IN THE SUPREME COURT
STATE OF ARIZONA

CENTERPOINT MECHANIC LIEN CLAIMS, LLC, Plaintiff/Appellant/Appellee, vs. COMMONWEALTH LAND TITLE INSURANCE COMPANY, Defendant/Appellee/Appellant.	)	No. CV-23-0164-PR Arizona Court of Appeals No. 1 CA-CV 21-0039 Maricopa County Superior Court No. CV2011-008600

AMICUS CURIAE BRIEF OF AMERICAN LAND TITLE ASSOCIATION IN SUPPORT OF COMMONWEALTH LAND TITLE INSURANCE COMPANY'S PETITION FOR REVIEW

(Filed with Permission in Accordance with this Honorable Court's May 10, 2024 Order)

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I. INTEREST OF AMICUS CURIAE AND INTRODUCTION

American Land Title Association (ALTA) is the premiere national trade association and voice for more than 6,000 title insurance agents, title abstractors and title insurance underwriters, which are businesses that search, review and insure real estate titles to protect home buyers, real estate investors and mortgage lenders. Originally founded in 1909, the mission of ALTA is to improve the skills and knowledge of providers in real property transactions, effectively advocate member concerns and standardize industry practices.

ALTA publishes standardized title policies and endorsements, which are used by its member title insurance underwriters, including the two Lenders' Policies of Title Insurance ("Lenders' Policies") issued by Commonwealth Land Title Insurance Company ("Commonwealth") to Universal SCP-1, LP and VR CP Funding, LP that are at issue in this appeal. In other words, ALTA drafted the very language under review by this Court. ALTA therefore respectfully submits the instant Amicus Curiae Brief (limited to Issue No. 1) for consideration and to offer its unique understanding and perspective of the language of the Lenders' Policies and purposes behind the language that may assist the Court in resolving this appeal.

On or about August 27, 2023, Commonwealth submitted a Petition for Review to this Honorable Court, requesting review of the Court of Appeals' May 23, 2023 Opinion and Order that affirmed in part and reversed/remanded in part, *inter alia*,

the grant of summary judgment in favor of Commonwealth on its insurance coverage claim.[1] Subsequently, on June 27, 2024, Commonwealth filed its Supplemental Brief. ALTA supports the arguments of Commonwealth. The Court of Appeals clearly erred in its analysis of the language of the Lenders' Policies in an effort to force its analysis to fit the framework set forth in *United Servs. Auto. Ass'n v. Morris*, 154 Ariz. 113 (1987), and its progeny – an exercise that was not only erroneous, but unnecessary as the stipulations in the underlying *Morris* Agreement are not being challenged. Notably however, the Court of Appeals' sole focus on adhering to (and ultimately, its misapplication of) *Morris*, blinded it to other Arizona long standing cannons of construction for insurance contract interpretation. Specifically, the Court of Appeals failed to read the clear and unambiguous policy language as a whole, resulting in a disregard of pertinent sections of the Policies and a lack of understanding of the primary purpose of indemnity Lenders' Policies. Instead, the Court of Appeals focused on and erroneously labeled portions of the Policies as "defenses to liability" because the term "liability" was used in the Policy section heading. To the contrary, the applicable language of the Policies and Arizona case law require proof of actual damages or loss as a prerequisite to coverage. The standards set forth in *Morris* and its progeny are not intended to re-write the terms

[1] ALTA's Amicus Brief herein is limited solely to the Court of Appeals' reversal of summary judgment in favor of Commonwealth on the insurance coverage claims, and misconstruction of title insurance policy language at issue.

of the Policies. This Honorable Court need look no further than the clear and unambiguous language of the Policies as a whole to reasonably and justly interpret coverage under the Lenders' Policies. Accordingly, ALTA respectfully requests that this Honorable Court: (i) vacate the Court of Appeals' Opinion, and (ii) reinstate summary judgment in Commonwealth's favor.

II. FUNDAMENTALS OF A TITLE INSURANCE POLICY

Title insurance is fundamentally different from liability or other types of insurance in that it focuses on risk prevention rather than risk assumption. *See* Joyce D. Palomar, 1 Title Insurance Law §1:15 (2020), citing *Lawyers Title Ins. Corp. v. Research Loan & Inv. Corp.*, 361 F.2d 764 (8th Cir. 1966); *GMAC Mortg., LLC v. First American Title Ins. Co.*, 464 Mass. 733, 740, 985 N.E.2d 823 (2013); and Johnstone, Title Insurance, 66 Yale L.J. 492, 516 (1957). In other words, title insurance generally protects the insured against issues that occurred *before* the policy was purchased (unless excluded). Property, casualty, life, health and other insurance policies protect the insured against events that occur *after* you purchase the policy.

There are two different types of title insurance policies, lender's policies and owner's policies. Both types of title insurance policies are indemnity agreements. *Swanson v. Safeco Title Ins. Co.*, 186 Ariz. 637, 925 P.2d 1354 (Ct. App. Div. 1 1995), redesignated as opinion and publication ordered, (Nov. 1, 1995); *Wenima*

Development, LLC v. Lawyers Title Ins. Corp., 2013 WL 85246, ¶¶ 13, 14 (Ariz. Ct. App. Div. 1 2013). Title insurance does not guarantee perfect title; instead, it pays damages, if any, caused by any covered defects to title that the title company should have discovered, but did not except from coverage. *First American Title Insurance Company v. Johnson Ban*k, 239 Ariz. 348, 372 P.3d 292 (2016) (citing *Swanson*, 186 Ariz. at 641, 925 P.2d at 1358); *see also Falmouth Nat. Bank v. Ticor Title Ins. Co.*, 920 F.2d 1058, 1063 (1st Cir. 1990) ("[W]hat is insured is the loss resulting from a defect in the security"). Consequently, the mere existence of a title defect is not a breach. *See In re W. Feliciana Acquisition, L.L.C.*, 744 F.3d 352, 359 (5th Cir. 2014).

Owner's Title Insurance protects a new owner of property from covered title defects. This type of title policy insures the full purchase price of the property. Lender's Title Insurance protects against the same potential problems, but it protects the lender rather than the owner. It also only protects up to the amount of the loan, instead of the full purchase price of the property. Significantly, coverage under a lender's policy decreases as the borrower repays the loan, expiring once the loan is paid off entirely. Like any insurance policy, a lender's policy also has certain exclusions. These exclusions may vary depending on the insurance provider and the specific policy terms. (Arizona Dept. of Insurance; https://insurance.az.gov/sites/default/files/documents/files/Title_Ins_Brochure.pdf.

) *The policies at issue in the within matter are lenders' policies*.

A lender's policy is essential for the lending industry because it reduces risk, covers the loan amount, and provides protection against potential legal disputes or ownership claims that may impact a lender's security interest. Specifically, and as seen in the matter at hand, real estate investors rely heavily on financing to fund their investments. The additional layer of protection over the transaction protection afforded by a lender's policy allows investors to focus on their investment strategies and mitigate the risks associated with real estate transactions. It is with these fundamental principles in mind that this Court's review must be analyzed.

III. ARGUMENT

A. The Court of Appeals Erred in Holding That Under the Terms of the Lenders' Policies, Conditions 8 and 10 Were Limited to Defenses of Liability.

The Court of Appeals' Opinion is based on the limited conclusion that conditions 8(a)(ii) and 10(b) do not provide or define coverage defenses, but instead operate only as defenses to payment liability. *Centerpoint Mechanic Lien Claims, LLC v. Commonwealth Land Title Ins. Co.*, 255 Ariz. 261, 271 ¶48 (App. 2023). This conclusory finding contradicts the specific policy language as a whole, and also contradicts the purpose of the indemnity lender policies in general. It is clear that the Court of Appeals' decision was focused on extinguishing liability defenses pursuant to the underlying *Morris* Agreement, rather than a fair interpretation of

coverage under the Lenders' Policies as a whole.

The Court of Appeals failed to recognize that when read and harmonized in its totality, the Covered Risks, Exclusion 3(c), along with Condition 8 of the Policies, require proof of actual loss or damages to be afforded any coverage. Furthermore, Condition 10(b), a standard condition to coverage in all lender's policies, also makes clear that coverage is tied to the debt of the lender. When the debt is repaid, any liability of the Company (i.e., coverage under the Policy) will be terminated. Notably, there are no published decisions by Arizona courts interpreting coverage under a lender's title policy that support the Court of Appeals' narrow reading of the Policies.

B. The Lenders' Policies Must be Examined as a Whole.

It is fundamental, black-letter, Arizona law that an insurance contract must be read as a whole and construed to give effect to all its provisions and to prevent any of the provisions from being rendered meaningless. *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 329, 909 P.2d 393, 396 (App. 1995), *as supplemented on reconsideration* (Oct. 3, 1995)(citing *Norman v. Recreation Centers of Sun City, Inc.*, 156 Ariz. 425, 752 P.2d 514 (App.1988)); *Droz v. Paul Revere Insurance Co.*, 1 Ariz. App. 581, 583, 405 P.2d 833, 835 (1965)("[An insurance] policy must be read as a whole in order to give a reasonable and harmonious meaning and effect to all of its provisions.").

When interpreting an insurance contract, Arizona courts historically "harmonize all parts of the contract ... by a reasonable interpretation in view of the entire instrument." *Brisco v. Meritplan Ins. Co.*, 132 Ariz. 72, 75, 643 P.2d 1042, 1045 (App.1982); *see also LeBaron v. Crismon*, 100 Ariz. 206, 209, 412 P.2d 705, 707 (1966).[2] Importantly, the "specific provisions of a contract qualify the meaning of a general provision." *Technical Equities Corp. v. Coachman Real Estate Inv. Corp*., 145 Ariz. 305, 306, 701 P.2d 13, 14 (App.1985). Finally, courts construe the written terms of insurance contracts to effectuate the parties' intent. *Tolifson v. Globe Am. Cas. Co.*, 138 Ariz. 31, 32, 672 P.2d 983, 984 (App.1983).

The Court of Appeals' interpretation of the Lenders' Policies violated these basic principles by focusing solely on the use of the word liability in certain provisions of the Policies, and ignoring the Policies as a whole. In effect, the Court of Appeals' Opinion rendered portions of the Lenders' Policies meaningless. Initially, the Court of Appeals posits that the express terms of Conditions 8(a)(ii) and 10(b) relate only to liability for payment. The Court states that both conditions by their terms and placement are unrelated to the question of what constitutes a covered event under the Policies. *Centerpoint Mechanic Lien Claims, LLC,* 255

[2] See also *AMHS Ins. Co. v. Mut. Ins. Co. of Arizona*, 258 F.3d 1090, 9th Cir. (2001 Ariz.); *5205 Lincoln LLC v. Owners Insurance Company*, United States District Court, D. Arizona. September 27, 2021 Not Reported in Fed. Supp.2021 WL 4427059.

Ariz. 261, ¶50 (App. 2023). The Court further opines that the Conditions make Commonwealth's *liability* to tender payment for covered occurrences contingent upon enumerated circumstances, but are not determinative of coverage. *Id*.

While the Court of Appeals correctly states that words in insurance policies should be accorded their plain and ordinary meaning (*Id*. at ¶45), the rules do not apply if it appears from context or otherwise that a different sense was intended. *Granite State Insurance Corp. v. Mountain States Tel. and Tel. Co.*, 117 Ariz. 432, 573 P.2d 506 (App.1977). Reading the Lenders' Policies as a whole, it is clear that Conditions 8 and 10, although labeled as "Determination and Extent of Liability" and "Reduction of Insurance; Reduction of Termination of Liability" respectively, were intended by the parties to be conditions or prerequisites to coverage. However, the Court of Appeals ignored the language in the Covered Risks provision that expressly incorporated or noted that coverage was subject to the Exclusions and Conditions [TE 10, 22]. Thus, contrary to the opinion of the Court of Appeals, the language of the Lenders' Policies as a whole, in particular the Covered Risk, Conditions and Exclusions are to be read in conjunction when interpreting coverage matters.

C. The Policies Cover Actual Loss.

The Court of Appeals also ignores that the Covered Risks section of the Lenders' Policies expressly states that "Commonwealth insures…against loss or

damage…" [TE 10, 22]. This distinction is critical as it determines when and if coverage is triggered. Indemnification against loss or damages applies when the indemnitee has actually paid the obligation for which he was found liable. *See generally MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, 302, ¶ 11, 197 P.3d 758, 763 (App.2008); *Skousen v. W.C. Olsen Inv. Co.*, 149 Ariz. 251, 253, 717 P.2d 930, 932 (App.1986).

The extent of a contractual duty to indemnify must be determined from the contract itself. Such contracts are construed to cover those losses or liabilities which reasonably appear to have been intended by the parties. *Estes Company v. Aztec Construction, Inc.*, 139 Ariz. 166, 677 P.2d 939 (App.1983); *Shirley v. National Applicators of California, Inc.*, 115 Ariz. 521, 566 P.2d 322 (App.1977); *Barnes v. Lopez*, 25 Ariz. App. 477, 544 P.2d 694 (1976). Indemnity contracts may be written to protect against not only loss and damage but also exposure to liability or both, but *the contract language is controlling.*

The Lenders' Policies discuss loss as it relates to coverage in multiple sections. First, the Lenders' Policies state that they are each 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...." (Condition 8). The Lenders' Policies further exclude "[d]efects, liens, encumbrances, adverse claims or other matters ... resulting in no loss or damage to

the insured claimant." (Exclusion 3(c).) Thus, the insured(s) would only be entitled to indemnification against actual loss or damage. See *Skousen, supra*.; *see* also *Falmouth Nat. Bank v. Ticor Title Ins. Co*., 920 F.2d 1058, 1062–63 (1st Cir.1990) (explaining that the mere existence of a defect covered by a title policy does not justify recovery absent evidence of actual loss); *see* generally *Hauskins v. McGillicuddy*, 175 Ariz. 42, 51, 852 P.2d 1226, 1235 (App.1992) (explaining that "agreements to indemnify against liability do not require proof of actual payment while agreements to indemnify against loss or damage do").

The language used in the Lenders' Policies is clear and unambiguous. To be afforded coverage, an insured must suffer an actual loss. This language also comports with the general and historical purpose of this type of title insurance coverage – to reduce any risk associated with the loan on the property. Because the insurer in a lender's policy is insuring the amount of the loan only, the coverage automatically reduces over time as the loan is paid and the insured recoups its initial investment. Any other interpretation or application of lender's policy coverage would open the door to double dipping and use or abuse of coverage to obtain a financial windfall on the lender's initial investment. This is not the purpose of lender's title insurance. Accordingly, lender's policies require a proof of actual loss to elicit coverage.

In addition, following the February 2011 *Morris* Agreement and sale of the

Centerpoint Property, the insureds' loans were fully paid, reducing the amount of indebtedness under the Lender Policies to zero. [TR Day 4, pp.11-13, 17-20 and 25-31]. Pursuant to Condition 10(b) of the Lenders' Policies, "repayment of the loan shall terminate all liability of the Company…" [TE 10, 22]. The insureds subsequently assigned their rights to any claim under the Lenders' Policies to Centerpoint in June of 2012. However, by the time of the assignment, any actual proceeds received by the insured lenders from a "sale" of the Centerpoint properties would necessarily reduce the amount of their indebtedness, and consequently, their coverage under the Policies. As the loans were paid in full, there could be no loss or damages, and coverage under the Lenders' Policies was extinguished.

The Court of Appeals erroneously relied on a February 6, 2011, memo by a Fidelity National Title Group Senior Major Claims Counsel Fidelity leadership informing them that [at the time] there were no known coverage defenses concerning the Lender's Title Policies. *Centerpoint Mechanic Lien Claims, LLC*, 255 Ariz. 261, ¶49 (App. 2023). The court's reliance on the out-of-date memo is indicative of its misunderstanding of the comprehensive language of and purpose behind the Lenders' Policies, as the *Morris* Agreement and resultant payment of the loans insured by the Lenders' Policies would alter the coverage determination under the language of the Policies, and rendered the Fidelity memo moot. As detailed by Commonwealth in its Supplemental Brief, many different jurisdictions throughout

the country agree that when the indebtedness is fully repaid, there is no loss under a lender's policy. See Commonwealth Supplemental Brief including citations at 11.

Despite actual loss being determinative of coverage under the language of the Lenders' Policies, the Court of Appeals found that loss was not relevant to whether coverage exists, but affects only the amount of the insurer's liability. As noted above, the Court of Appeals' analysis was focused on the effect the *Morris* Agreement had on Commonwealth's potential liability, and analyzed coverage through the *Morris* lens rather than applying the appropriate Arizona principles of contract interpretation. The effect of which was creating coverage "that the insured did not purchase." *Col. Cas. Ins. Co. v. Safety Control Co*., 230 Ariz. 560, 567, 288 P.3d 764, 771 (Ct.App.2012) (internal quotations and citations omitted). Whether or not a *Morris* Agreement exists cannot inform a court's analysis on coverage and usurp the language of the policy. Here, the Court of Appeals failed to read and harmonize the provisions of the Policies as a whole to determine whether coverage was triggered. Had it done so--as it was required to do under Arizona law--it would have found that coverage under the Lenders' Policies was predicated on loss through Covered Risks, Exclusions and Conditions. Any stipulations in the *Morris* Agreement related to liability should have no effect on the coverage analysis. The Opinion is illogical and contrary to well-established law of examining the policy as a whole. Moreover, the Court of Appeals opens the door to manipulation and abuse

of coverage defenses through *Morris* Agreements that could ultimately corrupt the purpose and history of title insurance, in particular lender's policies.

IV. CONCLUSION

Because of the Court of Appeals' clear errors and improper interpretation and construction of the Lenders' Policies as a whole and Arizona legal authority, ALTA urges this Honorable Court to reverse and vacate the May 23, 2023 Opinion and Order of the Court of Appeals.

Respectfully submitted this 9th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

[X] A brief, and is submitted under Rule 14(a)(5)

[] An accelerated brief, and is submitted under Rule 29(a)

[] A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

[] A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)

[X] An amicus curiae brief, and is submitted under Rule 16(b)(4)

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Dated this 9 day of August, 2024.

By: */s/ Matthew G. Kleiner*
Matthew G. Kleiner

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I hereby certify that on August 9, 2024, a copy of the foregoing **AMICUS CURIAE BRIEF OF AMERICAN LAND TITLE ASSOCIATION IN SUPPORT OF COMMONWEALTH LAND TITLE INSURANCE COMPANY'S PETITION FOR REVIEW** was filed electronically with the Clerk of the Court using the Court's electronic filing system, Turbo Court, which will send an electronic copy of this filing to all counsel of record.

Shannon D. Deissig