

CAUSE NO. D-1-GV-08-002014

THE STATE OF TEXAS,
Plaintiff

V.

AMERITRUST TITLE COMPANY
Defendant

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IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

261st JUDICIAL DISTRICT

**RESPONSE OF TEXAS TITLE INSURANCE GUARANTY ASSOCIATION
TO OBJECTIONS TO APPLICATION FOR TURN-OVER ORDER
[ENTERPRISE BANK]**

NOW COMES the Texas Title Insurance Guaranty Association (the “Guaranty Association”) and files this Response to the Objections to Special Deputy Receiver’s Turnover Application [Enterprise Bank] (the “Application”) filed by Jose Milton Villelas and Commonwealth Land Title Insurance Company. The Guaranty Association would show as follows:

I. REQUESTED RELIEF

1. The Association respectfully requests the Court to approve the Special Deputy Receiver’s (“SDR’s”) Application. The Ameritrust Title Company estate is entitled to the funds that were used to purchase the cashier’s check discussed in the Application. Because such funds were escrow funds, they should ultimately be paid over to the Guaranty Association.

II. PROCEDURAL BACKGROUND

2. The SDR filed the Turnover Application to require Enterprise Bank to turn over to the receivership estate certain funds that it holds on behalf of Ameritrust Title Company

(“Ameritrust”) and to declare that Respondents Jose Milton Villelas and Leydi D. Villelas (the “Villelases”) and Commonwealth Insurance Company (“Commonwealth”) have no claim to such funds. Enterprise Bank makes no claim to the money, and has agreed to interplead the funds in question into the Registry of the Court. The funds at issue shall be referred to hereinafter as the “Cashiers Check Proceeds.”

3. Commonwealth Land Title Insurance Company (“Commonwealth”) and Jose Milton Villelas filed Objections to the Application.¹

III. FACTUAL BACKGROUND

4. The facts are largely uncontested. On April 22, 2005, the Villelases deposited \$500 in earnest money with Ameritrust in connection with a contract to purchase residential property (the “Property”) located at 6011 Santa Cecilia in Houston. Subsequently, on December 30, 2005, Encore Credit, the Villelases’ lender, deposited \$123,213.13 in escrow with Ameritrust Title Company for payment of various third parties, including the Seller and the Seller’s lender, Compass Bank, in connection with the Villelases’ proposed purchase of the residential property.

5. Ameritrust evidently failed to pay off Compass Bank, a lienholder of the residential property the Villelases purchased. While Compass Bank was supposed to be paid \$85,489.20 to release its lien, Ameritrust only sent \$64,621.18. When Compass Bank rejected the “short” amount, Ameritrust evidently tried again. It sent the “short” amount by cashier’s check this time. Compass Bank again rejected the payment as insufficient.² The original cashier’s check has subsequently disappeared.

¹ Leydi D. Villelas, who has appeared as a movant in this receivership, although served with the Application, did not file an Objection.

² It remains unclear why Ameritrust sent Compass Bank the wrong pay-off amount, or why Ameritrust believed that subsequently sending the wrong amount in the form of a cashier’s check would make any difference.

6. According to the Villelases, Ameritrust's failure to properly pay Compass Bank eventually led to foreclosure of the property at 6011 Santa Cecilia by Compass Bank. The Villelases were evicted from their home in early June of 2006. The Villelases subsequently filed suit in Harris County against a number of parties, including Ameritrust and Commonwealth Land Title Insurance Company ("Commonwealth"), the title insurer for whom Ameritrust acted as agent.

7. Commonwealth eventually paid Encore Credit, the Villelases' lenders the sum of approximately \$155,000³ pursuant to the title insurance policy Ameritrust issued on Commonwealth's behalf. Commonwealth also paid the Villelases \$500 to replace the \$500 in personal funds the Villelases placed in escrow with Ameritrust as earnest money. However, the Villelases lawsuit remained pending, with the Villelases making a number of extra-contractual claims against both Ameritrust and Commonwealth.

8. At some point early in 2009, the Villelases, Zurich (the errors and omissions insurer for Ameritrust), and Commonwealth arrived at a framework for a global settlement agreement. This agreement was never signed. But basically, the parties were to settle their claims against each other in part through negotiation of the Cashier's Check Proceeds. The Villelases and Commonwealth are presently before the Court because they want to be able to consummate their settlement agreement, and they were counting on the Cashier's Check Proceeds to do so. The Guaranty Association submits that neither party is actually entitled to such funds.

³ This information was furnished to the Guaranty Association by counsel for Commonwealth in an e-mail dated September 17, 2009.

IV. ARGUMENT

9. The Guaranty Association believes the Cashier's Check Proceeds belong to the Guaranty Association. Clearly the funds for the initial check came from the Ameritrust Escrow Account at Enterprise Bank, and the cashier's check was issued in replacement of that prior check. The Guaranty Association submits that, under Texas law, only two parties could possibly have a valid claim for the funds represented by the check. The first is Compass Bank, the intended recipient of the funds. But Compass Bank rejected the check, and subsequently foreclosed on the property the Villelases thought they had purchased. The Guaranty Association believes Compass Bank was made whole by its foreclosure. At any rate, Compass Bank has never made any claim for the funds underlying the cashier's check, and is not before the Court at this time. This leaves the Ameritrust estate, the payor of the now-lost check, as the only valid claimant to the funds. It appears that the Cashier's Check Proceeds were escrow funds. Because the estate is required by law, and an order of this court, to turn over all escrow funds in its possession to the Guaranty Association for payment of "covered claims," as defined by the Texas Insurance Code. Thus, the Cashier's Check Proceeds should ultimately be paid over to the Guaranty Association.

10. It is clear why Commonwealth and the Villelases are attempting to collect the Cashier's Check Proceeds. Any claims the two parties might have against Ameritrust, if reduced to judgment, would be considered a general creditor claim. The SDR has reported Ameritrust liabilities to exceed its assets by over \$1.5 million, so there are presumably insufficient assets to satisfy all claimants in the four higher classes. Thus, neither Commonwealth nor the Villelases stand to receive any funds from the liquidation of the estate's assets.

11. Furthermore, both Commonwealth and the Villelases have filed claims with the Guaranty Association. Both claims have been rejected. Neither rejection has been appealed. The Villelases' claim was rejected because the Villelases have already recovered all of the escrow funds held by Ameritrust by virtue of the money paid to them and their lenders by Commonwealth. Commonwealth's claim was rejected because, among other things, its claim was a subrogation claim, and therefore not a "covered claim" as defined by the Texas Insurance Code. TEX. INS. CODE ANN. Sec. 2602.255(1) (West 2010). Thus, both the Villelases and Commonwealth are before the Court in an attempt to recover funds they know they are not entitled to under either the general distribution scheme of the liquidation estate or the statutory escrow claims process.

12. Commonwealth claims that the funds are no longer even escrow funds, though they evidently came from Ameritrust's escrow account, and were paid out in an attempt to pay Compass Bank, who was an intended recipient of the escrow funds. Even if the funds are not escrow funds, which the Guaranty Association submits they are, the Cashier's Check proceeds would still be the property of the estate, to be used for pay-out to creditors under the Texas Insurance Code's statutory distribution scheme. At best, Commonwealth may have an equitable claim against the estate for its subrogation interest arising from the payments to Encore Credit, the Villelases' lender. Commonwealth clearly has no claim that could attach to the Cashier's Check Proceeds given the statutory nature of the relationship created by the purchase of a cashier's check under Texas law and the fact that the purchase and rejection of the cashier's check occurred long before any subrogation interest was created. The fact the Cashier's Check Proceeds have not yet been recovered by the estate does not somehow allow the attachment of a lien. The proceeds remain the property of the estate even while in the possession of Enterprise

Bank. Commonwealth is simply not a party to the contractual relationship between Ameritrust and Enterprise. Unrecorded equitable interests are not recognized under the Act. Commonwealth is therefore simply a general creditor of the Ameritrust estate.

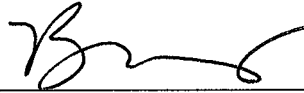
13. The most important question facing the Court is this: *Why should the Villelases, or Compass Bank, be entitle to the Cashier's Check Proceeds, when other claimants, including those with higher statutory priorities, would have their recoveries reduced or eliminated?* Any such recovery would seem to prefer either Commonwealth's, or the Villelases', contingent and unliquidated claims over all other claims in clear violation of Texas law.

CONCLUSION

Neither the Villelases nor Commonwealth has shown a valid basis for its objection to the SDR's Application. The Guaranty Association therefore respectfully requests that the Application be approved, and that the Court grant the Guaranty Association all such other and further relief to which it may be entitled.

Respectfully submitted,

By:



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CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing document has been sent to all parties of record in accordance with Rule 21a, Tex. R. Civ. P., on this the 12th day of July, 2010.



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