

IN THE SUPREME COURT
STATE OF ARIZONA

CENTERPOINT MECHANIC LIEN
CLAIMS, LLC,

Respondent/Cross-Petitioner,

v.

COMMONWEALTH LAND TITLE
INSURANCE COMPANY,

Petitioner/Cross-Respondent.

No. CV-23-0164-PR

Arizona Court of Appeals
No. 1 CA-CV 21-0039

Maricopa County Superior Court
No. CV2011-008600

**RESPONDENT AND CROSS-PETITIONER CENTERPOINT MECHANIC
LIEN CLAIMS, LCC'S SUPPLEMENTAL BRIEF**

Richard M. Lorenzen (#006787)
RMLaw/PC
2920 East Camelback Road, Suite 230
Phoenix, Arizona 85016
Telephone: +1.602.550.1252
RMLorenzen@rmlaw.ltd

*Attorney for Respondent/Cross-Petitioner,
Centerpoint Mechanic Lien Claims, LLC*

June 27, 2024

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
ARGUMENT	4
I. DAMAGE AND LIABILITY ISSUES ARE PRECLUDED IN THE COVERAGE PHASE OF <i>MORRIS</i> LITIGATION.....	4
A. A Double Bite at Escaping Liability Is Prohibited.	4
B. The Fact of Loss Was Actually Litigated and Determined in the Reasonableness Action.	6
II. THE INSUREDS SUFFERED TORT DAMAGES.	9
III. THE COURT OF APPEALS’ RULING ON THE COLLATERAL SOURCE RULE SHOULD BE REVERSED.	12
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Associated Aviation Underwriters v. Wood</i> , 209 Ariz. 137 (App. 2005)	4, 5, 6
<i>Blackhawk Prod. Credit Ass'n v. Chi. Title Ins. Co.</i> , 423 N.W.2d 521 (Wis. 1988)	18
<i>Cale v. Transamerica Title Ins.</i> , 225 Cal. App. 3d (1990)	19
<i>Campbell v. SZL Props. Ltd.</i> , 204 Ariz. 221 (App. 2003)	7
<i>Crowley v. Trust Co. Bank, N.A.</i> , 466 S.E.2d 24 (Ga. Ct. App. 1995)	17
<i>Falmouth Nat'l. Bank v. Ticor Title Ins. Co.</i> , 920 f2d 1058 (1st Cir. 1990)	19
<i>FDIC v. United Pac. Ins. Co.</i> , 20 F.3d 1070 (10th Cir. 1994)	13, 14
<i>First Am. Title Ins. Co. v. Johnson Bank</i> , 239 Ariz. 348 (2016)	19
<i>Flagstar Bank v. First Citizens Bank & Trust Co.</i> , No. 3:09-876-CMC, 2010 WL 2867289 (D.S.C. July 20, 2010)	16
<i>Green v. Evesham Corp.</i> , 430 A.2d 944 (N.J. App. 1981)	18
<i>Hutchins v. Michael Young</i> , No. 2018 CV 30022, 2018 Colo. Dist. LEXIS 3723 (Colo. Dist. Ct. Nov. 7, 2018)	16, 17
<i>John Munic Enters., Inc. v. Laos</i> , 235 Ariz. 12	13, 14, 15

TABLE OF AUTHORITIES (continued)

	Page(s)
<i>Leprino Foods Co. v. Factory Mut. Ins. Co.</i> , 653 F.3d 1121 (10th Cir. 2011).....	13
<i>Quihuis v. State Farm Mut. Auto. Ins. Co.</i> , 235 Ariz. 536 (2014).....	4, 5, 6
<i>Rawlings v. Apodaca</i> , 151 Ariz. 149 (1986).....	11
<i>Twin Cities Metro-Certified Development Co. v. Stewart Title Guaranty Co.</i> , 868 N.W.2d 713 (Minn. App. 2015).....	19
<i>United Services Auto. Ass’n v. Morris</i> , 154 Ariz. 113 (1987) (<i>Morris</i>)	passim
STATUTES	
A.R.S. § 12-341.01(A)	20

INTRODUCTION

Commonwealth's outrageous bad faith conduct wiped out \$19.5 million in value that its insureds (Universal and VRCP) would indisputably have recovered under their deeds of trust that Commonwealth insured in first and second priority positions. Commonwealth's endless quest to escape liability for those actions based on an argument that its insureds suffered no loss is in vain, because that argument is precluded on several grounds, and—in any event—is contrary to the facts, and to controlling law (as conceded in Commonwealth's Claims Handbook).

As to Commonwealth's first issue (discussed in Section I below), the Court of Appeals' ruling on coverage should be affirmed. Commonwealth is precluded here from litigating the existence or extent of economic harm suffered by its insureds (whether characterized as "liability" or, as in this case, "loss or damage"). Litigation regarding any such issues was permissible only in a separate case (the "Reasonableness Action"), which was concluded in 2012 by a final judgment (the "*Morris* Judgment"). Any dispute about the existence or extent of the insureds' losses or damages under their title policies is fully subsumed in the *Morris* Judgment.

Commonwealth is also precluded here from claiming that the insureds did not suffer at least \$5 million in losses under each title policy (plus interest), and/or that payments to VRCP's partners, and to Universal, in connection with the settlements

(“Settlement Payments”), constituted repayments on their loans. Those arguments were actually litigated in the Reasonableness Action and so are foreclosed here.¹

Commonwealth’s argument as to its second issue (discussed in Section II below), regarding diminution in value tort damages, is also unavailing. Initially, as noted above, Commonwealth is precluded from claiming that VRCP’s loan was repaid. The fact that Universal’s loan was ultimately repaid is irrelevant to its right to recover tort damages for diminution in value of its insured deed of trust, because all payments in question were from different borrowers, under separate deeds of trust against properties other than Centerpoint that were not insured under its title policy.²

The collateral source rule (discussed in Section III below) further precludes Commonwealth’s “no loss” argument. The collateral source rule bars evidence of all payments in question, because all of them came from sources wholly independent of Commonwealth after its bad faith conduct and resulting damages.

Apart from ignoring the preclusive effect of the *Morris* Judgment, Commonwealth misleadingly seeks to distract from the true measure of loss under a lender’s title policy. The relevant question of whether such a loss has occurred is not—as Commonwealth pretends—whether a loan secured by an insured mortgage

¹ Since there are no alleged payments to VRCP other than Settlement Payments, Commonwealth is thus also precluded from arguing that VRCP’s loan was repaid.

² Universal and VRCP are, as discussed below, also entitled to additional tort damages for unpaid benefits of their title policies, plus interest.

is ever repaid (or capable of being repaid) from a source other than the insured mortgage. The question under controlling law—as Commonwealth concedes in its Claims Handbook—is whether the value of the insured mortgage was diminished by an insured title defect, calculated *as of the date such loss becomes fixed*.³ Commonwealth improperly seeks to transform its primary title insurance covering the validity and priority of a mortgage into some kind of attenuated insurance of the loan, under which the insured must prove that it will never be able to collect the loan from any source(s). That argument should therefore be rejected for all purposes.

For the last thirteen years, Commonwealth has relentlessly pursued this litigation, based on: (1) legal arguments that conflict with controlling law, logic, and its internal teachings; and (2) factual arguments that conflict with the uncontroverted evidence. Why? In 2011, and despite admittedly having no defenses to coverage, Commonwealth made the entirely self-serving, bad faith business decision to refuse coverage and settlement so that—as the Court of Appeals found (at ¶ 63)—the insureds’ resulting settlement might enable Commonwealth to “manufacture defenses against Universal and VRCP and/or a more favorable settlement position,”

³ CMLC’s Response to Petition for Review (“CMLC’s Response”) at 8-11. As confirmed in Commonwealth’s Claims Handbook, a lender’s title policy “does not insure that the loan will be repaid,” but instead “insures the validity and priority of the mortgage itself.” Supplemental Appendix to CMLC’s Reply Brief at SS-APP576.

in protracted and expensive litigation. Commonwealth's current arguments and positions represent an unboken continuation of that same strategy, and its strategic decision to embark on a protracted campaign of bad faith to avoid being held accountable for its actions should not be rewarded by this Court.

ARGUMENT

I. DAMAGE AND LIABILITY ISSUES ARE PRECLUDED IN THE COVERAGE PHASE OF *MORRIS* LITIGATION.

A. A Double Bite at Escaping Liability Is Prohibited.

A judgment approving the reasonableness of an insured's stipulations and settlement under *United Services Auto. Ass'n v. Morris*, 154 Ariz. 113 (1987) (*Morris*) subsumes all facts and issues relating to the *measure* of the insurer's indemnity obligation, including the existence and extent of the insured's damages. To prevent an insurer from being allowed "a double bite at escaping liability," *Morris* prohibits litigation concerning liability and damages in the coverage phase. *Morris*, 154 Ariz. at 118. Under *Morris*, "liability related issues are not pertinent to coverage, but rather only to the separate question of whether the *Morris* agreement is reasonable and prudent." *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 143 ¶ 3 (App. 2005). *See also, Quihuis v. State Farm Mut. Auto. Ins. Co.*, 235

Ariz. 536, 542 ¶ 16 (2014) (in the coverage phase, insurers are precluded from challenging the “existence and extent” of the insured’s damages).⁴

The trial court ruled in favor of Commonwealth on coverage pursuant to Condition 8(a)(ii) of Commonwealth’s title policies, which is not a policy exclusion. Instead, Condition 8(a)(ii) quantifies Commonwealth’s indemnity liability for diminution in value losses that *are covered*, calculated as of the date such losses are fixed under applicable law.⁵ Commonwealth’s purported defense based on Condition 8(a)(ii) was therefore precluded here. *See Wood*, 209 Ariz. at 150 ¶ 37 (App. 2005): “*Morris* does not authorize, but rather essentially prohibits, an insurer’s attempt in [coverage litigation] to litigate liability and damage issues in the guise of a coverage defense.” *See also Quihuis*, 235 Ariz. at 538 ¶ 2 (same).

Although Commonwealth now seeks to invoke Exclusion 3(c) as a coverage defense, that argument was not raised below and so is waived.⁶ Regardless, any purported defense under Exclusion 3(c)—which excludes coverage if an insured suffers no loss or damage—is precluded here because Exclusion 3(c) involves no facts or issues other than the existence and extent of losses or damages. As this Court

⁴ These holdings are based on significant policy considerations that also apply here. *Wood*, 209 Ariz. at 152-54, ¶¶ 48-52.

⁵ The amount of the secured indebtedness *on that date* is relevant to determining the amount of Commonwealth’s indemnification liability under its title policies.

⁶ CMLC’s Response at 8-9.

held in *Quihuis*, only a “pure coverage issue”—meaning one of a type that does not seek to litigate the “existence or extent” of the insured’s damages, or to claim that no such damages exist—may be litigated in the coverage phase. *Quihuis*, 235 Ariz. at 542 ¶ 41.⁷ As further recognized in *Wood*, 209 Ariz. at 151, ¶ 41 (citation omitted): “[P]urported coverage issues that are either identical to or directly overlap with essential liability questions in the underlying tort case indeed are ‘precluded or foreclosed’ in the DRA coverage trial.” Under these authorities, any argument under Exclusion 3(c) is thus precluded in this case.⁸

B. The Fact of Loss Was Actually Litigated and Determined in the Reasonableness Action.

Commonwealth intervened in the Reasonableness Action, and actively opposed approval of the insureds’ settlements. As discussed below, Commonwealth made the same “no loss” arguments there—including that the Settlement Payments constituted loan repayments—and the trial court correctly rejected such arguments.

The doctrine of issue preclusion forecloses relitigation of an issue when: “(1) the issue was actually litigated in the previous proceeding, (2) the parties had a

⁷ *Quihuis* also recognizes that: “The *Wood* case illustrates the boundaries *Morris* set for insurers in contesting coverage”; and that *Wood* “precludes an insurer from litigating not only the fact of liability, but also those issues that ‘relate[e] strictly to liability and damages [and not] coverage.’” *Id.* at 541 ¶¶ 13, 14 (citation omitted).

⁸ Such purported defense would fail, in any event, because the insureds did suffer compensable losses. CMLC’s Response at 8-11. CMLC is also entitled to judgment on coverage under several additional grounds. CMLC’s Response at 13-15.

full and fair opportunity and motive to litigate the issue, (3) a valid and final decision on the merits was entered, (4) a resolution of the issue was essential to the decision, and (5) there is common identity of the parties.” *Campbell v. SZL Props. Ltd.*, 204 Ariz. 221, 223 (App. 2003). As discussed below, all of those requirements regarding Commonwealth’s purported “no loss” argument were plainly met in the Reasonableness Action and are thus foreclosed by the *Morris* Judgment.⁹

In the Reasonableness Action (and again below) Commonwealth argued: “Each of the policies issued respectively to Universal and VRCP contained provisions excluding coverage: (a) where the indebtedness owed to the insured is paid in full. . . .”¹⁰ Commonwealth argued that Universal thus purportedly suffered no loss because its loan was repaid (including by the Settlement Payments).¹¹

In the Reasonableness Action (and again below) Commonwealth argued that VRCP’s loan was repaid, based solely on its contention that payments to VRCP’s partners for the sale of their ownership interests in VRCP should be treated as loan repayments to VRCP. Commonwealth contended that the sales of partnership interests in VRCP were an unreasonable “sham” or “ruse” because they were

⁹ In granting summary judgment in favor of Commonwealth on coverage, the trial court rejected CMLC’s issue preclusion/collateral estoppel argument. The Court of Appeals elected (at ¶ 52) not to reach that argument, among others.

¹⁰ Amended Electronic Index of Record (“IR”) 295 at Ex. 1 fn. 8.

¹¹ IR 275 at 4 ¶ 2.

designed to preserve a claim against Commonwealth under its title policies, and so should be disregarded and recharacterized as loan repayments.¹²

The trial court in the Reasonableness Action rejected Commonwealth's arguments. It found that there was nothing improper about the sale of VRCP partnership interests, and that the insureds' transactions in connection with the settlements were reasonable in all respects. The trial court further found that one of the conditions of the settlements was that sales proceeds from Centerpoint could not be used to pay Universal or VRCP's loans.¹³ The court then entered the *Morris* Judgment, finding that Commonwealth is bound by the fact and amount of \$5 million in damages under each title policy, thereby rejecting and foreclosing Commonwealth's argument that its insureds suffered no losses.

In its September 2013 ruling, on CMLC's first motion for summary judgment regarding coverage, the trial court found that the *Morris* Judgment precluded

¹² IR 288 at 9-10. In its Response to Cross-Petition for Review ("Commonwealth's Response") Commonwealth now claims (at 9) that "VRCP received \$5.9 million from the sale." This is an unsupported assertion. In the very testimony cited by Commonwealth (at 9), Mr. Reeb testified unequivocally that the payments were "to the owners of VRCP Funding in exchange for purchase of their ownership interests in VRCP Funding." 12/2/19 trial transcript at 12:4-6. Mr. Reeb also testified that VRCP itself did not receive any money. 12/2/19 trial transcript at 229:18. *See also* IR 759. Based on the record, including the foregoing, Commonwealth's representations regarding VRCP (including at 3 and 10 of its Response) that it is supposedly "undisputed" that VRCP received "full repayment" of its loan, and that "no one disputes" that VRCP's loan was "fully repaid," are blatant falsehoods.

¹³ IR 759 at 5, citing Ex. F at ¶ 41.

Commonwealth's "no loss" argument and other purported coverage defenses. The court held, accordingly, that such purported defenses were precluded unless the *Morris* Judgment was reversed as to Commonwealth on appeal (which it was not).¹⁴

But, after substitution of a new judge, the trial court reversed course and, contrary to the authorities discussed above, granted summary judgment to Commonwealth on coverage based on the same "no loss" argument that had been rejected in the Reasonableness Action.¹⁵ The trial court thus impermissibly treated the Reasonableness Action as some sort of meaningless dress rehearsal for the coverage litigation below, and rendered the *Morris* Judgment superfluous.

Commonwealth's "no loss" argument is precluded in this case under *Morris* and its progeny. Even if that were not the case, that argument is precluded under general principles of issue preclusion, because it was litigated and rejected in the Reasonableness Action.

II. THE INSUREDS SUFFERED TORT DAMAGES.

For purposes of its second issue, regarding the insureds' diminution in value tort damages, the scope of Commonwealth's argument must be limited to whether

¹⁴ IR 227 at 2. To clarify the record (CMLC's Response at 12), CMLC notes that Commonwealth did argue in opposition to that motion for summary judgment that *Morris* does not apply to "first-party" title insurance. In any event, as explained in CMLC's Response (at 12-13), that argument is contrary to existing Arizona precedent, and is in any event foreclosed in this case by the *Morris* Judgment.

¹⁵ IR 377 at 5-6.

the fact that Universal's loan was ultimately repaid bars Universal's pecuniary tort damages for the diminution in value of its deed of trust against Centerpoint.¹⁶ That argument plainly fails, because Universal's loan was repaid by different borrowers under separate deeds of trust against properties other than Centerpoint that were not insured under its title policy. Those payments are thus irrelevant to the amount of the diminution in value of Universal's deed of trust against Centerpoint.

The trial court correctly found that tort damages for diminution in value of the insured deeds of trust were allowable as "pecuniary damages" under Arizona law.¹⁷ But the trial court erred by allowing Commonwealth to argue at trial that there was purportedly no loss based on subsequent payments from sources other than the deeds of trust. Such argument conflicted with the trial court's ruling regarding the allowability of diminution in value pecuniary damages, was barred as set forth above, irrelevant, and likely confusing for the jury.¹⁸

¹⁶ As discussed above, Commonwealth is precluded from arguing that VRCP's loan was repaid, and/or that the Settlement Payments constituted loan repayments. Such payments did not, in any event, operate to reduce the relevant diminution in value.

¹⁷ IR 676 at 4. The Court of Appeals did not disturb that ruling, and Commonwealth has not directly challenged or sought review of that ruling here.

¹⁸ Commonwealth should accordingly be prohibited in any future proceedings on diminution in value tort damages requested in CMLC's Cross-Petition from arguing that VRCP's or Universal's loans were repaid by Settlement Payments, and/or by subsequent payments to Universal.

The diminution in value of a deed of trust resulting from a title insurer's bad faith conduct constitutes a quantifiable damage to a tangible interest in real property that is expressly insured under the title policy. Contrary to Commonwealth's glib, unsupported assertion that a deed of trust has no intrinsic value (*e.g.*, Petition at 5), the reality is otherwise, as demonstrated by the fact that secured mortgages are bought and sold all the time, and packaged together in securitizations that enable sales of fractional interests in such instruments.¹⁹

At the time of Commonwealth's breach, the insured deeds of trust here were worth \$19.5 million, if they had just been in first and second priority *as insured*. But Commonwealth's bad faith refusal to cover or settle the \$38 million of mechanics' liens that it knowingly insured against rendered those deeds of trust worthless. As discussed above, that resulting diminution in value is inseparable from Commonwealth's bad faith, because that harm is what deprived the insureds of "the very protection or security which [they] sought to gain by buying insurance." *Rawlings v. Apodaca*, 151 Ariz. 149, at 157 (1986).

Apart from diminution in value damages, the trial court below expressly prohibited CMLC—based solely on its erroneous ruling in Commonwealth's favor

¹⁹ As discussed above, this fact is also confirmed by controlling Arizona law that the diminution in the value of an insured deed of trust resulting from title defects is what results in a loss under a lender's title policy. CMLC's Response at 8-11.

on coverage—from recovering tort damages equal to \$5 million plus prejudgment interest for unpaid benefits of the policies.²⁰ Given the Court of Appeals’ reversal of the trial court’s ruling on coverage, CMLC is now entitled to such additional tort damages.²¹ There is accordingly no basis for any argument that the insureds did not suffer tort damages, and the trial court should be instructed on remand to enter judgment in CMLC’s favor for such additional tort damages.

III. THE COURT OF APPEALS’ RULING ON THE COLLATERAL SOURCE RULE SHOULD BE REVERSED.

Arizona’s collateral source rule is clear and applicable here.²² Commonwealth’s tortious conduct destroyed \$19.5 million in the value of the insured deeds of trust, and all payments in question came after those damages had occurred, from sources who were wholly independent of Commonwealth.

The Court of Appeals erred by relying (at ¶ 57) on two out of state cases to conclude that the collateral source rule is inapplicable here. The holdings of both cases contravene controlling Arizona precedent, and in relying on such cases the Court of Appeals disregarded that insurance bad faith is a tort.

²⁰ IR 676 at 4. Unpaid benefits of the policies constitute bad faith damages, as Commonwealth acknowledges in its Response (at 5).

²¹ Given that ruling, the Court of Appeals should not have entertained (at ¶ 75) Commonwealth’s argument that the insureds suffered no tort damages.

²² Cross-Petition at 7-11.

In *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 653 F.3d 1121 (10th Cir. 2011) the plaintiff sued its insurer, seeking coverage for damage to property stored in a warehouse. The plaintiff also sued the warehouse owner in tort for such damages, and settled the tort claim. The court ruled that the collateral source rule did not bar evidence of the tort settlement in the plaintiff's contract action against the insurer.

Leprino noted that the collateral source rule typically prevents “a victim’s insurance proceeds from reducing the tortfeasor’s liability,” and stated: “Here, *Leprino* seeks to invert the [collateral source] rule so that a recovery from the tortfeasor does not reduce the amount the victim’s insurer must pay under the insurance policy.” *Id.* at 1135-36. Contrary to the Court of Appeals’ statement (at ¶ 57), CMLC is not seeking such an “inverted application of the rule.” Instead, CMLC is arguing—in a straightforward application of the collateral source rule—that evidence of payments from payors wholly independent of the tortfeasor (Commonwealth) is inadmissible to reduce Commonwealth’s tort liability.²³

The Court of Appeals’ reliance on *FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070 (10th Cir. 1994) was similarly misplaced. As in *Leprino*, the issue in *FDIC* was whether the collateral source rule barred evidence of the plaintiff’s settlement of a

²³ *Leprino* also held (at 1136), contrary to Arizona law, that Colorado’s collateral source rule does not apply to evidence of settlement payments. *See, e.g., John Munic Enters., Inc. v. Laos*, 235 Ariz. 12, at 20 ¶ 26 (citation omitted) (a tortfeasor may not “reap the benefit of a settlement to which [it was] not a party”).

tort claim in a breach of contract action against an insurance company. Again, CMLC's claim here was for the tort of bad faith, not breach of contract.²⁴

The Court of Appeals' opinion also misconstrues CMLC's position regarding this issue. In particular, the Court of Appeals states (at ¶ 54) that: "CMLC argues that. . . the court erred in admitting evidence of loan repayments made to Universal and VRCP by their borrowers."²⁵ That is contrary to what CMLC has always argued, both with regard to (1) the Settlement Payments (which were not loan repayments), and (2) the borrowers who made loan repayments to Universal following the settlements and sale of Centerpoint (who were not ML Investors).

First, as discussed above, CMLC has always argued that the Settlement Payments—as shown by the record—were not loan repayments but rather were for the purchase of the VRCP partnership interests (to acquire VRCP's claims against

²⁴ Further, in ruling that the collateral source rule did not bar evidence of tort recoveries in that breach of contract case, *FDIC* held: "It is a fundamental legal principle that an injured party is ordinarily entitled to only one satisfaction for each injury." *Id.* at 1082 (citation omitted). In contrast, under Arizona law, even when there is such a double recovery—which would not occur here—such a result is "better than the defendant 'escap[ing] liability altogether.'" *Munic*, 235 Ariz. at 19, ¶ 21. *FDIC* also held, again contrary to Arizona law, that Utah's collateral source rule does not apply to settlement payments. *Id.* at 1083. Finally, *FDIC* noted that Utah's collateral source rule (unlike Arizona's) is extremely limited and applicable only to insurance proceeds. *Id.*

²⁵ By "borrowers" the Court of Appeals was apparently mistakenly referring to Centerpoint's owners (who it defined as "ML Investors"), as it states later in the opinion (at ¶ 56) that all "payments in question were made by the ML Investors." That statement, as discussed below, is incorrect.

Commonwealth), and for the purchase of Universal’s claims against Commonwealth. Moreover, as discussed above, Commonwealth is barred from arguing to the contrary. The collateral source rule thus applies to the Settlement Payments.²⁶

Second, CMLC has also always argued that all loan repayments to Universal following the settlements and sale of Centerpoint were—as shown by the record—from borrowers other than ML Investors. There were indisputably as many as fifty (50) borrowers under Universal’s loan transaction (referred to by the Court of Appeals (at ¶ 8) as “Loan LLCs”), who were obligated under separate notes secured by deeds of trust on properties other than Centerpoint.²⁷ Once Centerpoint was sold, ML Investors had no further obligations to Universal, and there is no dispute that all payments to Universal following the settlements and sale of Centerpoint were by Loan LLCs other than ML Investors, from proceeds of sales of properties subject to separate deeds of trust that were not insured under Commonwealth’s title policies.²⁸

In any event, controlling precedent holds that Arizona’s collateral source rule applies to all payments recovered by Universal under its separate notes and deeds of

²⁶ Cross-Petition at 10-11. *See, e.g., Munic* 235 Ariz. 12, at 20 ¶ 26 (citation omitted) (a tortfeasor may not “reap the benefit of a settlement to which [it was] not a party”).

²⁷ The Court of Appeals explicitly noted (at ¶ 9) that: “Universal structured the loan with promissory notes issued by each respective Loan LLC, including [ML Investors], and secured those notes against the various ML deeds of trust.”

²⁸ Mr. Reeb testified that Universal *never* received any loan repayment from ML Investors, and reaffirmed that all post-settlement loan payments to Universal were from properties other than Centerpoint. 12/2/19 trial transcript at 232:16-25.

trust against properties other than Centerpoint. Those separate contracts were negotiated before Commonwealth's breach, and Commonwealth is not entitled to a windfall simply because it injured a lender who had the foresight to obtain additional protection for its loan.²⁹

The non-Arizona cases Commonwealth cites (at 11-14) do not alter controlling Arizona law and, in any event, do not support Commonwealth's position. For example, *Flagstar Bank v. First Citizens Bank & Trust Co.*, No. 3:09-876-CMC, 2010 WL 2867289 (D.S.C. July 20, 2010) held that the collateral source rule did not bar evidence of the plaintiff's settlement under a title insurance policy because the plaintiff received that title policy from the defendant. This holding simply confirms the fundamental pillar of the collateral source rule that a tortfeasor's liability is reduced by—but only by—benefits provided by the tortfeasor to the victim.³⁰ Here, Commonwealth provided absolutely no contracts or other benefits to the insureds.

According to *Hutchins v. Michael Young*, No. 2018 CV 30022, 2018 Colo. Dist. LEXIS 3723 (at 9) (Colo. Dist. Ct. Nov. 7, 2018) (at 9), the collateral source rule does not apply to contracts under which the injured plaintiff is not entitled to receive any payments. But here, unlike *Hutchins*, all of the underlying contracts resulting in the payments at issue did provide for such payments. In any event, it also

²⁹ Cross-Petition at 9-10.

³⁰ Cross-Petition at 8.

appears from *Hutchins* (at 10) that Colorado’s collateral source rule is limited to something called “the common law post-verdict component of the collateral source doctrine” and only “to a limited extent.” In contrast, Arizona’s collateral source rule is well-established, broadly applied, and not subject to any such limitation.³¹

Finally, in *Crowley v. Trust Co. Bank, N.A.*, 466 S.E.2d 24, 26 (Ga. Ct. App. 1995), a bank sued its lawyer for malpractice in connection with the handling of a loan transaction that was secured by a mortgage and guaranteed by a third party. The court held that the collateral source rule did not apply to the guarantee because the bank stipulated that it had fully mitigated its damages, and because the guarantee was part of the transaction forming the basis for the malpractice claim. Here, unlike in *Crowley*, the relevant question—as recognized by the Court of Appeals (at ¶ 55)—is whether the payors were “wholly independent of the wrongdoer [Commonwealth],” which they clearly were.

Commonwealth further attempts to distract from the clear applicability of the collateral source rule by rehashing (at 3-7) its “no loss” argument, which again is premised entirely on payments from sources wholly independent of Commonwealth.

³¹ Cross-Petition at 7-11.

That argument thus begs the question of whether the collateral source rule applies, because if the rule applies (which it does) the argument is barred.³²

Commonwealth sweepingly asserts (at 4-5) that non-Arizona case law somehow “uniformly holds” that a title insurer’s liability is reduced by payments to its insured under a mortgage that was *not insured* under the title policy. That proposition is false, and finds no support in any of the cases Commonwealth cites. Commonwealth claims in support of that assertion that *Green v. Evesham Corp.*, 430 A.2d 944, 946 (N.J. App. 1981) and four additional cases (at 5, n.5) dealt with “a situation involving multiple properties securing a loan,” which is also false. In truth, each dealt with a situation involving a *single property* secured by a single mortgage that was insured under a title policy.³³

Green holds that a title defect does not trigger a diminution in value loss if—unlike the situation in this case—the value of the property *subject to the insured mortgage* is sufficient to cover both the title defect and the amount of the secured

³² As discussed above, Commonwealth’s “no loss” argument is also contrary to Arizona law governing what constitutes a “loss,” and otherwise barred here. As also discussed above, CMLC is entitled to tort damages for diminution in value, and unpaid benefits of the policies plus prejudgment interest, even if the collateral source rule does not apply (which it does).

³³ In an actual situation involving multiple properties, a title insurer’s liability for diminution in value of an insured mortgage is *not* reduced by payments under mortgages that were *not insured* under the title policy. *See for example, Blackhawk Prod. Credit Ass’n v. Chi. Title Ins. Co.*, 423 N.W.2d 521, 526 (Wis. 1988).

loan.³⁴ Commonwealth’s remaining cases are similar and likewise provide no support for its argument here.³⁵ Unlike in those cases, the insureds here clearly suffered a diminution in value loss. The mechanics’ liens that Commonwealth knowingly insured over—but refused in bad faith to cover or settle—indisputably diminished the recoverable value of the insured deeds of trust by \$19.5 million.

The Court of Appeals’ opinion upends the collateral source rule and contradicts controlling Arizona precedent. Rather than holding title insurers accountable for tortious bad faith, that ruling exonerates them whenever an insured lender even arguably has some alternative means of collecting payment of a loan from any source(s) other than its insured deed of trust. The Court of Appeals’ opinion thus undermines the utility and value of lender’s title policies, unjustifiably rewards insurers for tortious conduct, and should be reversed.

³⁴ *Twin Cities Metro-Certified Development Co. v. Stewart Title Guaranty Co.*, 868 N.W.2d 713, 717-718 (Minn. App. 2015) holds that there is no diminution in value loss if—again unlike the situation here—the insured mortgage was worthless even without the title defect, because in that situation the title defect could not have “reduced the equity [the lender] was able to recover from the [insured mortgage] in satisfaction of its mortgage.”

³⁵ *Falmouth Nat’l. Bank v. Ticor Title Ins. Co.*, 920 f2d 1058 (1st Cir. 1990), and *Cale v. Transamerica Title Ins.*, 225 Cal. App. 3d (1990) address *when* an insured’s diminution in value loss becomes fixed; an issue previously resolved under Arizona law by this Court. *First Am. Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, at 3349 ¶ 1 (2016).

CONCLUSION

This Court should deny all relief requested in Commonwealth's Petition, grant all relief requested in CMLC's Cross-Petition for Review, including as requested above regarding tort damages for unpaid benefits of the policies and diminution in value, and award CMLC reasonable attorneys' fees on appeal under A.R.S. § 12-341.01(A).

June 27, 2024

Respectfully submitted,

RMLaw/PC

By: *s/ Richard M. Lorenzen*

Richard M. Lorenzen

2920 East Camelback Road, Suite 230

Phoenix, Arizona 85016

*Attorney for Respondent/Cross-Petitioner,
Centerpoint Mechanic Lien Claims, LLC*