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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHICAGO TITLE INSURANCE COMPANY et al., Plaintiffs and Appellants, v. ST. PAUL MERCURY INSURANCE COMPANY, Defendant and Respondent.	B221489 (Los Angeles County Super. Ct. No. BC395665)

APPEAL from a judgment of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Affirmed.

Munger, Tolles & Olson, Cary B. Lerman, Fred A. Rowley, Jr., Joseph J. Ybarra and Aaron S. Lowenstein for Plaintiffs and Appellants.

Cates Peterson, Mark D. Peterson; Greines, Martin, Stein & Richland and Robert A. Olson for Defendant and Respondent.

Appellants Chicago Title Insurance Company and Chicago Title Company (Chicago Title)[1] appeal judgment entered in favor of St. Paul Mercury Insurance Company (St. Paul). St. Paul insured Chicago Title under a standard commercial general liability (CGL) policy (Policy), and Chicago Title sought coverage under the policy for numerous lawsuits filed against it arising out of a real estate Ponzi scheme orchestrated by Rollo Richard Norton (Norton) in a San Diego condominium complex known as "Crown Point." Chicago Title's alleged role in the scheme was that its employees utilized confidential financial information in Chicago Title's possession to facilitate Norton's phony sales and refinancing of units in Crown Point. The trial court granted summary adjudication in favor of St. Paul and denied Chicago Title's motion for summary adjudication, rejecting Chicago Title's argument that the underlying lawsuits were covered by the policy's personal injury coverage for right to privacy violations, and finding the claims were excluded by the policy's provision denying coverage for insurance professional services. We affirm, finding the policy excludes the claims in the underlying lawsuit.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Policy

Chicago Title was insured pursuant to a Policy issued by St. Paul for the period April 1, 2004 to April 1, 2005. The Policy covered Chicago Title's employees for "work done within the scope of their employment" for Chicago Title and for "their performance of duties related to the conduct" of Chicago Title's business.

The Policy covered personal injury, described as follows in the Policy:

"**Personal injury liability**. We'll pay amounts any protected person is legally required to pay as damages for covered personal injury that:

"• results from your business activities; and

"• is caused by a personal injury offense committed while this agreement is in effect.

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[1] Plaintiffs are wholly-owned subsidiaries of Fidelity National Financial, Inc.

"*Personal Injury* means injury, other than bodily injury or advertising injury, that's caused by a personal injury offense. [¶] . . . [¶]

"*Personal Injury Offense* means any of the following offenses: [¶] . . . [¶]

"• Making known to any person or organization covered material that violates a person's right of privacy.

"*Covered material* means any material in any form of expression, including material made known in or with any electronic means of communication, such as the Internet."

The Policy excluded coverage for specified conduct, including personal injury resulting from "the protected person knowingly breaking any criminal law," or "any person or organization breaking any criminal law with the consent or knowledge of the protected person."

A separate endorsement titled "INSURANCE AND WORK RELATED EXCLUSION" precluded coverage for:

"• any obligation assumed by any protected person in connection with an insurance contract or treaty;

"• any failure to carry out, or improper carrying out of, any contractual or other duty or obligation in connection with an *insurance* contract or treaty;

"• the administration or management of, contribution to, or membership in an *insurance* association, fund, organization, plan or pool; and

"• the performance of or failure to perform insurance professional services.

[¶] . . . [¶]

"• advising, inspecting, making recommendations, or reporting in the protected person's capacity as an insurance agent, broker, company, consultant, or representative;

"• obtaining any insurance, reinsurance, or suretyship coverage;

"• investigating, defending, or settling any claim under any contract or treaty of insurance, self-insurance, reinsurance, or suretyship;

"• auditing or maintaining accounts or records of others;

"• conducting an investment, loan, or real estate department or operation;

"• acting in any capacity as a fiduciary or trustee for any annuity, employee benefit plan, endowment, mutual fund, pension or welfare fund, or other similar activity;

"• performing any actuarial, adjustment, appraisal, audit, claim, consulting, data processing, engineering, inspection, investigative, or survey service for a fee; or

"• managing the funds of others held by you in escrow." (Italics added.)

In addition to its commercial general liability policy with St. Paul, Chicago Title was also covered by an errors and omissions policy with National Union. Chicago Title tendered the claims to National Union, which agreed to defend Chicago Title.

B. Underlying Complaints Arising from Crown Point

As alleged in the complaints, in 1998, Norton formed "Safe Harbor Financial, Inc." to purchase the 116-unit Crown Point apartment complex in San Diego for the purpose of converting it into condominiums.[2] Norton initially financed the March 1999 purchase of the project by taking the property subject to existing loans and soliciting funds from investors. Norton told potential investors Crown Point was a sound investment, and promised them double-digit annual returns.

Norton's plans went awry because construction costs were high, rents on existing units were lower than expected, and sales of the condominiums were delayed until 2000. Norton was "desperate for cash" due to the high carrying costs and the expense of refurbishing the units. Chicago Title advised Norton to "get rid of the large loans that were collateralized by multiple units," and put the units in the names of Safe Harbor's individual investors to facilitate refinancing.

Thus, commencing in 2001, with Crown Point heavily leveraged with high-interest rate loans, and continuing through 2005, Norton began to siphon the equity of the condos.

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[2] The scheme also involved 85 acres of unimproved land in Vineyard, Utah obtained in 2003 from Safe Harbor investors Keith and Joni Holdaway via a section 1031 (26 U.S.C. § 1031) tax exchange for 26 Crown Point condominiums. Norton assured the Holdaways the condominiums were mortgaged at no more than 50 percent of their market value, and that rents from tenants of the units would pay the debt service and generate additional income.

In a series of over 300 sham transactions, Norton obtained new loans without the investors' knowledge and obtained money fraudulently from various financial institutions. Such transactions were generally disguised as sales or refinances. Employees of Chicago Title, including defendants Michael Godwin (vice president and San Diego County manager), Craig Gainor (vice president and San Diego County lender sales manager)[3] and Zuzzette Nieto (escrow officer), assisted, aided and abetted Norton in his scheme.

Norton made straw purchases using the names and credit histories of the Safe Harbor investors whose personal information was held by Chicago Title. Integral to the scheme was the use of forged loan applications, falsified rental agreements, forged purchase agreements, forged escrow instructions, fraudulent and duplicate HUD-1 statements, forged grant deeds and deeds of trust prepared and accepted by Chicago Title. One method used the same down payment to close multiple escrows by transferring the funds from one escrow to another.[4] "Hard money" lenders, such as banks, and the Safe Harbor investors knew nothing of these sham transactions.[5] Each of the sham transactions generated escrow

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[3] Gainor knew Norton prior to Gainor joining Chicago Title in July 2002. Gainor assisted Norton in the initial purchase of the Crown Point condominium complex, and induced Norton to use Chicago Title's services for condominium sales. As Crown Point was a "'high volume'" account, it would require an escrow officer who could handle such high volume; consequently, Gainor hired Nieto, whom he knew, as escrow officer. The scheme to drain equity out of the condominiums through fraudulent transactions was possibly hatched by Gainor and Norton as early as 2000 or 2001, but certainly by July 2002 when Gainor joined Chicago Title.

[4] In mid-2001, at an escrow held in Las Vegas, Safe Harbor investor Gemma Ramsour "purchased" 17 Crown Point condominiums. However, the escrow closings were staggered over several months because the same down payment was used to fund each "purchase." The number of documents Ramsour was required to sign at escrow was so voluminous that she complained. Norton later created a rubber stamp with Ramsour's signature that he later used to sign her name to escrow documents at Chicago Title.

[5] Nieto concealed the fraudulent transactions by having all recorded documents and escrow related correspondence directed to the Norton defendants instead of the victims.

fees, title insurance premiums, and income for Chicago Title, and the net proceeds were funneled to Norton.

Norton also inflated the prices of some of the Crown Point condos, and this served to increase brokers' commissions and other price-based charges paid out of escrow. Further, Chicago Title conducted escrow transactions with no legitimate purpose but that were instead undertaken to reimburse Chicago Title for losses, to artificially inflate the prices of the Crown Point condominiums, or to obtain funds from third party lenders to pay Chicago Title's obligations to third parties.

Chicago Title knew that Norton often did not have sufficient funds for down payments on the "'straw man'" purchases, so Chicago Title created an atypical escrow mechanism to accommodate Norton's need for funds. To implement the scheme, Gainor would have Chicago Title waive the down payment requirement, or if the lender required proof of down payment, Norton would deposit funds into escrow representing the purchaser's "down payment," which the "down payment" would be refunded immediately to Norton after the lender had confirmed the presence of the down payment in escrow. The Chicago Title employees participating in the Norton scheme termed this type of escrow a "[l]oop de [l]oop" escrow. Some escrows were opened without a down payment, and in some instances, Norton's deposit in escrow for a "purchase" was refunded to him within hours.

A sample sham purchase was described in one of the underlying complaints. Ramsour owned unit 306, which she had purchased from Norton in October 2001 for $480,000. In February 2002, without Ramsour's knowledge or consent, Norton transferred the unit to a Norton controlled entity (Handle-Tie Properties, LLC) for a sales price of $205,000 and purported assumption of Ramsour's mortgage. In March 2002, Norton arranged the sale of the unit for $486,000, to Norton investor Kathleen Gilfillan, and forged Gilfillan's signature on documents, including a falsified loan application to Bank of America.

Gainor assisted in the process by using his access to title information held by Chicago Title on the Crown Point condominiums. Gainor would evaluate existing encumbrances and available equity and identify particular condominiums as targets for equity skimming. Gainor would "steal the unknowing buyers'/borrowers' identities and credit and (often) further misappropriate [their] equity in the target condominium." "When [Norton] was short of funds needed to make a . . . deposit into escrow, [Gainor] . . . lined up . . . hard money lenders. Those lenders [would provide Norton] . . . interim funding he needed to close escrow." Nieto assisted the conspiracy by turning a "blind eye" to the forgeries and insuring that the defrauded investors never learned of the sham purchases.

In May 2004, in an episode involving a "'wild deed'" of trust, a legitimate purchaser of a Crown Point condo in which Chicago Title had acted as title insurer and escrow company was assured by Chicago Title that all existing liens on the unit had been paid off. Four months later, when the purchaser began to receive foreclosure notices, Chicago Title discovered that a wild deed of trust on the property had not been paid off. Chicago Title paid the lender $253,900 to extinguish the lien represented by the wild deed, and recouped its losses by draining proceeds from 11 other unrelated sales escrow transactions on Crown Point condos without the knowledge of the third parties involved in the escrows.

Another fraudulent settlement involved a scheme to artificially inflate the price of a legitimate Crown Point sale by convincing the purchaser to agree to record a higher sales price for the unit, generating more fees for Chicago Title. Norton promised to refund the higher amount paid for the condo through the escrow, but failed to do so. As a result, the purchaser hired a lawyer, and Chicago Title paid the entire amount the purchaser demanded by misappropriating funds from another Safe Harbor investor's sham escrow at Chicago Title.

The Crown Point Ponzi scheme collapsed when in September 2005, Ramsour, a major Safe Harbor investor, demanded the return of her $6 million investment. This created a "'run on the bank'" and exposed the scheme in late November 2005. Many investors, who were over the age of 65, lost their life savings and were unable to pay for daily living

expenses or needed surgeries. As Norton had often failed to make payments on the condominium mortgages as he had promised the investors, the notes went into default, generating foreclosure notices to the investors. As a result of Norton's conduct, the investors lost their investment in Safe Harbor, were subjected to adverse consequences, damaged credit ratings, and emotional distress.

Norton was charged with mail fraud (18 U.S.C. § 1341) in a federal criminal action filed in August 2007, and pleaded guilty to the charges in August 2007.

C. The 15 Norton Actions

A total of 15 complaints[6] filed against Norton or Chicago Title in San Diego County Superior Court are at issue in this matter.[7]

The complaints asserted claims for damages based on theories of, for example, breach of fiduciary duty, negligent, negligent misrepresentation, fraud, conversion, conspiracy, elder abuse, securities violations, violations of the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Not one of the complaints stated claims that were based on a privacy violation, whether under common law or the California Constitution.

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[6] The trial court's judgment identifies 15 lawsuits.

[7] The 15 actions, all filed (or intended to be filed) in San Diego Superior Court between 2005 and 2008, are: (1) *Gilfillan v. Norton* (No. 859034); (2) *Cropper v. Norton* (No. 857652); (3) *Lankford v. Norton* (No. 854902); (4) *Burke v. Safe Harbor Financial* (No. 861381); (5) *Marino v. Norton* (No. 870137); (6) *Holdaway v. Norton* (No. 865638); (7) *Ramsour v. Norton* (No. 872531); (8) *Euro-Canadian Inc. v. Norton* (No. 880360); (9) *Stout v. Fidelity National Financial* (No. 2007-00067302); (10) *Harvey Williams v. Fidelity National Financial*, never filed; (11) *Crockett v. Chicago Title*, never filed; (12) *Betty Jean Miller v. Chicago Title* (No. 2008-00083969); (13) *Dyson v. Chicago Title* (No. 2008-00084612); (14) *Wheeless v. Chicago Title* (No. 2008-00084470); and (15) *Tearnan v. Chicago Title* (No. 2008-00084855).

The first three actions are not part of the record. The *Gilfillan*, *Cropper*, *Burke* (as to the first settling plaintiffs) and *Lankford* actions were settled before tender to St. Paul. Two other settlements were made immediately after tender (*Marino*, *Holdaway*), and the remainder were made after tender.

However, many of the complaints contained specific factual allegations about use of the plaintiffs' personal information. The *Ramsour* complaint alleged that Norton "never disclosed to Plaintiff that [the Norton defendants] would . . . engage in multiple sham real estate transactions using R[amsour's] personal information, identity, credit and forgeries of her signature." Ramsour further alleged that the Norton defendants "exploited and profited from [Norton]'s practice of obtaining his clients' authorization and private information in order to purchase one condominium from them, in their names . . . with their consent and using their signatures." Ramsour alleged that Chicago Title employees aided and abetted Norton "in completing the theft of Plaintiff's identity and credit and did so in order to wrest substantial fees, premiums, and commissions out of the fraudulent obtained loan proceeds."

The *Dyson* complaint alleged that "[u]nbeknownst to Ms. Dyson, in February of 2005, [Norton] opened an escrow at Chicago Title in Ms. Dyson's name to facilitate the 'sale' of Unit 304, allegedly to other [Safe Harbor] investors, Keith and Joni Holdaway. However, the Holdaways, residents of Vineyard, Utah, were completely unaware that their names and credit were being used to purchase Unit 304 from Ms. Dyson. In fact, the Holdaways later sued Chicago Title and discovered in that case that there had been over 75 forged escrows in the Holdaways' name at Chicago Title."

The *Miller* complaint alleged that when Norton was unable to obtain refinancing on the condominium project as a whole, he concocted the scheme which would "generate money through a series of sham sale and refinance transactions using individual condominiums and N[orton's] investors' identities. Again, two key ingredients for this scheme were the stolen identities of unsuspecting investors and the misappropriated commingled retirement savings (including Plaintiffs') to be used as 'seed money' for making deposits and defraying commission, fees, premiums, etc."

The *Marino* action alleged that the Norton defendants' "carefully orchestrated Ponzi and identity theft scheme was designed to and, in fact, did misappropriate Plaintiffs' and other elderly investors' commingled savings, as well as misuse their identities and credit, including those belonging to Plaintiffs here."

The *Euro Canadian* action summed up the Crown Point mortgage fraud scheme, and alleged that "[c]ompleting sham transactions month after month required a stream of forgeries, mortgage fraud, and above all, an escrow/title conglomerate whose blind pursuit of even greater profits propelled its active and patently egregious participation in that unlawful conduct. In the end, [the Norton defendants'] conspiracy destroyed Plaintiffs' savings, investment portfolios, and liquid net worth, encumbered their real property, subjected them to adverse tax consequences, damaged their credit history and credit worthiness, and destroyed [plaintiffs'] well-being:"

D. Chicago Title's Claims Under the Policy

In April and May 2007, Chicago Title tendered to St. Paul the *Burke*, *Gilfillan*, *Holdaway*, *Lankford*, *Marino*, *Ramsour*, *Cropper*, *Euro*, *Williams*, and *Stout* lawsuits for defense and indemnity. Prior to tender to St. Paul, Chicago Title had been defending the lawsuits in collaboration with its errors and omissions carrier for about one year. In late May and early June 2008, Chicago Title tendered the *Crockett*, *Miller*, *Dyson*, *Wheeless*, and *Tearnan* actions. By that time, Chicago Title incurred more than $15 million in defense fees and costs.

On December 13, 2007, St. Paul advised Chicago Title that the Policy did not cover the Norton Actions.

On March 11, 2008, Chicago Title reiterated its assertion the actions were covered under the Policy, and at a bare minimum St. Paul had a duty to defend. On September 8, 2008, St. Paul agreed in an email to defend Chicago Title in the underlying lawsuits, subject to a full reservation of rights. Chicago Title demanded that St. Paul reimburse it for monies it paid in settlements of the underlying lawsuits. On September 26, 2008, St. Paul formally informed Chicago Title that had reconsidered its original denial of the tenders of defense, subject to a full reservation of rights. Up to the time of its summary judgment motion, St. Paul paid $3,132,322.02 on behalf of Chicago Title towards defense of the Norton actions, subject to its reservation of rights.

E. Complaint and Cross-complaint

Chicago Title's complaint filed August 4, 2008 alleged six causes of action: claims for declaratory relief (duty to defend, duty to settle), breach of the duty to defend and the duty to settle; breach of contract; and tortious breach of the covenant of good faith and fair dealing. Specifically, Chicago Title alleged that the underlying actions alleged "damage due to the distribution of private financial information used in the creation . . . of [Chicago Title's] escrow documents and HUD-1 statements." Further, the "alleged acquisition, use, publication and distribution of claimants' personal private financial information by [Chicago Title] falls within the ambit of '*covered material*' in that it was allegedly disclosed without claimants' consent and/or knowledge and was in turn allegedly made known to third parties in violation of claimants' right of privacy. As a result of this alleged invasion of privacy, a 'personal injury offense' and/or an 'advertising injury offense' were alleged as defined by the [Policy]." Chicago Title principally contended St. Paul owed it a duty to defend the Norton actions, and breached its duty to settle the claims asserted against Chicago Title.

St. Paul filed a cross-complaint stating six causes of action for declaratory relief (no duty to pay pretender fees, no duty to pay settlements entered into without its consent, no duty to defend, and no duty to indemnify) and equitable reimbursement (for defense costs and indemnity payments). St. Paul alleged no duty to defend or indemnify Chicago Title because the gravamen of the Norton action complaints was the loss of the plaintiffs' investment money; Chicago Title failed to tender the Norton actions in a timely manner and settled several of the actions without St. Paul's consent; and the Policy's exclusion for "insurance and related work" precluded coverage.

F. Motions for Summary Adjudication

1. St. Paul's Motion

The parties both filed motions for summary adjudication. St. Paul sought summary adjudication of three issues: (1) it had no duty to defend the underlying lawsuits because they were not even potentially covered under the Policy; (2) it had no duty to pay pretender

defense costs; (3) it had no duty to reimburse settlements paid without its consent. St. Paul argued that the underlying complaints did not allege personal injury caused by an invasion of privacy under California common law, and at most alleged identity theft, which was a crime under Penal Code section 530.5, subdivisions (a) and (d).[8] Further, the exclusion for insurance work related services barred claims based upon "'insurance professional services,'" including as set forth by the Policy, "'auditing or maintaining [the] accounts . . . of others,'" "'conducting an investment, loan, or real estate department or operation,'" or "'managing the funds of others held by [Chicago Title] in escrow."

In opposition, Chicago Title contended the Norton actions alleged invasion of the common law right to secrecy as well as the common law right to seclusion. Chicago Title also argued disclosure of the plaintiffs' confidential financial information was protected under the right to privacy protected by the California Constitution. Further, Chicago Title contended the exclusion for "insurance and related work" services did not apply because the exclusion was not clear and unambiguous; the exclusion was limited to the business of insurance, while here the cases alleged wrongdoing stemming from escrow and other services; and no auditing, maintaining of accounts, conducting of an investment, loan, or real estate department or operation, or managing of funds of others held by Chicago Title in escrow occurred.

2. Chicago Title's Motion

Chicago Title moved for summary adjudication of: (1) whether St. Paul had a duty to defend the Norton actions from tender on April 17, 2007; (2) whether St. Paul had a duty to reimburse Chicago Title for defense costs and fees incurred in the Norton actions from

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[8] Penal Code section 530.5, subdivision (a) provides: "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment in the state prison."

tender on April 17, 2007; and (3) whether St. Paul had a duty to reimburse Chicago Title for defense fees and costs because of St. Paul's unreasonable delay in payment after it accepted defense. Chicago Title argued the Norton actions were covered under the provision indemnifying it for "personal injury" offenses, specifically, "[m]aking known to any person or organization covered material that violates a person's right of privacy." Chicago Title argued the alleged facts in the Norton action stated a claim for violation of the "seclusion" privacy right.

In opposition, St. Paul argued that Chicago Title was attempting to "shoehorn" what was a professional liability action into a claim under a general liability policy. It argued that the plaintiffs in the underlying action sought damages for activities arising from Chicago Title's participation through its escrow operations in a Ponzi and identity theft scheme, and did not allege privacy violations. As a result, St. Paul was entitled to summary adjudication on the duty to defend issue because the Norton actions were not potentially covered. St. Paul again asserted the professional services exclusion precluded coverage for losses resulting from "'managing the funds of others held by you in escrow,'" "'auditing or maintaining accounts or records of others,'" and "conducting an investment, loan, or real estate department or operation."

G. Trial Court Ruling

The trial court granted St. Paul's motion for summary adjudication as to all three issues, and denied Chicago Title's motion as to all three issues. On Chicago Title's motion, the court found that "[t]he underlying lawsuits do not involve violations of the plaintiffs' privacy rights under the Policy. Instead, the underlying lawsuits relate to an extensive scheme orchestrated by Richard Norton to commit fraud in connection with [Chicago Title's] escrow services. Since fraudulent acts are deemed purposeful rather than accidental, they are not covered under a general liability policy. *Chatton v. Nat'l Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 861. Further, to the extent that [Chicago Title]'s actions caused the underlying plaintiffs to suffer damages, the Court finds that the damages were caused by the theft of their funds, or identity theft as a result of forged documents, not

by [Chicago Title] making known to third parties materials that violated their privacy rights."

In addition, the court found that St. Paul had no duty to defend based on the Policy's exclusion for "'insurance professional services,'" which was defined in the Policy to include "'auditing or maintaining [the] records of others,'" or "'managing the funds of others held by you in escrow.'" The court concluded, "[s]ince the underlying plaintiffs allege that [Chicago Title] failed to maintain the integrity of their financial records, and allowed Norton and others access to these records in connection with real estate/escrow transactions involving Crown Point, [St. Paul] has no duty to defend [Chicago Title] under the Policy's exclusion provisions." As a result of its finding St. Paul had no duty to defend, the court found against Chicago Title on the other two issues raised.

With respect to St. Paul's motion, the court granted the motion on the first issue, finding it had no duty to defend. The court also found St. Paul entitled to reimbursement of costs paid to Chicago Title in the amount of $3,132,322.02, and granted the motion on the two other issues raised based on its finding St. Paul had no duty to defend.

Following the trial court's ruling, the parties stipulated to entry of judgment against Chicago Title. The trial court entered judgment in favor of St. Paul, and awarded it $3,132,322.02 plus prejudgment interest and costs of suit.

DISCUSSION

I. JUDICIAL NOTICE

Both parties have requested we take judicial notice of documents filed in related actions. We discuss St. Paul's motion in connection with the argument *post* that the Policy's exclusion for "insurance related professional services" does not apply.

Chicago Title has requested we take judicial notice of two appellate briefs filed in *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.* (2007) 147 Cal.App.4th 137 (*ACS Systems*). In that action, it argues St. Paul took the position in its brief, contrary to its position here, that a policy with identical language could not depend upon the common law

"invasion of privacy" tort but instead that the coverage analysis must be rooted in the words of the policy.

We deny Chicago Title's motion as untimely made. (Evid. Code, § 453, subd. (a).) Evidence Code section 453, subdivision (a), requires the party seeking judicial notice to give the other party "sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request." (See *Baker v. Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 338.) Furthermore, Chicago Title requests judicial notice to support an argument made in its reply brief. Although the parties may raise novel legal arguments for the first time on appeal if the underlying facts are not disputed, that does not countenance the raising of new legal arguments in a party's reply brief. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [appellate court will not consider arguments first raised in reply brief].)

II. STANDARD OF REVIEW AND PRINCIPLES OF INSURANCE POLICY INTERPRETATION

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (Code of Civ. Proc., § 437c, subd. (p)(1); *Aguilar*, at p. 850.) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, at p. 850.) Where summary judgment has been granted, "[w]e review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

An insurer has a duty to defend its insured "if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage" under the insurance

policy. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) The "duty to defend is broader than [the] duty to indemnify," but is not unlimited, and "extends beyond claims that are actually covered" to those that are potentially covered, but no further. (*Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 59.) The nature and kind of risks covered by the policy establish the scope of this duty to defend. "[I]f, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 655.) An absence of a duty to defend is also shown where an exclusion applies. It is the insurer's burden on summary judgment to establish the lack of potential coverage. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300–301.)

We use the same rules of interpretation applicable to other contracts when interpreting an insurance policy. Our goal is to give effect to the mutual intention of the contracting parties at the time the contract was formed. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.) We ascertain that intention solely from the written contract if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. (*Id.* at pp. 390–391; Civ. Code, §§ 1639, 1647.) We interpret words in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (*Powerine Oil*, *supra*, 37 Cal.4th at p. 390.)

A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable, but language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.) Whether policy language is ambiguous is a question of law that we review de novo. (*American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1245.) Any ambiguity must be resolved in a manner consistent with the objectively reasonable

expectations of the insured in light of the nature and kind of risks covered by the policy. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co*. (1998) 18 Cal.4th 857, 869.) Contract interpretation, including the resolution of any ambiguity, is solely a judicial function, unless the interpretation turns on the credibility of extrinsic evidence. (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865.) We must interpret policy terms in context and give effect to every part of the policy with each clause helping to interpret the other. (*Palmer* v. *Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.) Moreover, coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are interpreted narrowly against the insurer. (*MacKinnon*, at p. 648.)

A CGL policy, often referred to as a business general liability policy, provides liability insurance for businesses. The policy is written in two essential parts: the insuring agreement, which states the risk or risks covered by the policy, and the exclusion clauses, which remove coverage for risks that would otherwise fall within the insuring clause. (*Collin v. American Empire Ins. Co*. (1994) 21 Cal.App.4th 787, 802–803.) Before "even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within [the policy terms]." (*Hallmark Ins. Co. v. Superior Court* (1988) 201 Cal.App.3d 1014, 1017.) This is significant for two reasons. First, "when an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded." (*Glavinich v. Commonwealth Land Title Ins. Co*. (1984) 163 Cal.App.3d 263, 270.)[9]

Second, although exclusions are construed narrowly and must be proven by the insurer, the burden is on the insured to bring the claim within the basic scope of coverage,

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[9] We do not read this rule of insurance policy construction to mean that in every event we must conduct an analysis of whether the claim is covered by the policy before we may consider whether it is excluded. The rule states in substance that exclusions are a subset of covered claims, and is not a rigid directive of procedure in policy interpretation. Thus, we may assume, without deciding, that the claims asserted are covered by the Policy and conclude the exclusion applies.

and (unlike exclusions) courts will not indulge in a forced construction of the policy's insuring clause to bring a claim with in the policy's coverage. (*Collin v. American Empire Ins. Co.*, *supra*, 21 Cal.App.4th at p. 803.)

III. THE EXCLUSION FOR PROFESSIONAL SERVICES APPLIES TO THE ESCROW AND TITLE SERVICES THAT CHICAGO TITLE PROVIDED

A. Judicial Estoppel

St. Paul has requested we take judicial notice of documents filed in an action Chicago Title commenced against its errors and omissions carrier, Illinois Union Insurance Company, in Los Angeles Superior Court case no. BC393052 (Illinois Union action) arising from the Norton actions. These documents are: (1) the trial court's minute order granting summary adjudication in favor of Chicago Title dated September 24, 2009 finding that Illinois Union breached its duty to defend and breached the implied covenant of good faith and fair dealing; (2) the trial court's minute order denying Illinois Union's motion for reconsideration of the foregoing summary adjudication in favor of Chicago Title, dated November 23, 2009; and (3) the trial court's order vacating both its order granting summary adjudication and denying reconsideration, filed January 15, 2010, based upon a stipulation and settlement of the parties' dispute.

St. Paul argues these documents provide a basis for judicial estoppel against Chicago Title because in the Illinois Union action, Chicago Title took the position the underlying Norton action claims arose from acts committed solely in Chicago Title's performance of professional services, which is contrary to the position it takes in the instant litigation, where it asserts that the "insurance and related work exclusion" does not apply because the covered privacy disclosures did not arise from insurance activities. Chicago Title counters that the position it took in the Illinois Union action involved a policy that presented different coverage questions than those presented in the instant action because the lawsuit involved its Errors and Omissions policy, and how such policy is to be interpreted has no bearing on this action. Indeed, it notes that the policy term at issue was "professional

services," not "insurance professional services." As a result, its position was not inconsistent, and the materials are not relevant and not the proper subject of judicial notice.

California court may notice the records of any federal or state court. (Evid. Code, § 452, subd. (d).) However, only material relevant to the issues before the court may be judicially noticed. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, disapproved on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.) Judicial notice is meant to serve as a substitute for formal proof. Evidence that is judicially noticed is given a conclusive presumption of truth and, therefore, no evidence can be offered to dispute judicially noticed evidence. (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1051.) As such, judicial notice of evidence is only proper when the evidence is "not reasonably subject to dispute." (Evid. Code, § 452, subd. (h).) Judicial estoppel is an equitable doctrine aimed at preventing fraud on the courts. "'The primary purpose of the doctrine is not to protect the litigants, but to protect the integrity of the judiciary. [Citations.] The doctrine does not require reliance or prejudice before a party may invoke it.'" (*Billmeyer v. Plaza Bank of Commerce* (1995) 42 Cal.App.4th 1086, 1092.) The doctrine applies where a party has taken positions so irreconcilable that "'one necessarily excludes the other.'" (*Prilliman v. United Air Lines, Inc*. (1997) 53 Cal.App.4th 935, 960.) The remedy is extraordinary and will only be invoked where a party's inconsistent positions will result in a miscarriage of justice. (*Haley v. Dow Lewis Motors, Inc*. (1999) 72 Cal.App.4th 497, 511.)

In practice, judicial estoppel will be applied where "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial . . . proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as the result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

We grant St. Paul's motion for judicial notice, but decline to apply the doctrine of judicial estoppel. The rights and liabilities of the parties to an errors and omission policy

differ from those under a commercial general liability policy. Errors and omissions insurance covers a professional for claims arising from the insured's negligent conduct arising out of the performance of professional services. On the other hand, commercial general liability polices insure against accidental occurrences that cause "personal injury," and "property damage." (*Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1047.) Thus, even if Chicago Title made a contradictory argument in the Illinois Union action that the torts committed by its employees involved professional services, its arguments are not totally inconsistent given the different contexts in which the arguments were made because the term "professional services" could be given different meanings in different insurance contracts. (*Morris v. Chiang* (2008) 163 Cal.App.4th 753, 758, fn. 5 [for judicial estoppel to apply, positions taken in the former and present cases must be totally inconsistent].)

B. Escrow Services of a Title Insurer Constitute "Insurance Professional Services."

Chicago Title argues the "Insurance and Related Work Exclusion" does not apply because the exclusion's title, structure, and language all show that it was intended to exclude only insurance related activities, and does not exclude real estate escrow operations. First, Chicago Title contends the title of the exclusion focuses on "insurance and related work," and although the Policy does not define "insurance" it commonly means the business of insuring persons or property; the exclusion specifies four activities that it does not cover, which are activities bound up with the business of insurance.[10] On the other hand, its employees' activities in releasing personal information took place in the context of the provision of real estate escrow services and are thus not excluded. Further, Chicago Title argues that by applying the enumerated categories of specific activities (e.g.,

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[10] Chicago Title points to four types of activities the policy excludes, and asserts all of them relate to "insurance": (1) "obligation[s] assumed . . . in connection with an insurance contract"; (2) dereliction in carrying out "any contractual or other duty or obligation in connection with an insurance contract"; (3) administering or participating in "an insurance association, fund, organization, plan, or pool"; or (4) "the performance of or failure to perform insurance professional services."

"'auditing or maintaining records of others"), the trial court's interpretation distorted the exclusion's text, structure and purpose, and fundamentally altered the Policy's coverage by extending such subcategories to encompass Chicago Title's central business enterprises, essentially negating the policy. St. Paul argues that the exclusion applies to the full scope of Chicago Title's title insurance professional services, including escrow services, as set forth in Insurance Code section 12340.3's definition of title insurance services.[11] Indeed, St. Paul points out that that Chicago Title's title insurance and related escrow services are a risk insured under its Errors and Omissions (E&O) policy, and are not insured by the CGL policy.

As relied on by the trial court, the Policy provides an exclusion for "the performance of or failure to perform insurance professional services,"[12] which are defined as, among other things, "maintaining the accounts or records of others," and "managing the funds of others held by you in escrow." We need not belabor the issue of whether the mortgage fraud and identity theft at issue here fell within the exclusion because this language could not be clearer that Chicago Title's performance of escrow services is excluded by the Policy, because in handling escrows it held funds on behalf of others and managed others' accounts and records. Indeed, Chicago Title's management and handling of the underlying

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[11] Insurance Code section 12340.3 provides the "'[b]usiness of title insurance'" includes "[t]he performance by a title insurer, an underwritten title company or controlled escrow company of any service in conjunction with the issuance or contemplated issuance of a title policy including but not limited to the handling of an escrow." (Ins. Code, § 12340.3, subd. (c).)

Similarly, Insurance Code section 104 provides, "[t]itle insurance means insuring, guaranteeing, or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage suffered by reason of: [¶] **(a)** Liens or encumbrances on, or defects in the title to said property; [¶] **(b)** invalidity or unenforceability of any liens or encumbrances thereon; or [¶] **(c)** incorrectness of searches relating to the title of real or personal property."

[12] Indeed, the rendering of "escrow services," for purposes of an exclusion under a CGL policy, has been held to constitute "professional services." (*Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, 713.)

plaintiffs' funds is precisely how the theft of the plaintiffs' personal information was accomplished. (*Carolina Casualty Ins. Co. v. L.M. Ross Law Group* (2010) 184 Cal.App.4th 196, 206 [where policy language clear and unequivocal, the only thing the insured may reasonably expect is the coverage afforded by the plain language of the policy].

Nonetheless, Chicago Title argues that "insurance services" is ambiguous as set forth in the Policy because the Policy does not define "insurance services," and the trial court construed the term far beyond insurance activities, fundamentally altering the policy. Chicago title relies on *Marquez Knolls Property Owners Assn., Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228 (*Marquez Knolls*), where the policy at issue had an exclusion for wrongful acts based on the design and construction of any structure. (*Id.* at p. 231.) The dispute centered on the homeowners association's involvement in a neighbor dispute between two homeowners in the development about a structure that was blocking another neighbor's view and violated the homeowners association's covenants, conditions and restrictions. (*Id.* at pp. 230–232.) The association took sides in a lawsuit between the two homeowners by providing evidentiary material to one homeowner, and the homeowner who was not aided by the association later sued the association. (*Id.* at pp. 231–232.) The association tendered the suit to its insurer, who claimed the exclusion applied because the claim was based upon the design or construction of any structure. The trial court agreed and granted summary judgment in its favor. (*Id.* at pp. 232–233.)

Marquez Knolls held the exclusion did not apply because there must be a connection between the risks policy insured or excluded and the insured. *Marquez Knolls* further rejected the trial court's conclusion that because the dispute arose from construction, the exclusion applied, pointing out that the gravamen of the issue was not the Association's design or construction of any improvement, but one of the resident's construction activity. (*Marquez Knolls*, *supra*, 153 Cal.App.4th at p. 234.) The court stressed that its interpretation of the exclusion was consonant with the policy as a whole because "[t]he language of the development/construction exclusion could scarcely have apprised the Association that its activities in resolving dispute among members—virtually

the sole purpose of its existence—would be excluded from coverage." (*Id.* at p. 235.) *Marquez Knolls* observed that reading this clause in the context of the risk insured against compelled the result, because to interpret it any other way would "eliminate a necessary connection between the insured and the risk that is excluded from the policy." (*Id.* at pp. 235–236.)

Marquez Knolls is easily distinguishable. Our interpretation of the Policy to exclude escrow services is consonant with California law, and is bolstered by relevant statutes regulating insurance. California recognizes 22 different classes of insurance, each providing coverage for their respective statutorily defined type of risk. (Ins. Code, § 100; see Ins. Code, § 100, subd. (4) [title insurance].) Title insurance differs from other types of insurance in that it does not protect against future, unknown and contingent risks, but insures the title to real property as of the date of the policy against conditions of title. "Title insurance has unique attributes not shared by other types of insurance. 'Most types of insurance provide protection against loss from potential damage from future events, and usually apply to conduct of the insured within his or her control. The title policy indemnifies for conditions that exist on the date of the policy, does not insure against loss from future events, and does not represent that the event insured against will not occur.' [Citations.]" (*Radian Guaranty, Inc. v Garamendi* (2005) 127 Cal.App.4th 1280, 1289; Ins. Code, § 12340.1.[13])

In California, title insurance is monoline insurance and a title insurer may not issue other types of insurance. (Ins. Code, § 12360.) Nonetheless, while a title insurance company cannot conduct any other line of insurance business, it is permitted to conduct escrow services. (Ins. Code, § 12340.3.) The Policy's exclusion for insurance-related

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[13] Insurance Code section 12340.1 provides that "'Title insurance' means insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein against loss or damage suffered by reason of: [¶] (a) Liens or encumbrances on, or defects in the title to said property; [¶] (b) Invalidity or unenforceability of any liens or encumbrances thereon; or [¶] (c) Incorrectness of searches relating to the title to real or personal property.

services thus necessarily refers to title insurance professional services, which include "maintaining [the] accounts or records of others," and "managing the funds of others held by you in escrow." Thus, "insurance . . . related" services as set forth in the policy cannot, as Chicago Title asserts, be construed to cover any other type of insurance, including property insurance. The statutes governing title insurance companies place the exclusion squarely within Chicago Title's title insurance services, which services include escrow services, and which escrow services by their nature include "maintaining [the] accounts or records of others," and "managing the funds of others held by you in escrow." On that basis *Marquez Knolls* is distinguishable because there, the exclusion bore no logical relationship to the claim. Here, the exclusion is precisely defined to exclude escrow-related financial services.

Further, viewing this exclusion in context of Chicago Title's business crystallizes its meaning because the mismanagement of such accounts, records, or funds would give rise to a claim under the insured's errors and omission policy, not its commercial general liability insurance. (*Fibreboard Corp. v. Hartford Accident & Indemnity Co*. (1993) 16 Cal.App.4th 492, 509 [insurance contract may be interpreted in light of other coverage held by insured].)

Thus, our interpretation does not, as Chicago Title contends, construe the provision far beyond the provision of "insurance services" because here, Chicago Title acted at the same time as title insurer and escrow company for purposes of the mortgage fraud perpetrated by its employees.

C. The Exclusion is Sufficiently Conspicuous

Finally, Chicago Title argues the exclusion cannot be enforced unless it is "conspicuous, plain and clear." Here, it argues, the trial court's interpretation would render the exclusion confusing and insufficiently conspicuous because under the trial court's interpretation, it would operate as a "stealth professional services exclusion."

Any provision that limits coverage reasonably expected by the insured under the policy terms must be "'conspicuous, plain and clear'" to be effective. (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204); *Gray v. Zurich Insurance Co.* (1966) 65

Cal.2d 263, 272–273.) The exclusion must be placed in a position and printed on a form that will attract the reader's attention. (*Haynes v. Farmers Inc. Exchange*, *supra*, 32 Cal.4th at p. 1216.) In addition, to be "'plain and clear,'" the substance of the exclusion must be precise and understandable. (*Malcom v. Farmers New World Life Ins. Co.* (1992) 4 Cal.App.4th 296, 301.)

Here, the exclusion is sufficiently conspicuous. It is in the same size font as the rest of the Policy; it is on a separate page that is titled in bold face and capital letters, "Exclusion Endorsement;" the Exclusion uses bullet points to set off its terms; and the introductory text explains, "How Coverage is Changed" (in bold face) by stating, "The following is added to the Exclusions—What this Agreement Won't Cover section. This change excludes coverage." (See *Hervey v. Mercury Casualty Co.* (2010) 185 Cal.App.4th 954, 967; *National Ins. Underwriters v. Carter* (1976) 17 Cal.3d 380, 384 [provision under a prominent "EXCLUSION" heading and in same font size as rest of policy is conspicuous].)

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.