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# The Docket: Lien Priorities in a Title Company Escrow Account

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*The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee which reviews significant court rulings and other legal developments and explains the relevance to the title insurance industry*.

Lance Pomerantz, a New York-based sole practitioner who provides expert testimony, litigation consulting and strategic advice in land title disputes, reviews a recent New Jersey case that determined the competing priorities of lien creditors to sale proceeds held in a title company escrow account. He can be reached at **lance@landtitlelaw.com.**

**Citation:** *Tarquinio v. Tarquinio, N. J. App. Div. Docket No. A-1802-18T1 (Jan. 22, 2020, not for publication).*

**Facts:** Peter Tarquinio and third-party creditors each obtained judgment liens in separate lawsuits against Peter's brother, Claudio, and Claudio's wife, Tammy. The third-party creditors' judgment was docketed six months before Peter's. Claudio filed for bankruptcy and, although Tammy was not a party to the bankruptcy proceeding, the bankruptcy court permitted Claudio's bankruptcy trustee to partition and sell both spouses' interests in their jointly-owned property. Pursuant to the bankruptcy court's order, Claudio's share of the sale proceeds was turned over to the bankruptcy estate, while Tammy's share was held in escrow by the title insurance agency that closed the sale pending resolution of the judgment lien priority dispute by a court or agreement of the creditors. After the closing, Peter levied execution on the escrowed monies. The third-party creditors claimed priority over the escrow based on their earlier docketing, while also asserting the funds were *in custodia legis* because the title company was acting as an agent of the bankruptcy trustee.

**Holding:** The Appellate Division affirmed the trial court, agreeing that under New Jersey law, priority among creditors is determined by order of levy of execution or the date of entry of judgment if no execution is issued. Thus, a junior creditor who first levies upon the property of the debtor is accorded priority over a senior creditor who has not levied. Additionally, the trial judge dismissed the third-party creditors' assertion that the funds were i*n custodia legis* because, as an agent of the bankruptcy trustee, the title company was "an officer of the [c]ourt." Instead, relying on the bankruptcy order and the applicable HUD1 statement, the judge determined "the role of the title company" was that of a "settlement agent" acting "in the normal course of selling... property." According to the judge, "[m]erely directing the settlement agent to hold the funds pending further determination does not make it an officer of the court."

**Relevance to the Title Industry:** The record in this case did not reveal any sort of control by, or connection between, the bankruptcy trustee and the title company, which was selected and paid by the buyer. Such control is a prerequisite to establishing an agency relationship. Therefore, the title company

was not the agent of the bankruptcy trustee, and, as such, was not an officer of the bankruptcy court. Accordingly, Tammy's share was not held *in custodia legis* by the title agency. Although the court did not address the potential consequences had the title agency been selected by, or connected with the bankruptcy trustee, prudence would suggest an agent not hold an escrow under those circumstances. Doing so could invite more trouble than the escrow fee would be worth.

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