

Miami Attorneys Sink \$8 Million Title Insurance Claim

Defense attorneys say a ruling allowing a plaintiff to claim millions above the damage cap would have hobbled the insurance industry's ability to price policies and assess risk.

**Commentary by
 Samantha Joseph**

Levine Kellogg Lehman Schneider + Grossman attorneys defeated an \$8 million claim against a title insurer blamed for derailing a commercial real estate project near downtown Fort Lauderdale.

The firm beat back the lawsuit by a successor lender looking to recover millions beyond the policy cap from Fidelity National Title Insurance Co.—a move attorneys say would have hobbled the insurance industry's ability to price policies and assess risk.

“It was a very creative, very opportunistic lender trying to get money ... with what we call a ‘Hail Mary’ lawsuit,”



Left to right: Jeffrey Schneider, Jezabel Lima and Chad Lipsky of Levine Kellogg Lehman Schneider + Grossman.

said Levine Kellogg founding partner Jeffrey C. Schneider, who litigated the case with partner Jezabel P. Lima and associate Chad E. Lipsky.

That lender, Indigo Real Estate Inc., purchased the debt on a vacant lot earmarked for a mixed-used

project with lofts and commercial space. It took assignment of the mortgage in May 2008, then foreclosed the following year on delinquent borrower Progresso Lofts LLC. Then, in a move that alarmed insurance industry attorneys, Indigo turned its

attention to Fidelity by claiming the insurer failed to act quickly enough to remove an impediment that caused the project to fail.

Title insurance protects property owners and lenders from losses associated with defective titles. In this case, Progresso uncovered an easement giving an electric company the right to run power lines across the development site. That defect, which had escaped discovery during due diligence, reduced the size of the floor plan Progresso could build on the property. It also meant the developer needed to remove the easement before gaining municipal and other approvals to proceed with the project.

Progresso discovered the easement in March 2006 and notified Fidelity, which accepted the claim the following month and hired attorneys to vacate the easement. The attorneys ultimately succeeded in July 2007—way too slowly, according to Indigo.

“This could have been done much sooner. When you’re developing a project, that length of time could be fatal,” said plaintiffs lawyer Brian

S. Dervishi of Weissman & Dervishi in Miami. “And that’s what happened here.”

Unable to get a clear title for more than a year, Progresso’s project languished, generated no sales revenue and forced the developer to default on its loan to Indigo, according to the lawsuit, which sought to hold the title company liable.

Indigo sought to recover \$8 million in losses and expenses on a policy with a \$5 million damage cap, alleging Fidelity’s failure to act gave rise to an extra-contractual claim not barred by the recovery ceiling.

“That’s not something that’s outside of the contract. It’s actually in the contract,” Dervishi said. Fidelity “has an obligation to cure any lien, any title defects in a reasonable and diligent manner.”

But in defending Fidelity, the Levine Kellogg attorneys presented a case showing Indigo as an opportunist looking to take advantage of the last real estate market collapse. They argued Indigo purchased the debt nearly a year after Fidelity vacated the easement and Progresso had defaulted on the mortgage. In

other words: the investor had its eye all along on a strategy to recoup millions from a deep-pocketed third party, according to defense counsel.

“All of the problems were already there,” Schneider said. “What they were doing was buying the ability to sue the title insurance company.”

At trial, Broward Circuit Judge Carlos A. Rodriguez sided with Fidelity, finding the loan policy had already expired when Indigo brought suit, and the lender had never provided a notice of claim during the policy period. The Fourth District Court of Appeal upheld his decision.

“The issue was about policy termination,” defense counsel Lima said. “They were trying to make it about the cap, but we were able to change the narrative, and tell the judge, ‘There’s a more important issue to decide.’”

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