# STATE OF MICHIGAN

# COURT OF APPEALS

FIFTH THIRD MORTGAGE-MI, L.L.C., FIFTH THIRD MORTGAGE COMPANY, and FIFTH THIRD BANK,

        Plaintiffs-Appellees,

v

ROBERT M. HANCE, STEPHANIE HANCE, and EXECUTIVE ESTATE BUILDERS, L.L.C.,

        Defendants-Appellants,

and

ROCKRIDGE HOLDINGS, INC. and TYRONE A. HOGAN,

        Defendants

UNPUBLISHED
September 29, 2011

No. 294633
Oakland Circuit Court
LC No. 05-070592-CZ

FIFTH THIRD MORTGAGE-MI, L.L.C., FIFTH THIRD MORTGAGE COMPANY, and FIFTH THIRD BANK,

        Plaintiffs-Appellants,

v

ROBERT M. HANCE, STEPHANIE HANCE, and ROCKRIDGE HOLDINGS, INC.,

        Defendants,

and

FIRST AMERICAN TITLE INSURANCE COMPANY,

        Defendant-Appellee.

No. 294698
Oakland Circuit Court
LC No. 05-070592-CZ

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

TALBOT, P.J. (*concurring in part, dissenting in part*).

While I concur with the resolution of the majority of claims presented in this appeal, I write separately as I disagree with the conclusion reached regarding Fifth Third Bank's breach of contract claim as I would find the closing protection letter (CPL) to be unambiguous and limited to prospective application.

A CPL comprises a contractual agreement or obligation and "generally applies only with respect to the particular transaction for which it is issued."[1] As noted by the majority, relevant language from the CPL contains the following:

> When title insurance of First American Title Insurance Company is specified for your protection or the protection of a purchase from you in connection with closings of real estate transactions on land located in the State of Michigan in which *you are to be* the seller or purchaser of an interest in the land or a lender secured by a mortgage . . . of an interest in land, the Company, subject to the Conditions and Exclusions set forth below, hereby agrees to reimburse you for the actual loss incurred by you in connection with such closing when conducted by the Issuing Agent (an Agent authorized to issue title insurance for the Company), referred herein and when such loss arises. . . .

Contrary to the majority's determination, I would concur with both parties that there is no ambiguity in the CPL language. As noted previously by this Court:

> Michigan courts enforce contracts. We enforce contracts according to their terms, as a corollary to the parties' liberty to enter into a contract. We examine contractual language and give the words their plain and ordinary meanings. An unambiguous contractual provision reflects the parties intent as a matter of law, and "[i]f the language of the contract is unambiguous, we construe and enforce the contract as written." Courts may not create ambiguity when contract language is clear. Rather, this Court must honor the parties' contract, and not rewrite it.[2]

It is undisputed that the actual closings on the subject properties occurred before issuance of the CPL. As noted by the trial court, the focus of the CPL is prospective in application as evidenced by the wording indicating the coverage of the letter is for "closings of real estate transactions . . . in which you are *to be* the seller . . . ."[3] It is clear that the "construction form of

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[1] Murray, *Closing Protection Letters: What Is (And Is Not) Covered?*, Practising Law Institute, Real Estate Law and Practice Course Handbook Series, PLI Order No. 13949, (2008).

[2] *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664-665; 770 NW2d 902 (2009) (internal citations omitted).

[3] Emphasis added.

to be [plus] infinitive is used to convey a sense of planning for the future, command, or contingency."[4]  Based on the use of this future tense, the CPL cannot be construed to impose liability on First American for past transactions.  The prospective wording of the CPL, particularly in combination with its date of issuance after the effectuation of the subject closings and the failure of the CPL to make any reference to the completed closings should, in my opinion, result in the affirmance of the trial court's ruling on this issue.


/s/ Michael J. Talbot

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[4] http://grammar.ccc.commnet.edu/grammar/tenses/simplefuture.htm.