

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**GERALD R. KIRWAN, JR. and LEONA
KIRWAN, husband and wife,**
Plaintiffs,

vs.

**CHICAGO TITLE INSURANCE
COMPANY,**
Defendant.

Case No. 20472

SUMMARY JUDGMENT

DATE OF HEARING: March 18, 1999.

DATE OF DECISION: April 15, 1999.

APPEARANCES:

For plaintiffs: David A. Domina with plaintiffs.
For defendant: Richard J. Butler and Derrick Hahn.

SUBJECT OF ORDER: (1) plaintiffs' motion for partial summary judgment, and,
(2) defendant's motion for summary judgment.

FINDINGS: The court finds and concludes that:

1. The plaintiffs seek reimbursement of defense costs under a title insurance policy issued by the defendant. The basic facts show:

a. The plaintiffs purchased certain South Dakota real estate. In that transaction, the plaintiffs executed a mortgage to a bank, which loaned the plaintiffs part of the purchase price. The defendant issued an owners policy to the plaintiffs and a loan policy to the bank. The bank subsequently sold the loan to another financial institution. As any subsequent loan assignment does not affect the analysis, the term "plaintiffs' lender" denotes the original bank mortgagee and any subsequent assignee.

b. A former part-owner of some of the real estate brought suit in South Dakota Circuit Court to set aside a quit claim deed he had given to his co-owners, who had later sold the property to the plaintiffs. The plaintiffs, the bank holding the trust deed, and the South Dakota sellers were all named as defendants in the South Dakota litigation.

c. The plaintiffs tendered the defense to the defendant, which initially defended the plaintiffs and the plaintiffs' lender. During the course of litigation, the defendant withdrew the defense first for one plaintiff and later for the other plaintiff. The defendant continued to defend the plaintiffs' lender. The plaintiffs continued the defense through their own counsel and paid for the attorney's fees and costs incurred after the defendant withdrew their defense.

d. The South Dakota Circuit Court entered summary judgment in favor of the plaintiffs and the plaintiffs' lender. The circuit court found:

(1) The plaintiffs and the plaintiffs' lender were, respectively, buyers and encumbrancer in good faith for value without notice of the claimant's interest and entitled to judgment under the South Dakota recording statute.

(2) The South Dakota sellers had committed a fraud upon the former co-tenancy owner and entered judgment in favor of the claimant against the sellers for monetary damages. Although the sellers were related to the plaintiffs by blood or marriage and share the same last name (Kirwan), the circuit court found that the plaintiffs were not parties to the fraud committed by the South Dakota sellers.

e. The claimant appealed to the South Dakota Supreme Court.

f. After the circuit court decision dismissing the action against them, the plaintiffs brought this action against the defendant for reimbursement of defense costs. During the pendency of this action, the South Dakota Supreme Court filed its opinion affirming the judgment and approving the reasoning of the circuit court in all respects.

2. The defendant admits the policy but asserts various defenses. The defendant also counterclaims for reimbursement of defense costs incurred for the lender and incurred for the plaintiffs prior to withdrawal of the defense. The defendant further counterclaims for rescission of the policy under NEB. REV. STAT. § 44-358 (Reissue 1998).

3. The plaintiffs move for partial summary judgment for specific determinations. The effect of the plaintiffs' motion will be discussed further later. The defendant moves

for summary judgment on the plaintiffs' petition and on the defendant's counterclaim. Voluminous exhibits were offered and received.

4. The oft-repeated standard for decision of a summary judgment motion provides that summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Parker v. Lancaster Cty. School Dist. No. 001*, 256 Neb. 406, ___ N.W.2d ___ (1999). The court views the evidence in a light most favorable to the party against whom the judgment is sought and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.* On a motion for summary judgment, the question is not how a factual issue is to be decided but whether any real issue of material fact exists. *Id.* Where reasonable minds may differ as to whether an inference supporting an ultimate conclusion can be drawn, summary judgment should not be granted. *Id.*

5. The court first considers the motions insofar as they apply to the plaintiffs' petition.

6. The defendant concedes that this court must afford the South Dakota decision full faith and credit. *Miller v. Walter*, 247 Neb. 813, 530 N.W.2d 603 (1995). However, the plaintiffs also assert that the court must accept the factual findings of the South Dakota courts under the doctrine of collateral estoppel. See *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). For purposes of ruling upon the plaintiffs' motion, the court assumes, without deciding, that the collateral estoppel doctrine requires this court to accept the factual findings of the South Dakota courts.

7. A title insurance policy is a contract of indemnity. The insurer agrees to indemnify the insured against loss or damage sustained because of title defects. The defendant also agrees to "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."

Exhibit 71, Attachment B, at 22. (All references to exhibit page numbers refer to the numbering of the entire exhibit at the summary judgment evidentiary hearing and not to the original page numbering of a particular attachment. Similarly, to avoid confusion, the court refers to an evidentiary exhibit marked as such at the summary judgment hearing as “exhibit” and to any attachment thereto as “attachment” even though the document marked as an evidentiary exhibit may have referred to the attachment as an “exhibit” or the attachment is itself labeled as an “exhibit.”)

8. An insurer’s duty to defend is distinct from insurance coverage for a risk. *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981); *Farmers Elevator Mut. Ins. Co. v. American Mut. Liability Ins. Co.*, 185 Neb. 4, 173 N.W.2d 378 (1969). Moreover, the insurer’s duty to defend is broader than its duty to indemnify. *John Markel Ford, Inc. v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996). An insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify. *Id.*

9. However, the nature of the duty to defend is defined by the insurance policy as a contract. *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, *supra*. Although an insurer is obligated to defend all suits brought against the insured, even though groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside of the coverage of the policy. *Id.*; *Iowa Mut. Ins. Co. of DeWitt, Iowa v. Meckna*, 180 Neb. 516, 144 N.W.2d 73 (1966); *Gottula v. Standard Reliance Ins. Co.*, 165 Neb. 1, 84 N.W.2d 179 (1957).

10. The defendant asserts that the plaintiffs’ failure to comply with a condition of the title insurance commitment requiring disclosure of the adverse claim discharges the defendant’s liability.

a. The defendant relies on paragraph 2 of the commitment's section entitled "CONDITIONS AND STIPULATIONS," which states:

If the [plaintiffs] . . . acquir[e] actual knowledge of any . . . adverse claim . . . other than those shown in Schedule B hereof, and shall fail to disclose such knowledge to the [defendant] in writing, the [defendant] shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent the [defendant] is prejudiced by failure to so disclose such knowledge.

Exhibit 73, Attachment A, at 4.

b. As discussed more fully below, assumption of the South Dakota courts' factual findings, coupled with other undisputed facts, would compel this court to conclude that: (1) the commitment had already issued, (2) the plaintiffs received the South Dakota claimant's attorney's demand letter, (3) such demand letter constituted plaintiffs' first knowledge of the adverse claim, (4) the plaintiffs had already paid or committed themselves to pay for the property prior to receiving notice of the adverse claim, (5) the plaintiffs deemed the claim unmeritorious, (6) the plaintiffs did not notify the defendant or its agent of the existence of the claim, and, (7) the defendant later issued the policy without knowledge of the existence of the adverse claim.

c. This court need not analyze the effect of the plaintiffs' knowledge of the existence of the adverse claim upon the liability under the commitment. The commitment expressly provides that "*all liability and obligations hereunder shall cease and terminate . . . when the policy . . . committed for shall issue . . .*" Exhibit 73, Attachment A, at 3 (emphasis supplied). Consequently, the plaintiffs' obligation to disclose the adverse claim under the commitment "cease[d] and terminate[d]" when the policy issued. Further analysis of the commitment's provisions is unnecessary.

11. Under the section entitled "EXCLUSIONS FROM COVERAGE," the owners policy provides that:

The following matters are expressly excluded from the coverage of this policy and the [defendant] 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:

.....
(b) not known to the [defendant], not recorded in the public records at Date of Policy, but *known to the insured claimant and not disclosed in writing* to the [defendant] by the insured claimant prior to the date the insured claimant became an insured under this policy

Exhibit 71, Attachment B, at 23 (emphasis added).

12. Neither the findings pronounced by the circuit court from the bench (Exhibit 19, Attachment 15, at 286-291), the judgment entered by the circuit court upon those findings (Exhibit 73, at 13-17), nor the amended findings of fact and conclusions of law (Exhibit 69) refer to the issuance of title insurance or purport to make findings regarding the issuance of title insurance. The South Dakota Supreme Court opinion (Exhibit 73, at 3-12) does not distinguish between issuance of the title insurance commitment and issuance of the title insurance policy, noting that by the time of the demand letter from the claimant's attorney "title insurance had been issued in an amount of \$690,000.00 reflecting fee simple title in the sellers" Exhibit 73, at 10. Thus, there are no South Dakota factual findings regarding the relationship of the date on which the plaintiffs received notice of the adverse claim to the title insurance policy provisions.

13. The evidence clearly and undisputedly establishes the applicability of the cited exclusion.

a. For purposes of this analysis, the court accepts the South Dakota courts' findings that the plaintiffs became aware of the adverse claim on April 7 or 8, 1996.

b. Although there is evidence from the defendant's perspective that the title insurance commitment was not actually delivered to the plaintiffs' attorney until after April 8, 1996, the commitment bears an effective date of April 1, 1996. Viewing the facts most favorably to the plaintiffs and treating the South Dakota findings as necessitating a finding that the commitment had already been issued, the court assumes that the

commitment issued prior to April 7, 1996. This treatment accords the South Dakota finding the full evidentiary weight to which the plaintiffs assert such finding is entitled.

c. There is no evidence suggesting that the defendant had any knowledge of the adverse claim until after suit was filed in South Dakota and the plaintiffs' attorney notified the defendant's agent by letter dated June 21, 1996. Exhibit 64, Attachment I, at 40. Thus, the adverse claim was "not known to the [defendant]"

d. The South Dakota findings clearly show that the adverse claim was "not recorded in the public records at Date of Policy [May 16, 1996]" Exhibit 73 at 6, 9. No contrary evidence exists in the record.

e. The third requirement of the exclusion contains three parts. First, the clause requires knowledge of the adverse claim by the insured. As noted above, that occurred on April 7 or 8, 1996. Second, the clause requires lack of written disclosure to the defendant. Again, this has already been discussed. Finally, the clause requires the two situations exist prior to the date the plaintiffs became an insured under the policy. The plaintiffs became insured upon initial issuance of the policy on its effective date of May 16, 1996. Clearly, April 7 or 8 precedes May 16. Thus, the undisputed facts satisfy the third requirement of the exclusion.

14. Because the adverse claim was thereby excluded from coverage under the policy, the subsequent expenses were not "incurred in defense of the title, as insured" The insured title excluded such claims under exclusion 3(b). Consequently, the defendant had no duty to defend the claim, which was beyond the coverage under the policy.

15. In their briefs, the plaintiffs emphasize paragraph 3 of the "CONDITIONS AND STIPULATIONS" section of the policy.

a. That paragraph, entitled "NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT," states:

The insured shall notify the [defendant] 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 [defendant] 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 [defendant], then as to the insured all liability of the [defendant] shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the [defendant] shall in no case prejudice the rights of any insured under this policy unless the [defendant] shall be prejudiced by the failure and then only to the extent of the prejudice.

Exhibit 71, Attachment B, at 24 (emphasis supplied). Essentially, the plaintiffs view the issue as a matter of failure to give notice under the provisions of such paragraph 3.

b. The court agrees that there would be no ground for denying liability relating to the plaintiffs' notification to the defendant of the South Dakota litigation (*condition 3(i)*). But that issue does not address the extent of insurance coverage under *exclusion 3(b)*. *Condition 3(i)* addresses post-policy adverse claims *actually asserted* through litigation. *Exclusion 3(b)* considers pre-policy knowledge of a *potential* adverse claim.

c. Similarly, the plaintiffs view the situation as a failure to disclose the plaintiffs' knowledge under *condition 3(ii)*. The plaintiffs misperceive the problem.

(1) The plain, unambiguous language of the policy shows that *condition 3(ii)* does not apply. *Exclusion 3(b)* excludes this adverse claim from coverage. *Condition 3(ii)* requires notice of an adverse claim to the title, "*as insured.*" Because of the plaintiffs' pre-policy-issuance actual knowledge of the adverse claim, it is excluded and does not fall within the scope of the *insured* title. Further, because the claim is excluded from coverage, the defendant could not "be liable by virtue of this policy." It lies outside of the coverage of the policy. *Condition 3(ii)* simply does not pertain here.

(2) Had the plaintiffs acquired their first knowledge of this claim *after* the policy issued, the exclusion would not have applied. The plaintiffs' hypothetical subsequent failure to disclose knowledge of the adverse claim would have required analysis

under *condition* 3(ii), and would have required the defendant to show prejudice from that failure to notify.

(3) Application of condition 3(ii) only to post-policy-issuance acquisition of knowledge not only results from the plain language of the policy, but also makes common sense. The court perceives no justification for a title insurance company to deny relief for a claim within the policy coverage by a failure to disclose knowledge of a claim acquired *after* policy issuance, unless that failure produces actual prejudice. As to knowledge first acquired post-policy-issuance, there is no impact upon policy *coverage*. When the adverse claim falls within the scope of the policy, then condition 3(ii) appropriately requires a title insurance company to show prejudice from the failure to notify. Otherwise, a title insurer would be allowed to escape coverage for an adverse claim of which both insured and insurer were equally unaware because of an insured's technical breach of the policy that never affected the risk assumed under the policy. However, this rationale does not apply to pre-policy-issuance acquisition of knowledge. The rationale of title insurance is a coverage of risks ascertainable to both parties from the public records and not otherwise ascertainable by the proposed insured and the insurer. Permitting an insured to obtain coverage for something he or she knew about, but which was unknown and unknowable to the insurer, upsets the actuarial basis and justification for title insurance. Common sense supports the application of an exclusion to such situations, and precludes the "notice" analysis that the plaintiffs advocate.

d. The plaintiffs' failure to disclose their pre-policy-issuance knowledge of the potential adverse claim simply removes the claim from the policy coverage and from the scope of the duty to defend. The plaintiffs assert that they did not believe the potential claim to have merit. Viewing the evidence most favorably to the plaintiffs, the court accepts that interpretation. The plaintiffs' subsequent victory in the South Dakota litigation supports that view. But exclusion 3(b) excludes adverse *claims*, not just "defects, liens, [or] encumbrances." The plaintiffs' assertion that the claim was unmeritorious, and their

subsequent victory in making that position legally true, does not affect the scope of the exclusion. Paragraph 3 of the conditions and stipulations affords the plaintiffs no basis for relief.

16. Viewed in the light most favorable to the plaintiffs, there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts, and the defendant is entitled to judgment as a matter of law on the plaintiffs' petition.

17. The court now turns to the defendant's counterclaim. The court first considers whether the plaintiffs' motion for partial summary judgment is sufficient to reach the defendant's counterclaim.

a. The plaintiffs' motion does not expressly state whether relief is sought as to the plaintiffs' petition, as to the defendant's counterclaim, or both.

b. At oral argument on the motions, the plaintiffs' counsel argued that if such motion was granted the only matter remaining for trial would be the fairness and reasonableness of the defense costs incurred by the plaintiffs. That argument indicates that the motion was intended to reach all of the respective pleadings. The defendant's attorney made no suggestion that the plaintiffs' motion did not pertain to the defendant's counterclaim. The arguments of counsel would suggest that the plaintiffs' motion does reach the defendant's counterclaim.

c. Moreover, the specific factual and legal determinations sought by the plaintiffs' motion are inconsistent with the survival of the counterclaim. In other words, if the court granted the specific relief sought by the plaintiffs, the counterclaim would necessarily fail.

d. Accordingly, the court concludes that the plaintiffs' motion is intended, and is sufficient, to reach the allegations of the defendant's counterclaim. The defendant's motion expressly seeks summary judgment as to the plaintiffs' petition and as to the defendant's counterclaim.

18. The first cause of action of the counterclaim does not particularly indicate whether the defendant seeks relief on a theory of fraud or upon a subrogation theory. However, it is important to note that this cause of action addresses only the plaintiffs' affirmative representation (through attorney Boyd Strobe on the plaintiffs' behalf) of lack of prior knowledge of the adverse claim made *after* the South Dakota litigation commenced. The South Dakota litigation commenced after the date of issuance of the final title policies. The court considers each theory in turn.

19. As a preliminary matter, the court observes that the defendant specifically pleads the notice requirements of the commitment in paragraphs 3 through 8 of the answer, which are incorporated by reference in paragraph 18 of the counterclaim's first cause of action. As discussed above, the plaintiffs' obligations under the commitment ceased and terminated at the date of policy issuance. Thus, the commitment is legally irrelevant to the allegations of post-policy misrepresentation.

20. In order to maintain an action for fraudulent misrepresentation, the party asserting the fraud must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the recipient should rely upon it; (5) that the recipient reasonably did so rely; and (6) that the recipient suffered damage as a result. *Foiles v. Midwest Street Rod Assn. Of Omaha*, 254 Neb. 552, ___ N.W.2d ___ (1998).

21. The first cause of action purports to address defense expenditures made by the defendant, both on behalf of the plaintiffs and on behalf of the lender. The court first considers the matter of expenditures on behalf of the lender.

22. As to the lender, the post-policy representation of an owner does not affect the defendant's obligation to defend against an adverse claim on behalf of the lender.

a. The loan policy provides the lender with a right to require defense. That right existed at the date of policy issuance. An owner's post-policy misrepresentation cannot affect the pre-existing right of the lender to a defense under the loan policy.

b. There is no suggestion that the lender had any knowledge of the adverse claim prior to service of process in the South Dakota litigation.

c. While the Supreme Court opinions do not expressly discuss the issue using the term "proximate cause," the last element of fraud encompasses that concept. The owner's post-policy-issuance representation cannot, as a matter of law, constitute a proximate cause of any damage to the defendant in providing a defense to the lender under the loan policy. Consequently, the defendant's theory of fraudulent misrepresentation fails as to the lender's defense costs as a matter of law.

23. Regarding the subrogation theory, it is unclear whether the defendant asserts contractual or equitable subrogation.

a. The contractual theory, regarding the lender's defense costs, finds any apparent basis in section 12(a) of the loan policy conditions and stipulations. Exhibit 64, Attachment H, at 34. That part contains three unnumbered paragraphs.

(1) The first paragraph affords a right of subrogation "[w]henver the [defendant] shall have settled and paid a claim" *Id.* In this case, no claim was paid or settled. That language provides no source of contractual subrogation for defendant.

(2) The second paragraph subrogates the defendant to "all rights and remedies which the [lender] would have had against any person or property in respect to the claim had this policy not been issued." *Id.* The court first recalls that no loss, as such, occurred. The plaintiffs prevailed in the South Dakota litigation. Thus, the loan documents control as to the matter of defense costs between borrower and lender. In that regard, the mortgage provides:

In the event any action or proceeding is commenced that questions [the plaintiffs'] title or the interest of [the plaintiffs' lender] under this mortgage, [the plaintiffs] shall defend the action at [the plaintiffs'] expense. [The

plaintiffs] may be the nominal party in such proceeding, but [the plaintiffs' lender] shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of [the plaintiffs' lender's] own choice, and [the plaintiffs] will deliver, or cause to be delivered, to [the plaintiffs' lender] such instruments as [the plaintiffs' lender] may request from time to time to permit such participation.

Exhibit 63, Attachment C, at 7. In this case, the plaintiffs did successfully defend the action at the plaintiffs' expense. They fulfilled the requirement of the first sentence. The second sentence does not impose any requirement on the plaintiffs to pay for the cost of separate counsel chosen by Lender. Consequently, the second paragraph of the loan policy subrogation section affords no source of recovery for the defendant against the plaintiffs for defense costs on the lender's behalf.

(3) The last paragraph of the section covers another situation not present here and affords no source of recovery for the defendant.

b. The equitable theory of subrogation appears no more hospitable to the defendant's claim for defense costs paid on behalf of the lender.

(1) In the context of insurance, the right to subrogation is based on two premises: that the wrongdoer should reimburse the insurer for payments that the insurer has made to its insured, and, that the insured should not be allowed to recover twice from the insurer and the tort-feasor. *Continental Western Ins. Co. v. Swartzendruber*, 253 Neb. 365, 570 N.W.2d 708 (1997). In this case, neither principle supports equitable subrogation.

(a) There was no loss or damage to the lender. The plaintiffs prevailed in the South Dakota litigation. While the court, here viewing the facts most favorably to the defendant, does not assume the specific factual findings of the South Dakota courts, the ultimate judgment dismissed the South Dakota claimant's fraud claim against the plaintiffs and the plaintiffs' lender. That judgment determined that the plaintiffs did not defraud the South Dakota claimant.

(b) For essentially the same reasons, the plaintiffs are not the "wrongdoers" in regard to the South Dakota claimant's action. The other Kirwans (the

South Dakota sellers) were the “wrongdoers,” as contemplated by the first principle of equitable subrogation. This affords no basis for equitable subrogation against the plaintiffs.

(c) Here, there is no double recovery. The lender stands in the same position as if the claim had never been asserted. No loss occurred, because the plaintiffs won the South Dakota case. No double recovery for defense costs has, or will, occur.

(2) The defendant’s equitable subrogation theory also fails on the issue of causation. The first cause of action is pleaded upon post-policy-issuance action by the plaintiffs. The fraud of the other Kirwans had already occurred, along with the transfer of the real estate to the plaintiffs, prior to issuance of the title policies. The post-policy-issuance conduct did not cause the assertion of the adverse claim. Any post-policy-issuance wrongdoing by the plaintiffs would not have afforded the defendant with any legal excuse to its loan policy obligation to defend the lender.

c. The court concludes that the defendant’s subrogation theory for recovery of defense costs on behalf of the lender, whether premised upon contractual subrogation or equitable subrogation, also fails as to the lender’s defense costs as a matter of law.

24. However, as to the defense costs paid by the defendant on the plaintiffs’ behalf, the situation differs. The defendant’s lawyer inquired of the plaintiffs, “please tell me when Gerald and Leona Kirwan first became aware of the [a]greement shown as Exhibit 6 to the [c]omplaint, or when they learned of any of the matters in that [a]greement.” Exhibit 65, Attachment C, at 15. The Boyd Strobe letter dated August 12, 1996, responded: “Gerald and Leona Kirwan first became aware of the Vanderwerf [a]greement, as shown in Exhibit 6 of the [c]omplaint, when they were served with a [s]ummons from the lawsuit. Prior to that time they had no knowledge of the Vanderwerf [a]greement.” Exhibit 65, Attachment D, at 17.

25. The elements of fraudulent misrepresentation are all present:

a. The statements in attorney Strobe's letter constituted a representation. They clearly expounded definite statements as to matters of fact. See *Vavricka v. Mid-Continent Co.*, 143 Neb. 94, 8 N.W.2d 674 (1943).

b. The representation was false. The plaintiffs became aware of the Vanderwerf agreement on or about April 7 or 8, long before the South Dakota case was filed and summons was served, and indeed, substantially prior to the issuance of the title policies. Exhibit 58, 91:3-22 (Depo. of Boyd Strobe).

c. When made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion. The Kirwans certainly knew that they had received notice of the adverse claim by April 7 or 8. Thus, the representation was known to be false.

d. The representation was made with the intention that the recipient should rely upon it. It was made at a time when the defendant was investigating the plaintiffs' request for a defense of the South Dakota litigation, in direct response to the inquiry of the lawyer investigating the request for the defendant directly bearing on an issue relevant to the insurer's duty to defend. No other inference can reasonably be made but that the representation was made with the intention that the defendant would rely upon it.

e. Clearly, the defendant did rely upon the representation. Exhibit 65, Attachment E, at 19; Exhibit 65, ¶ 15-16, at 6.

f. The recipient suffered damage as a result. The defendant accepted the tender of defense as a result of such reliance, and paid attorney Grossenburg \$3,664.38 for defense costs for the plaintiffs. Exhibit 65, ¶ 29, at 8; Exhibit 67. Had the representation not been made, the defendant could, and would, have declined the defense as an adverse claim excluded from coverage under the policy, for the same reasons set forth above regarding the plaintiffs' petition.

g. As to the defense costs paid by the defendant on behalf of the plaintiffs as part of the defendant's first cause of action in its counterclaim, viewed in the light most

favorable to the plaintiffs, there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law against plaintiffs, jointly and severally, in the amount of \$3,664.38. Under NEB. REV. STAT. § 45-103.02 (Reissue 1998), interest accrues thereon from date of judgment.

h. Coincidentally, this places the plaintiffs in the same situation that they would have been had they disclosed such knowledge in response to the specific inquiry about their knowledge. Upon the defendant concluding that the adverse claim was excluded from coverage and rejecting the tendered defense, the plaintiffs would have initially hired their own counsel and ultimately prevailed in defending their title, as indeed they did. Similarly, it places the defendant in the same position as if the representation had not been made. As noted above, the post-policy-issuance representation had no impact upon the defendant's obligation to defend the lender under the loan policy. The exclusion applied only to the owner's policy.

26. The court is persuaded that the defendant's second cause of action, for rescission of the policy under NEB. REV. STAT. § 44-358 (Reissue 1998), fails as a matter of law for a variety of reasons.

a. The first sentence of that section deals with representations or warranties made "in the negotiation for a contract or policy . . ." *Id.*

(1) The evidence fails to show any such negotiations. There may be an inference from the issuance of a commitment and the issuance of the later policy that someone requested such issuance, but the evidence does not expressly show any such negotiations.

(2) Even assuming the existence of negotiations, the evidence shows no affirmative representations, written or oral, or warranties made in such negotiations. The failure to disclose knowledge of the adverse claim, prior to issuance of the policy, is not a misrepresentation or warranty.

(3) Moreover, any issue regarding a violation of a condition or stipulation of the commitment expressly “cease[d] and terminate[d]” upon policy issuance.

b. The second sentence prohibits avoidance of the policy for breaches of warranties or conditions “unless such breach shall exist at the time of the loss and contribute to the loss” *Id.*

(1) No loss occurred.

(2) The failure to disclose the plaintiffs’ pre-policy knowledge of the adverse claim did not “contribute” to the existence the adverse claim. The claim existed entirely independently of any action or inaction of the plaintiffs.

c. This statute does not apply to an excepted risk never assumed by the insurer. *Krause v. Pacific Mutual Life Ins. Co.*, 141 Neb. 844, 5 N.W.2d 229 (1942). Because the adverse claim was excluded from the title policy under exclusion 3(b) and the defendant never assumed that risk, the section does not apply. Thus, it affords no basis for relief to the defendant as a matter of law.

27. The plaintiffs’ motion for partial summary judgment should be granted as to the relief requested by the defendant’s answer and counterclaim to the extent such relief is denied in this order. Except as granted, the motion should be denied.

28. The defendant’s motion for summary judgment should be granted:

a. as to the relief requested in the defendant’s answer and counterclaim to the extent such relief is granted in this order; and,

b. as to the relief requested by the plaintiffs’ petition to the extent such relief is denied in this order.

29. Except to the extent that the defendant’s motion is granted, it should be otherwise denied.

30. The court had previously, by interlocutory order, provided for payment of certain amounts by the plaintiffs, jointly and severally, for reasonable expenses including

attorney's fees, to be taxed as costs to the plaintiffs upon entry of final judgment. The court adheres to such rulings and taxes such costs as part of the judgment entered herein.

31. Except as expressly taxed as costs herein, the defendant's request for costs and attorneys' fees against the plaintiffs should be expressly denied as part of the affirmative relief granted to the plaintiffs on the plaintiffs' motion for partial summary judgment.

32. The plaintiffs' request for costs and attorneys' fees against the defendant should be expressly denied as part of the affirmative relief granted to the defendant on the defendant's motion for summary judgment.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED
that:

1. The plaintiffs' motion for partial summary judgment is granted as to the relief requested by the defendant's answer and counterclaim to the extent such relief is denied in this order. Except as granted, the motion is denied.

2. The defendant's motion for summary judgment is granted:
a. as to the relief requested in the defendant's answer and counterclaim to the extent such relief is granted in this order; and,
b. as to the relief requested by the plaintiffs' petition to the extent such relief is denied in this order.

3. Except to the extent that the defendant's motion is granted, it is otherwise denied.

4. Summary judgment is entered in favor of the defendant and against the plaintiffs on the plaintiffs' second amended petition, in that the said petition is dismissed with prejudice.

5. Summary judgment is entered in favor of the defendant and against the plaintiffs, jointly and severally, on the first cause of action of the defendant's counterclaim

for reimbursement of defense costs paid on behalf of the plaintiffs in the amount of \$3,664.38, without prejudgment interest.

6. To the extent not otherwise apparent from the limitation of relief provided on the first cause of action of the defendant's counterclaim in the preceding paragraph, summary judgment is entered in favor of the plaintiffs and against the defendant on the first cause of action of defendant's counterclaim for reimbursement of defense costs paid on behalf of the plaintiffs' lender, in that the said first cause of action of the counterclaim as to the claim for reimbursement of defense costs paid on behalf of the plaintiffs' lender is dismissed with prejudice.

7. Summary judgment is entered in favor of the plaintiffs and against the defendant on the second cause of action of defendant's counterclaim, in that the said second cause of action of the counterclaim is dismissed with prejudice.

8. Costs are taxed to the plaintiffs, joint and severally, and judgment entered against the plaintiffs and in favor of the defendant for such costs, in the amounts of:

a. \$300.00, pertaining to costs taxed by interlocutory order entered on September 24, 1998;

b. \$1,150.00, pertaining to costs taxed by interlocutory order entered on January 14, 1999; and,

c. other taxable costs in the amount of \$1,032.30.

9. Summary judgment is hereby granted in favor of the defendant denying any attorneys' fees or costs requested by the plaintiffs.

10. Summary judgment is hereby granted in favor of the plaintiffs denying any attorneys' fees or costs requested by the defendant except as provided above.

11. This judgment shall bear interest at 5.732% per annum from date of judgment until paid.

Entered: April 15, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19 ____ by _____.
- : Enter judgment on the judgment record.
Done on _____, 19 ____ by _____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 19 ____ by _____.
- : Note the decision on the trial docket as: 4/15/99 Signed "Summary Judgment" entered.
Done on _____, 19 ____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge