

If the land described in Schedule (A)(C) consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the amount of insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused thereby.

The Company shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued. If requested by the Company, the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) **The Company's Rights Against non-Insured Obligors.**

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

14. ARBITRATION.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the Insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

16. SEVERABILITY.

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at 1 First American Way, Santa Ana, California 92707, or to the office which issued this policy.

SCHEDULE A

ORDER NO. 18233 **POLICY NO.** H300745

AMOUNT OF INSURANCE $38,000.00 **PREMIUM** $295.00

DATE OF POLICY FEBRUARY 15, 2005 AT 8:00 A.M.

1. NAME OF INSURED:

KARL A. KLOSTER, LORI A. KLOSTER, THELMA V. KLOSTER and KARIN J. KLOSTER------

2. THE ESTATE OR INTEREST IN THE LAND COVERED BY THIS POLICY IS:

A FEE SIMPLE------

3. TITLE TO THE ESTATE OR INTEREST IN THE LAND REFERRED TO HEREIN IS AT DATE VESTED IN:

KARL A. KLOSTER and LORI A. KLOSTER, husband and wife and THELMA V. KLOSTER, an unmarried person and KARIN J. KLOSTER, an unmarried person, as tenants in common------

4. THE LAND REFERRED TO IN THIS POLICY IS DESCRIBED AS FOLLOWS:

Lot 1, PACIFIC RIM ESTATES, according to the Plat thereof, recorded in Book 5, Page 31, Klickitat County Plat Records.-----

SCHEDULE B

THIS POLICY DOES NOT INSURE AGAINST LOSS OR DAMAGE (AND THE COMPANY WILL NOT PAY COSTS, ATTORNEY'S FEES OR EXPENSES) WHICH ARISE BY REASON OF THE FOLLOWING:

SECTION ONE:

GENERAL EXCEPTIONS:

1. Taxes or assessments which are not shown as existing liens by the records of any taxes authority that levies taxes or assessments on real property or by the public records.
2. Any facts, rights, interest, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.
3. Easements, claims of easement or encumbrances which are not shown by the public records.
4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by public records.
5. Unpatented mining claims; reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.
6. Any lien, or right to lien, for services, labor, materials or medical assistance theretofore or hereafter furnished, imposed by law and not shown by the public records.
7. Indian tribal codes or regulations, Indian treaty or aboriginal rights, including easements or equitable servitudes.
8. Defects, liens, encumbrances, adverse claims or other matters, if any, created first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires of record for value the estate or interest or mortgage thereon covered by this commitment.

SECTION TWO:

1. Taxes for 2005: A lien not yet payable.
(Parcel No. 03-11-2151-0001/00)

2. Right of Way Easement for Utilities, including the terms and provisions thereof, in favor of Public Utility District No. 1 for Klickitat County, recorded June 15, 1949, in Book 105, Page 55, Auditor's File No. 45360, Klickitat County Deed Records.

3. Easements, Conditions, Restrictions and Reservations, including the terms and provisions thereof, recorded April 5, 1978 in Book 184, Page 31, Auditor's File No. 165309, Klickitat County Deed Records.

Amended by document recorded March 25, 1997 in, Book 347, Page 28, Auditor's File No. 258579, Klickitat County Deed Records. Further amended by document recorded August 31, 2000, Auditor's File No. 1019450, Klickitat County Deed Records and corrected by document recorded June 26, 2002, Auditor's File No. 1024173, Klickitat County Deed Records.

4. Conditions, Restrictions and Reservations, including the terms and provisions thereof, as contained in contract between Donald C. Ramsay, et.al., recorded May 5, 1978 in Book 184, Page 549, Auditor's File No. 165809, Klickitat County Deed Records.

5. Easements, Conditions, Restrictions and Reservations, including the terms and provisions thereof, as contained in Short Subdivision filed as Auditor's File No. 167997, Klickitat County Short Plat Records.

6. By-Laws of the Columbia Rim Owners Association, including the terms and provisions thereof, recorded May 27, 1981 in Book 207, Page 320, Auditor's File No. 181729, Klickitat County Deed Records.

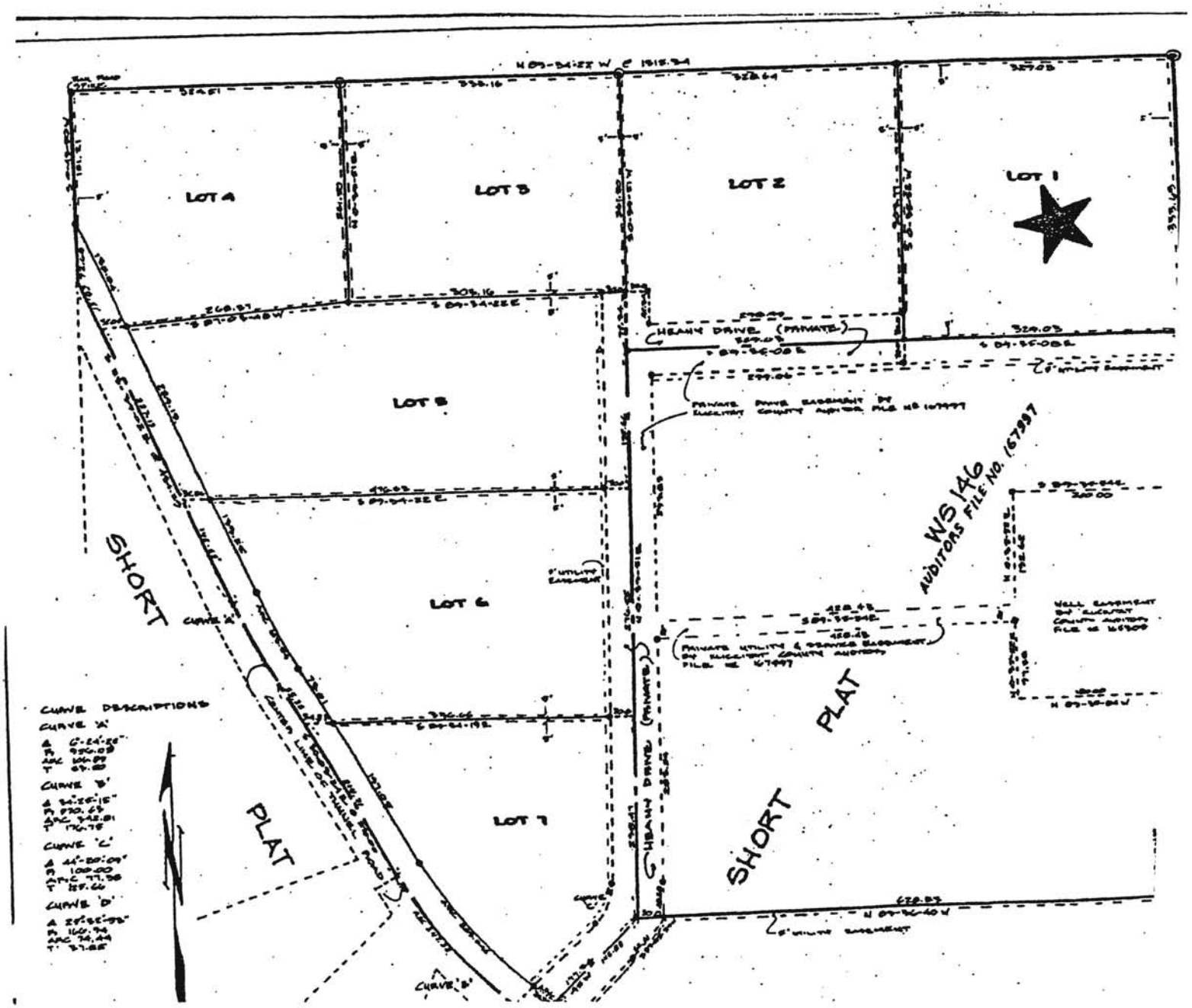
7. Any unpaid dues or assessments of the Columbia Rim Owners Association, as provided for the By-Laws shown above.

8. Conditions, Restrictions, Easements for roadways and Utilities and disclosure regarding maintenance of roads, including the terms and provisions thereof, as shown on the Plat recorded December 1, 1981 in Book 5, Pages 31 and 32, Klickitat County Plat Records.

AmeriTitle

(509) 493-1965
Fax: (509) 493-1905
PO Box 735 - 165 NE Estes
White Salmon, WA 98672

ANY SKETCH ATTACHED HERETO IS DONE SO AS A COURTESY ONLY AND IS NOT PART OF ANY TITLE COMMITMENT OR POLICY. IT IS FURNISHED SOLELY FOR THE PURPOSE OF ASSISTING IN LOCATING THE PREMISES AND FIRST AMERICAN EXPRESSLY DISCLAIMS ANY LIABILITY WHICH MAY RESULT FROM RELIANCE MADE UPON IT.




FIRST AMERICAN
1889
First American Title Insurance Company
POLICY
OF
TITLE
INSURANCE
FIRST AMERICAN TITLE INSURANCE COMPANY
INCORPORATED
SEPTEMBER 24,
1968
CALIFORNIA

Appendix C

Court's Pretrial Ruling on Title Policy Ambiguity

(dated 8/1/11) (CP 2911)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KLICKITAT

Thelma, Karl, Lori Kloster,	)	No. 05-2-00108-4
Plaintiffs,	)	Court's Pretrial Ruling
vs.	)	on Title Policy Ambiguity
Schenectady Roberts, et al,	)	
Defendants.	)	

First American Title Insurance Company ("First American") moves the court for a pretrial order finding that the First American title policy issued to the Klosters is not ambiguous and must be enforced in accordance with its terms. Because the court reaffirms its prior rulings that the Title Policy is ambiguous when viewed in its entirety, the court denies First American's motion.

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The court agrees with First American's analysis paragraphs 1-7, on pages 6 and 7 of its brief in support of the motion. However an ambiguity is created, when viewing the contract as a whole, by virtue of the unfortunate plat map appended to the policy.

Schedule A of the Klosters' title policy refers to the Pacific Rim Estate plat. The northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is shown on the map that includes both the Pacific Rim Estates plat and short plat WS-146. The northern 30 feet of the Rickey parcel, Tract 2, short plat WS-146, is not part of Pacific Rim Estates plat. The plats are legally distinct and Pacific Rim Estates cannot encumber WS-146.

However, when the entire policy is interpreted as it would be understood by an average person, a question is created as to coverage when each constituent part of the policy is parallelized.

An average person could reasonably conclude that the title policy for Lot 1, Pacific Rim Estates, covers access outside the plat across the northern 30 feet of the Rickey parcel, Tract 2, in adjoining short plat WS-146, because it both references the mistaken easement by attachment and guarantees coverage to "access." In other words, it is the inclusion of the inaccurate plat in the policy along with otherwise unambiguous language which creates the ambiguity. And it is First American's policy.

The court also agrees with First American that generally insurance policy interpretation is a question of law for the court. Moreover, as noted in the treatise provided by First American, "[w]hen an insurance policy provision is deemed ambiguous, courts resolve the ambiguity themselves, frequently by invoking the rule that construes insurance policy provisions against the insurer." Randall H. Warner, All Mixed up about Contract: When is Contract Interpretation a Legal Question and When Is It a Fact Question?, 5 Va. Law & Bus. Rev. 81, 111 (2010).

Accordingly, finding the policy ambiguous as to access coverage as a whole, the court rules as a pretrial matter that First American is precluded from arguing coverage to the jury.

So ordered.

Brian Altman

Appendix D

Jury Verdict Form

(dated 11/3/11) (CP 3714-3716)

SUPERIOR COURT OF WASHINGTON IN AND FOR KLICKITAT COUNTY

THELMA, KARL, LORI, and KAREN KLOSTER, Plaintiffs, Vs. PACIFIC RIM BROKERS, INC., a corporation; and FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation.	)	No. 05-2-00108-4 **JURY VERDICT FORM**

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Do you find by clear, cogent, and convincing evidence that there was any difference between the price the Klosters paid for the property and its actual market value? If yes, state the dollar amount.

ANSWER: **YES** (NO)

ANSWER: $_____

INSTRUCTION: Circle "Yes" or "No." If you answered "Yes," fill in the dollar amount. Answer Question 2.

QUESTION 2: Do you find by clear, cogent, and convincing evidence that there was any cost of cure? If yes, state the dollar amount.

ANSWER: (YES) **NO**

ANSWER: $ 9,000

INSTRUCTION: Circle "Yes," or "No." If you answered "Yes," fill in the dollar amount. Answer Question 3.

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QUESTION 3: Do you find by clear, cogent, and convincing evidence the Klosters suffered any other damages as a natural consequence of the defective easement? If so, please state the amount. (Note: Any dollar amount that you state in answer the Question 3 may not exceed the alleged cost of the water connection in the amount of $1,300.00, and the alleged cost of the easement survey in the amount of $287.50).

ANSWER: **YES** (NO)

ANSWER: $_____

INSTRUCTION: Circle "Yes," or "No." If you answered "Yes," fill in the dollar amount. Answer Question 4.

QUESTION 4: Do you find by clear, cogent, and convincing evidence that Pacific Rim Brokers, Inc., committed the following cause of action concerning the validity of the disputed easement running along the northern 30 feet of WS-146?

Negligent Misrepresentation: **ANSWER:** **YES** (NO)

INSTRUCTION: Circle "Yes," or "No." Answer Question 5.

QUESTION 5: Do you find by a preponderance of the evidence that the Klosters' conduct constituted failure to minimize their loss?

ANSWER: (YES) **NO**

INSTRUCTION: Circle "Yes," or "No." Answer Question 6.

QUESTION 6: As to each party as to which you answered "Yes" to any part of Questions 4 or 5, set forth those parties' percentage shares of fault. The total percentage shares of fault must equal 100%.

Klosters: 100 %

Pacific Rim Brokers, Inc.: Ø %

TOTAL: 100%

INSTRUCTION: sign and return this verdict.

Dated this 4th day of November, 2011.

Gordon J. Kelley

Presiding Juror

Appendix E

Court's ruling on Attorney's Fees After Jury Verdict

(dated 11/23/11) (CP 4207)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KLICKITAT

Thelma, Karl, Lori, and Karin Kloster,	)	No: 05-2-00108-4
Plaintiffs,	)	Ruling of Court on Attorney's Fees After Jury Verdict
vs.	)	
Schenectady Roberts, *et al*,	)	
Defendants.	)	

After oral argument on November 22, 2011, the court makes the following rulings dispositive of the attorney's fees issues:

I. **Ruling on Schenectady Roberts and Pacific Rim Brokers, Inc., Motion for Attorney's Fees.**

Defendants Schenectady Raney (f/n/a Schenectady Roberts) and Pacific Rim Brokers, Inc., move the court for an award of attorney's fees following their successful defense of all claims. The defendants argue that the plain language of the Vacant Land Purchase and Sale Agreement (VLPSA)

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applies to this case and requires the court to award fees to the prevailing party. The plaintiffs concede that the defendants were the prevailing parties, but argue that since the claims against the defendants were based in tort and not contract, it is inappropriate to base an award on the VLPSA, and that therefore no award of fees should be given.

Defendants are asking for a total of $258,816.50 in fees and an additional $11,101.58 in costs. The attorney's fees clause in the VLSPA between the Klosters and Ms. Raney appears to support the award. It says in relevant part:

> ATTORNEY'S FEES/COSTS AND MEDIATION. If the Buyer, Seller, or any real estate licensee or broker involved in this transaction is involved in any dispute relating to this transaction, any prevailing party shall recover reasonable attorneys' fees and costs (including those for appeals) which relate to the dispute.

Emphasis added by court.

This clause (paragraph 16 of the VLPSA) is also cited in the plaintiffs' complaint, in paragraph 26 of their first cause of action ("Negligent Misrepresentation and/or Concealment Against all Defendants"). In fact, the plaintiffs pled, "Pursuant to this clause, the KLOSTERS are entitled to, and demand, the benefit thereof and request an award of their legal fees, costs and expenses incurred in connection herewith according to proof at trial."

The issues before the court are 1) whether the actions against the defendants were in tort, exclusively, so that the terms of the VLPSA do not apply and, 2) if the action sounds partially in contract, thereby triggering the VLPSA, are the fees reasonable under a Lodestar analysis.

It is beyond dispute that the plaintiffs' causes of action which survived to jury trial—negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment—arose out of the VLSPA which was the initial legal document that gave birth to the entire lawsuit. But for the VLSPA, there would have been no action; the torts alleged were "on the contract" because they arose out of the parties' agreement to transfer ownership of the property. The contract was the cornerstone upon which the entire lawsuit was built.

The broad language of the VLSPA clearly contemplates an award of fees to the prevailing party for *any dispute* relating to the transaction. The Plaintiffs concede that the defendants are the prevailing parties. Therefore reasonable fees must be awarded.

The plaintiffs filed no papers objecting to the reasonableness of the fees and costs asserted by the defendants. The court finds the methodology and analysis of defendants' counsel in application of the lodestar method to be correct—in fact, the very model of how it should be done.

The defendants have shown and the court finds the rate charged by counsel was substantially below market.

The plaintiffs filed this case in 2005. Staring down the barrel of the VLPSA attorney's fees clause (which, as noted, they included in their complaint), the plaintiffs made a series of strategic decisions, with able counsel, which forced defendants to (expensively) defend. It should be recalled that the defendants were originally sued in an expansive complaint for everything they were worth. They had to defend. As it turned out, many of the original causes of action had no basis in fact and, of course, the jury dealt the final death blow to the plaintiffs' action. Nevertheless, all matters were hotly contested—every single issue was the subject of briefing and argument, which demanded defense. For a piece of property worth $38,000 (which the plaintiffs believe has no value), and a $9,000 "fix", it was expensive litigation, and the hours expended were reasonable.

Total fees awarded to defendants: $258,816.50. Total costs: $11,101.58.

The court's Findings of Fact and Conclusions of Law and Judgment are attached to this ruling, and will be entered 30 days from this date (no later than (12/23/11) unless an objection is timely filed with the court. A hearing on objections and to settle the final record shall be limited to 30 minutes, and counsel may appear telephonically. No motions for reconsideration will be entertained.

II. Ruling on First American's Proposed Judgment on Verdict and Plaintiffs' Motion for Judgment against First American.

In a close question, the court has consistently found that the plaintiffs have coverage under First American's title policy. At trial, the jury was instructed that the court had found access coverage based upon an ambiguity in the policy as a whole. The jury announced a verdict of $9,000 as a "cost of cure," and the narrow question before the court is whether "coverage" includes that amount. If it does, then Mr. Striker has an argument for his fees; if not, plaintiffs take nothing from First American.

First American argues the title insurance policy's insuring clauses are invoked on loss or damage to the insured from the existence of a listed title defect. Since the jury found there was no difference in the value of the plaintiffs' property as insured and as subject to defect, the plaintiffs failed to establish a claim for loss. In other words, the "cost of cure"—which the jury found to be $9,000—never did apply to the plaintiffs' claim for access coverage.

This question must be resolved in favor of the plaintiffs. A contract of indemnity insures against actual loss from the existence of a title defect. Although the "cost of cure" was linked to the Pacific Rim jury instruction on liability, the jury found the plaintiffs suffered a real, actual loss. That loss was directly attributable to the defective title, for which there was coverage. The plaintiffs had to sue for coverage. Mr. Striker gets reasonable fees related to the coverage issues, and the plaintiffs take a judgment for $9,000.

Mr. Courser requested review of fees in his papers, and it is anticipated that he will note this on the December 20th civil calendar for a hearing on objections to Mr. Striker's fees and to settle the final record. [1] Mr. Striker is to be prepared on the following concerns: "that his declarations fail to specify time entries asserted against First American, and the claimed costs include block billing, time spent of unsuccessful motions, vague entries, and time spent in mediation." If there is to be discussion as to pre-judgment interest, that will be the time to do it. Argument shall be limited to 30 minutes, and counsel may appear telephonically. No motions for reconsideration will be entertained.

[1] The Court Administrator informs me that 12:00 is a good time.

This ruling will be filed this date. So ordered.

November 23, 2011

Brian Altman, Judge

Appendix F

Findings of Fact, Conclusions of Law and Order Granting Klosters' Motion for Judgment, Award of Attorney Fees and Expenses Against First American and Granting First American's Motion For Judgment of Costs

(dated 2/1/12) (CP 4451)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KLICKITAT

ORIGINAL

THELMA, KARL, LORI and KARIN KLOSTER, Plaintiffs, vs. SCHENECTADY ROBERTS; et al.; Defendants.	No. 05 2 00108-4 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING KLOSTERS' MOTION FOR JUDGMENT, AWARD OF ATTORNEY FEES AND EXPENSES AGAINST DEFENDANT FIRST AMERICAN TITLE INSURANCE COMPANY AND GRANTING DEFENDANT FIRST AMERICAN TITLE INSURANCE COMPANY'S MOTION FOR JUDGMENT OF COSTS**

THIS MATTER having come before the Court on November 22, 2011, on the motion of Plaintiffs THELMA, KARL, LORI and KARIN KLOSTER ("KLOSTERS") for judgment against Defendant FIRST AMERICAN TITLE INSURANCE COMPANY ("FIRST AMERICAN") and an award of their attorney fees and expenses and on the cross-motion of FIRST AMERICAN for judgment of its costs against the KLOSTERS; and

THE COURT having reviewed the moving and opposing papers and having heard the evidence presented during trial and the arguments of counsel; and

THE COURT having issued and filed its written ruling on November 23, 2011, granting the KLOSTERS' motion for judgment against FIRST AMERICAN and awarding the KLOSTERS' attorney fees and expenses and

granting FIRST AMERICAN's cross-motion for judgment of its costs against the KLOSTERS; and

THE COURT being fully advised in the premises, now, the Court hereby enters the following findings of fact, conclusions of law, and order.

I. FINDINGS OF FACT

1. The jury's verdict found a "cost of cure" for the non-recorded access easements of $9,000.00, a real, actual loss.

2. The "cost of cure" is a covered loss under FIRST AMERICAN's title policy issued to the KLOSTERS because the title policy is a contract of indemnity which insures against actual loss from the existence of a title defect.

3. The Defendants collectively made a valid CR 68 offer which expired on January 21, 2008, which the KLOSTERS did not accept.

4. The KLOSTERS are entitled to attorney fees and costs incurred under Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 52 - 53, (1991), for litigating coverage matters up to January 21, 2008, the date the CR 68 offer expired.

5. FIRST AMERICAN is entitled to recover its costs incurred after January 21, 2008, the date the CR 68 offer expired, in the sum of $796.65.

6. The hard thing for the court to determine and the area where the court spent several hours on was how to sort through Mr. Stryker's submissions and come up with a reasonable basis for awarding earned fees where the court wasn't just guessing. And Mr. Courser did an admirable job on showing show difficult that is. The court is not allowed to speculate.

After viewing Mr. Courser's submissions, it's clear that FIRST

AMERICAN's position is that with all these flaws in the way that that these bills were submitted, that taking almost any of the theories, that Mr. Stryker can't be awarded any fees because the court has no basis to award them. Again, the court has narrowed this down to not awarding fees for unsuccessful motions, the torts that didn't succeed, the Consumer Protection Act that didn't succeed, the mediation that occurred, block billing that was indecipherable to the court cannot succeed, and then the overall determination, of course, the global view of how much they asked for, a million dollars versus how much they got, and in addition to ultimately not adopting the plaintiffs' theory.

In that context, the court went through both Mr. Stryker's and Mr. Courser's version of Mr. Stryker's fees line by line, block by block, and the court found what the court believes to be a number of hours that are not reasonably subject to speculation, that were coverage or intermingled with AMERI-TITLE issues in a way that cannot be appropriately segregated, and the court doesn't believe have to be, but that were clearly not related to the PACIFIC RIM issues nor any of these unsuccessful motions.

Naturally, the submissions made it very difficult to do that with any absolute accuracy. Nevertheless, the court has a number of hours that the court is confident reasonably approach what the KLOSTERS had to pay for coverage up until the date in 2008, and that is 168 hours. 168 hours was spent on coverage. The court is using its calculator right now to double check the court's math. That's $25,200.00. $25,200 is the award of fees to Mr. Stryker under Olympic Steamship.

The court agrees with Mr. Courser's position on the costs and the costs to Mr. Stryker's clients will be $314. After sorting through the KLOSTERS' attorney time and cost entries, the Court has identified 168

hours of attorney's time expended on coverage matters and $314.00 in costs.

7. The reasonable value of such attorney's time is $25,200.00.

8. FIRST AMERICAN's costs will be off-set against the KLOSTERS' judgment for "costs of cure," attorney fees and costs.

II. CONCLUSIONS OF LAW

1. The KLOSTERS have coverage under FIRST AMERICAN's title policy issued to them for the non-recorded access easements for which the jury found $9,000.00 as a "cost of cure."

2. The KLOSTERS are entitled to judgment against FIRST AMERICAN for the "cost of cure" of $9,000.00 as found by the jury.

3. The KLOSTERS expended 168 hours of attorney's time litigating coverage issues of the reasonable value of $25,200.00 and incurred $314.00 in costs litigating coverage issues which the KLOSTERS are entitled to recover against FIRST AMERICAN pursuant to Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 52 - 53, (1991).

4. FIRST AMERICAN is entitled to its costs of $796.65 incurred after January 21, 2008, the date the CR 68 offer expired.

III. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered that Plaintiffs the KLOSTERS' motion for judgment against Defendant FIRST AMERICAN and an award of their attorney fees and expenses is hereby GRANTED; and

It is hereby further ordered that Defendant FIRST AMERICAN's motion for judgment of its costs against Plaintiffs the KLOSTERS is hereby granted; and

It is hereby further ordered that judgment be entered in favor of Plaintiffs the KLOSTERS and against Defendant FIRST AMERICAN in the

total sum of $33,715.35 which consists of the jury's finding of a "cost of cure" in the sum of $9,000.00; a reasonable attorney fee of $25,200.00 and reasonable expenses of $314.00; less the judgment of Defendant FIRST AMERICAN for costs of $796.65.

Dated: January 1, 2012

FEB

The Hon. Brian Altman
Judge of the Klickitat County Superior Court

Approved As To Form:

D. Jeffrey Courser, Esq.
Stoel Rives, LLP
WSBA No. 15466

D Jeffrey Courser WSB # 15466

Attorney for Defendant FIRST AMERICAN TITLE INSURANCE COMPANY

Appendix G

Judgment Against
First American Title Insurance Co.

(dated 2/1/12) (CP 4449)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KLICKITAT

THELMA, KARL, LORI and KARIN KLOSTER, Plaintiffs, vs. SCHENECTADY ROBERTS; et al.; Defendants.	No. 05 2 00108-4 **JUDGMENT AGAINST DEFENDANT FIRST AMERICAN TITLE INSURANCE COMPANY**

ORIGINAL

I. JUDGMENT SUMMARY

Judgment Creditors: Thelma, Karl, Lori and Karen Kloster

Judgment Creditors' Attorney: Lance S. Stryker, Esq.

Judgment Debtor: First American Title Insurance Company

Judgment Debtor's Attorney: D. Jeffrey Courser, Esq., of Stoel Rives LLP;

Principal Judgment Amount: **$33,715.35**

Interest Rate pursuant to RCW § 4.56.110: **5.25%**

II. JUDGMENT

Based upon the findings of fact and conclusions of law entered by this Court which provide that Plaintiffs Thelma, Karl, Lori and Karin

LANCE S. STRYKER, ESQ.
40 PALOS VERDES, WHITE SALMON, WA 98672
TELEPHONE: 509/493-2007

Kloster are awarded the sum of $34,512.00 for "costs of cure" and reasonable attorney fees and costs, offset by the award of costs to Defendant First American Title Insurance Company in the sum of $796.65, now it is therefore

ORDERED, ADJUDGED AND DECREED that Thelma, Karl, Lori and Karin Kloster shall have judgment against Defendant First American Title Insurance Company in the amount of $33,715.65. The judgment amount shall bear interest pursuant to RCW § 4.56.110 at 5.25%.

DONE IN OPEN COURT this 14th day of ~~January~~ Feb, 2012.

The Hon. Brian Altman
Judge of the Klickitat County Superior Court

Form Of Judgment Presented By:

Lance S. Stryker, Esq.
WSBA No. 35005

Lance S. Stryker

Attorney for Plaintiffs THELMA, KARL, LORI and KARIN KLOSTER

LANCE S. STRYKER, ESQ.
40 PALOS VERDES, WHITE SALMON, WA 98672
TELEPHONE: [illegible]

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **BRIEF OF RESPONDENTS/CROSS-APPELLANT** on the following named person(s) on the date indicated below by

- ☐ mailing with postage prepaid
- ☐ hand delivery
- ☐ facsimile transmission
- ☒ overnight delivery

to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

Lance Stewart Stryker
40 Palos Verde
White Salmon WA 98672-8941

Attorney for Plaintiffs Thelma, Karl, Lori and Karin Kloster

Jeffrey P. Downer
Christine Slattery
Lee Smart, P.S., Inc.
701 Pike Street, Suite 1800
Seattle WA 98101-3929

Attorneys for Defendant Pacific Rim Brokers, Inc.

L. Eugene Hanson, Jr.
Hanson Law Office
111 N. Grant Street
Goldendale WA 98620

Attorney for Defendant Alvin Fred Heany, Jr.

I also hereby certify that I caused the original to be filed with the appellate court clerk, by mailing the same via Federal Express overnight delivery to the following:

Washington State Court of Appeals
Division III
500 N. Cedar Street
Spokane WA 99201
Attention: Court Clerk

DATED: September 14, 2012

D. Jeffrey Courser, WSB No. 15466
Of Attorneys for Defendants First American Title Insurance Company and AmeriTitle, Inc