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extend it. It is significant that, from the many arguments presented by the petitioners,⁵⁴ the Court chose to reply to three relatively minor arguments that related to the racial neutrality of the courts because the replies underscore the Court's distaste for attributing the racial prejudices of the testator to the courts responsible for supervising the disposition of his property.⁵⁵ This may be indicative of a changing attitude of the Court which will tend to give the equal protection clause a rest while relying more on legislation to eliminate racial discrimination. Recent civil rights legislation⁵⁶ certainly makes this feasible.

GEORGE S. KING, JR.

Insurance—Judicial Construction of the Lender's Policy of Title Insurance

The recent trend of judicial interpretation of standard insurance policies has been to construe policies liberally in order to provide more comprehensive coverage for the insured. Although the courts have depended upon various principles of contract interpretation to accomplish this end, the import of adjudication in this field reveals a sound propensity of the courts to protect the consumer. The brunt of the criticisms of insurance practices has recently fallen upon the underwriters of liability insurance. However, a recent case, *Paramount Property Co. v. Transamerica Title Insurance Co.*,¹ expands the criticisms of liability insurance policies to encompass the provisions of the standard lender's policy of title

⁵⁴ In their . . . briefs, the petitioners . . . have advanced several arguments which we have not here discussed. We have carefully examined each of these arguments, however, and find all to be without merit. 396 U.S. 435, 448 (1970).

⁵⁵ To the contention that the Georgia courts had violated the Constitution by making the "anti-Negro choice" with regard to the uncertain intent of the testator, the Court replied that there was no constitutional obligation to resolve doubts in favor of integration. To the argument that the decision the trust had failed rested on a premise by the court that integration would destroy the desirability of the park to whites, the Court said that it was the desirability of integration to the testator alone that caused the trust to fail. In response to the prediction of loss to the public of many charitable trusts, the Court pointed out that state courts were free to use or not use cy pres as they normally would. 396 U.S. 435, 445-47 (1970).

⁵⁶ *E.g.*, Civil Rights Act of 1968, tit. VIII, 42 U.S.C. §§ 3601-3619 (Supp. V, 1970); Civil Rights Act of 1964, 78 Stat. 241 (codified in scattered sections of 5, 28 & 42 U.S.C.).

¹ 1 Cal. 3d 562, 463 P.2d 746, 83 Cal. Rptr. 394 (1970) (in bank). *Paramount* relies heavily upon a recent case construing a liability insurance policy. *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (in bank).

insurance.² Although the disposition of the particular fact situation involved is essentially just, the express and implied analogies that the court has drawn between the principles underlying the two types of insurance are not altogether accurate; thus, specific aspects of the decision necessitate further clarification.

The facts of the case succinctly illustrate the nature of title insurance for the lender, as well as depict problems of interpretation that may arise in even a relatively straight-forward, standardized contract. The defendant title insurance company had issued two standard lender's policies to the plaintiff, Paramount Property Co., one for each of two deeds of trust that had been delivered to Paramount by third parties to secure a loan. Subsequently, one Guibbini, alleging ownership of the land, filed a quiet title action declaring that the deeds of trust were invalid. During the pendency of the suit, which the title insurance company defended in accord with its obligation,³ Guibbini paid Paramount the amount of the indebtedness due, received a reconveyance of the trust deeds, and dismissed his action without prejudice. This transaction enabled Guibbini to clear record title to the parcels of land in preparation for their sale. After selling one parcel, Guibbini commenced a new action, only two months after the first, to recover the amount paid. He claimed that Paramount's lien was invalid on the identical grounds stated in the previous action, and, in addition, he contended that he paid the debt under duress,—that Paramount knew or should have known of the invalid lien but, realizing that Guibbini could not sell the property until he removed the cloud on the title, continued to assert its claim. The title insurance company, standing by the explicit terms of the policies, declined to defend in Guibbini's second suit. Paramount successfully defended this action and thereafter brought suit against the title insurance company for reimbursement of the costs of the defense.

Paramount's action against the title insurance company raised the issue of the proper construction of several provisions of the standard lender's policy of title insurance.⁴ The standard policy contained the following termination clause: "*Payment in full by any person or voluntary satisfaction or release by the Insured of a mortgage covered by this policy shall terminate all liability of the company to the insured owner of the*

² 1 Cal. 3d at 566 nn.2 & 3, 570 n.6, 463 P.2d at 748 nn.2 & 3, 751 n.6, 83 Cal. Rptr. at 396 nn.2 & 3, 399 n.6. These provisions are those of the AMERICAN LAND TITLE ASSOCIATION [hereinafter cited as ALTA] MORTGAGEE POLICY 1962 (Rev. 1968 & 1969) paras. 4(a), 7(d) & 3(d).

³ 1 Cal. 3d at 566 n.2, 463 P.2d at 748 n.2, 83 Cal. Rptr. at 395 n.2.

⁴ *Id.* at 565, 463 P.2d at 747, 83 Cal. Rptr. at 395.

indebtedness secured by such mortgage”⁵ The policy also excluded from coverage “[d]efects known to the insured either at the date of this policy or at the date such insured acquired an . . . interest insured by this policy”⁶ Relying on these two clauses, the title insurance company offered two basic defenses: First, since there had been a “payment in full” according to the unambiguous language of the policy, the coverage had terminated. Second, even if the policy were in full effect, Guibbini’s complaint alleged that Paramount knew or should have known that the title was defective, thus bringing the case within the latter mentioned exclusion from coverage. The court of appeals found no ambiguity in the termination clause and adjudged that the policy had terminated;⁷ the California Supreme Court, in reversing, decided that the policy had not terminated and that the title insurance company did have a duty to defend.

In resolving this first issue of the case, the court found that the accepted practice of paying a debt in full to remove a cloud on the title and immediately suing for a refund⁸ did not constitute a payment in full as was contemplated by the parties to the contract.⁹ The court conceded that in most circumstances the termination clause would operate in a straightforward manner, but the unique situation at bar created an ambiguity in the clause in light of the purpose of the contract¹⁰ and the reasonable expectations of the parties.¹¹ Thus the court ruled that only a final and unconditional payment should be considered a “payment in full.” By

⁵ ALTA MORTGAGEE POLICY para. 7(d) (emphasis added).

⁶ *Id.* at para. 3(d).

⁷ Paramount Prop. Co. v. Transamerica Title Ins. Co., 77 Cal. Rptr. 894 (Cal. Ct. App. 1969).

⁸ See *Leeper v. Beltrami*, 53 Cal. 2d 195, 347 P.2d 12, 1 Cal. Rptr. 12 (1959).

⁹ 1 Cal. 3d at 567-69, 463 P.2d at 749-50, 83 Cal. Rptr. at 397-98.

¹⁰ The purpose of title insurance is to protect the insured from loss growing out of an undiscovered defect in title to the insured property. 1 Cal. 3d at 568, 463 P.2d at 750, 83 Cal. Rptr. at 398. The statutes of many states reflect this definition, e.g., N.C. GEN. STAT. § 58-132 (1965). For comparable definitions see J. MAGEE & D. BICKELHAUPT, *GENERAL INSURANCE* 548 (7th ed. 1964); Johnstone, *Title Insurance*, 66 YALE L.J. 492 (1957).

¹¹ 1 Cal. 3d at 568, 463 P.2d at 750, 83 Cal. Rptr. at 398; see, e.g., *Harris v. State Farm Mut. Ins. Co.*, 232 F.2d 532, 536 (6th Cir. 1956); *Boeing Airplane Co. v. Firemen's Fund Indem. Co.*, 44 Wash. 2d 488, 268 P.2d 654 (1954); 3 A. CORBIN, *CONTRACTS* § 545, at 164 (1960); 1 *RESTATEMENT OF CONTRACTS* § 236(b) (1932). The rules established for the construction of written contracts are also applicable to policies of insurance. See generally 43 AM. JUR. 2d *Insurance* § 257 (1969). Since a title insurance policy is a contract of insurance rather than a suretyship, rules of contract interpretation apply. See *DeCarli v. O'Brien*, 150 Ore. 35, 41 P.2d 411 (1935); *Foehrenbach v. German-American Title & Trust Co.*, 217 Pa. 331, 66 A. 561 (1907).

purporting to discern the reasonable expectations of parties to a contract under the particular circumstances involved, the court has, in effect, implemented a policy of protection for the insured. Nevertheless, to augment the impact of this decision on future cases that may call upon the courts to construe any provision of the standard lender's policy of title insurance, the court reinforced its reasoning with the established principle that ambiguous insurance contracts are to be resolved against the insurer.¹² However, except for the reference to the ambiguities involved in the contract, the court did not illuminate the rationale behind this principle nor explain its applicability to the case. Basic contract law provides that where language is ambiguous it will be construed against the party who drafted it.¹³ The insurer almost always provides the contract, but because the insurer has the further advantage of being, in most situations, the stronger party in a setting of extreme disparity of bargaining power, the courts have perceived a contract of adhesion¹⁴ and have found for the insured upon observation of the slightest ambiguity in language, or the comparatively small size of print or the location of certain provisions.¹⁵ The courts advocating the doctrine have come dangerously close to writing a contract for the parties, but they have recognized that, in reality, the insurance company is a highly professionalized institution¹⁶ issuing a standardized, technically phrased contract on a take-it-or-leave-it basis which is rarely, if ever, understood by the layman who pays the premium.¹⁷

Notwithstanding the magnanimous intentions of the courts, one might

¹² 1 Cal. 3d at 570, 363 P.2d at 750, 83 Cal. Rptr. at 398.

¹³ See 4 S. WILLISTON, CONTRACTS § 621, at 760 (Jaeger ed. 1961).

¹⁴ When the stronger party drafts the contract, ambiguities will be construed in favor of the weaker party. See Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 855-61 (1964); see also Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943). The basis of the doctrine of contracts of adhesion is suggested by Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917). See, e.g., *Aschenbrenner v. United States Fid. & Guar. Co.*, 292 U.S. 80, 84-85 (1934); *First Nat'l Bank v. United States Fid. & Guar. Co.*, 416 F.2d 52, 56 (5th Cir. 1969).

¹⁵ E.g., *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 878, 377 P.2d 284, 294, 27 Cal. Rptr. 172, 182 (1962): "If [the insurer] deals with the public upon a mass basis, the notice of non-coverage of the policy, in a situation in which the public may reasonably expect coverage, must be conspicuous, plain, and clear." Cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See also UNIFORM COMMERCIAL CODE § 2-302.

¹⁶ The insurance company is obviously more highly skilled in the field than the layman. See 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4687 (1962).

¹⁷ E.g., *Coniglio v. Connecticut Fire Ins. Co.*, 180 Cal. 596, 599, 182 P. 275, 276 (1919).

reasonably argue that the doctrine of contracts of adhesion should not be applied to the standard lender's policy of title insurance.¹⁸ An explanation of the origins and subsequent development of the ALTA Loan Policy offers a point of departure for such an argument. The real estate boom in the United States after World War I provided a lucrative outlet for life insurance companies eager to invest their funds, and since they were obligated to go to the land, these companies expanded their operations far from home localities. To protect their investments against loss from defects in title they required broad insurance coverage and, because of the diverse insurance practices throughout the nation, a standard policy.¹⁹ In response to this demand, four large life insurance companies drafted the Life Insurance Company Standard Loan Policy (L.I.C. Policy).²⁰ In 1929 the American Title Association (now the American Land Title Association) in concert with the four life insurance companies responsible for the L.I.C. Policy, drafted a standard lender's policy of title insurance which incorporated the elements of the L.I.C. Policy.²¹ The ATA immediately prepared to present its standard policy to all life insurance companies lending money on first mortgages, as well as to all real estate mortgage companies in general.²² That the individual title insurance company should adopt the form was assumed: "The Association is going to exert every effort to secure its adoption and requests for its use from the loaning agencies, and trusts that every title company will immediately adopt and put into use as their sole mortgagee's form."²³

It is interesting to note that the size of the print and the general form of the first ALTA policy compare closely to those aspects in the recent ALTA Loan Policy which were criticized by the court in *Paramount*. Also included in the policy of 1929 was the provision contained in the present policy regarding termination of insurer's liability upon payment in full or release by the insured. It is true that the title insurance industry largely owes its expansion in recent years to the institutional lenders,²⁴

¹⁸ See Johnstone, *Title Insurance*, 66 YALE L.J. 492, 504-05 (1957).

¹⁹ Henley, *What Investors in Mortgage Loans Are Demanding in Title Insurance*, 35 TITLE NEWS, May, 1956, at 12.

²⁰ Metropolitan Life Insurance Company, Prudential Insurance Company, Equitable Life Assurance Society of the United States, and John Hancock Mutual Life Insurance Company. See *The American Land Title Association Standard Loan Policy of Title Insurance*, 8 TITLE NEWS, July, 1929, at 5.

²¹ 8 TITLE NEWS, July, 1929, at 5.

²² *Id.*

²³ *Id.* at 10.

²⁴ Glendining, *Title Insurance in Massachusetts*, 3 Bost. B.J., April, 1959, at 21.

but, in turn, the lenders have continued to demand active participation with the ALTA in the revisions of the standard lender's policy and to push for maximum coverage.²⁵ The title insurance industry has, with some consternation, been cognizant of these efforts.²⁶

There is, of course, no precise answer to the question of whether the policy of title insurance for the lender should be viewed as a contract of adhesion²⁷ in the same manner as, for example, the liability insurance contract. However, the cursory analysis of the court should be clarified to determine the impact of its decision on future construction of the policies. The provisions of the ALTA Loan Policy have been written into the policies of almost every title insurance company in the United States.²⁸ It would seem unjust to rely on a blanket application of the rule that an insurance contract is resolved against the insurer when the insurer may not have a bargaining position superior to the insured, and when the form contract in question is not fully written nor developed by the insurer. It is true that the above rule has been generally applied in the construction of insurance contracts, title insurance policies included, but most courts have stipulated that the rule is applicable because the insurer alone drafts the policy and presents it to a consumer who has no choice but to accept it.²⁹ Furthermore, the insured lending institution is a member of a powerful industry and is hardly in the same weak position as the individual consumer.³⁰

The second basic question resolved in *Paramount* is whether or not the

²⁵ *E.g.*, Henley, *Report of Chairman, Committee on Title Insurance Standard Forms*, 40 TITLE NEWS, Jan., 1961, at 130; see also Schuenke, *What a Life Insurance Company Requires . . .*, 48 TITLE NEWS, Mar., 1969, at 18.

²⁶ Henley, *supra* note 19.

²⁷ In contrast to the ALTA Loan Policy, the ALTA Owner's Policy seems more analogous to a contract of adhesion. For example, the lender's policy, basically a rewritten L.I.C. Policy, was drafted before the owner's policy. Insurance rates are also lower for the lender than for the owner. Although the difference in rates exists partly because the risk terminates more quickly for the lender, the risk for the lender decreases as the debt is paid, and, in the case of the lender, the insurer has a chance to salvage losses through debt assignment. One authority attributes the difference to the greater bargaining power of the lender. Johnstone, *supra* note 18, at 504. Finally, the coverage for the owner is slightly less than for the lender.

²⁸ Johnstone, *supra* note 18, at 504.

²⁹ *E.g.*, Liberty Mut. Ins. Co. v. Hercules Powder Co., 224 F.2d 293, 294 (3d Cir. 1955); Heffron v. Jersey Ins. Co., 144 F. Supp. 5, 9 (E.D.S.C. 1956); Gould Morris Elec. Co. v. Atlantic Fire Ins. Co., 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948); Marandino v. Lawyers' Title Ins. Corp., 156 Va. 696, 700, 159 S.E. 181, 182 (1931).

³⁰ *Cf.* Navin, *Waiver of Defense Clauses in Consumer Contracts*, 48 N.C.L. REV. 505, 524-25 (1970).

title insurance company had a duty to defend under a policy in full effect. The court understandably had little difficulty finding that the title insurance company had violated its duty to defend in light of a recent and important California case, *Gray v. Zurich Insurance Co.*,³¹ which made this duty absolute in the field of liability insurance. Before *Gray*, the duty to defend was generally determined by the allegations of the complaining party.³² The title company in *Paramount* apparently adhered to this position, and the underlying issue of both *Gray* and *Paramount* is identical—in both cases the complaints of the third parties alleged intentional acts excluded from coverage by the policies. The court in *Gray* held that the allegations of the complaint are not determinative of the duty to defend since, under the modern rules of civil procedure, the facts of the case are stressed rather than the theory of recovery set forth in the complaint.³³ Therefore, as long as there remains a reasonable potential of liability, the insurer is obligated to defend. In *Gray* the doctrine of contracts of adhesion provided the primary support for this position. The liability insurance policy in *Gray*, as do most liability insurance policies, contained the following provision in the insuring clause: “[T]he company shall defend any suit against the insured . . . even if any of the allegations of the suit are groundless, false, or fraudulent.”³⁴ The court construed this opening, broad promise to defend to be incompatible with the less conspicuous exclusion from coverage of an intentional act on the part of the insured, and the ambiguity was resolved, according to the established rule, in favor of the insured. The court in *Paramount* justified its holding by relying on *Gray*'s reference to the modern rules of civil procedure and by supporting this reiteration of *Gray* with a simple analysis of the facts involved.³⁵ Nevertheless, by an almost dogmatic reliance upon *Gray* with respect to the above issue, the court has at least opened the door for future decisions to extend the duty to defend under a standard policy of title insurance where the claim against the insured alleges facts more clearly outside express terms of the policy. Modern rules of civil procedure alone may warrant such decisions, but the ALTA

³¹ 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966) (in bank).

³² See 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4683 (1962); Annot., 50 A.L.R.2d 458, 465, 497 (1956).

³³ 65 Cal. 2d at 276-77, 419 P.2d at 176-77, 54 Cal. Rptr. at 112-13. See F. JAMES, CIVIL PROCEDURE § 2.11, at 85-86 (1965).

³⁴ 65 Cal. 2d at 267, 419 P.2d at 170, 54 Cal. Rptr. at 106.

³⁵ Since the complaint of Guibbini did not say *when* Paramount knew or should have known of the invalid lien, the facts alleged may possibly fall within the terms of the policy. See ALTA LOAN POLICY para. 3(d).

policy does not contain the broad and ambiguous promise to defend, heavily relied upon by *Gray*, nor does the doctrine of contracts of adhesion apply without question to the lender's policy.

The ALTA has been aware of judicial criticisms of insurance policies, and the recently drafted ALTA Policies of 1970, the Owner's Policies (Forms A and B), the Loan Policy, and the new Single Form Policy reflect an attempt to anticipate these criticisms. The revisions attempt to clarify possible ambiguities in the form of the policies, rather than limit coverage. All the policies expand and make more conspicuous the insuring clauses to include immediately reference to the exclusions from coverage. The purpose behind this revision is to thwart the possible judicial ruling that the fine print of an exclusionary clause is inconsistent with the bold print promising to insure, with the result that the exclusionary clause is ignored.³⁶ The 1970 ALTA Loan Policy and the 1970 Single Form Policy continue to contain the provision terminating the insurer's liability when there is payment in full³⁷ but the provision is under the subheading "Reduction of Liability" rather than under the subheading found to be ambiguous in *Paramount*, "Payment of Loss."³⁸ The 1970 ALTA Policies generally define the purpose and the scope of the coverage with more exactness. At any rate, the scope of the coverage as well as the form of the policy of title insurance for the lender are not controlled by the individual title insurance companies to the extent that a court should mechanically resolve ambiguities it might find in even revised policies in favor of the lending institution.

CHRISTIAN NESS

Labor Law—The Right to an Unbiased Tribunal in Union Disciplinary Proceedings

A significant weakness in union disciplinary procedure has been the

³⁶ All of the 1970 ALTA Policies contain as the first sentence of the policy the following provision: "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF"

³⁷ ALTA LOAN POLICY—1970 para. 8; ALTA SINGLE FORM POLICY—1970 para. 8.

³⁸ 1 Cal. 3d at 569-70, 363 P.2d at 571, 83 Cal. Rptr. at 399.