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AMERICAN LAND TITLE ASSOCIATION

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Agent Focus

Insurance Department Cannot Be Sued for Making False Allegations About Title Agent

SDS Title, LLC v. Arnold, 2021 WL 5177318 (Md.Sp.App.) (unpublished).

The Maryland Insurance Administration and its staffer are immune from suit by a title agent who says that the staffer submitted false findings of fact about the title person's conduct in a wire transfer fraud case, and that he will now have to report to every insurance department that his license was suspended due to those findings.

Steven D. Soto is an attorney and title agent in Maryland. In 2016, he worked for Evergreen Settlement Company Inc., conducting title examinations and real estate settlements.

In April 2016, Soto gave accurate wiring instructions to an Evergreen employee for the wiring of the closing proceeds to the seller. However, the seller's email account was hacked. The employee received an email from a fraudster, telling her to send the money to a fake bank account. The employee trusted the fraudulent email and sent the money to the fake account. Evergreen immediately recalled the wire, retrieving about $50,000 of the roughly $411,000 sent to the fraudster.

The sellers filed a complaint with the Maryland Insurance Commissioner against Evergreen, alleging negligence. They also filed a complaint in Montgomery County Circuit Court against Evergreen and Soto. Evergreen sued others in the court action.

Evergreen filed a claim with its carrier, Houston Specialty Insurance Company, which was denied.

In 2017, the parties in the court action settled that case and the sellers released Evergreen and Soto. However, the sellers did not withdraw the MIA complaint. Mr. Soto says that, after the court action was settled, the MIA's Chief Enforcement Officer, Darlene Arnold, demanded that Evergreen pay the sellers an additional $34,000 or so. Evergreen refused because it had settled with the sellers and had obtained a release from them.

Soto now claims that, after Evergreen refused to pay more money, enforcement officer Arnold submitted "altered and falsified" proposed findings of fact to commissioner Erica J. Bailey, "in order to obtain a retaliatory ruling against Evergreen, its owner, Susan Chang," and Soto. The order was entered in October 2017. Based on the findings of fact, the commissioner held that Chang, Soto and Evergreen "willfully" violated a number of insurance laws and had shown a lack of trustworthiness or competence. She made them jointly and severally liable for an administrative penalty of $2,500, ordered their licenses suspended for up to six

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The Title Insurance Law Newsletter, which is distributed electronicly each month by the American Land Title Association (ALTA), reports on cases addressing title insurance coverage, class actions and regulatory enforcement, escrow and closing duties, agent/underwriter disputes, conveyancing law, and RESPA and TILA compliance and violations.

This publication provides helpful information for title agents, approved attorneys, underwriters, claim administrators and attorneys who practice in title insurance defense work or conveyancing disputes.

J. Bushnell Nielsen serves as editor. Please submit news and guest columns to **bnielsen@reinhartlaw.com**.

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months, and ordered them to pay the sellers $34,925.06.

A few weeks later, Soto formed a new title agency, SDS Title LLC. He claims that the MIA sat for months on the SDS Title license application, "to pressure him to resolve his claim against the MIA."

On April 30, 2018, Soto notified the Treasurer of the State of Maryland and counsel for the MIA that he would sue the MIA and Ms. Arnold. He claimed that he would be "forced to disclose this administrative action on all license and insurance applications in perpetuity, which has already resulted in higher premium payments and other irreparable harm."

About two weeks later, on May 17, 2018, the MIA issued the license to SDS Title. The following day, the MIA issued a consent order in the Evergreen action, saying:

> Further investigation since the initial order has lead [sic] the MIA to determine that proceeding against Steven D. Soto for violations outlined in the initial order is not warranted. As a result, the Order as to Mr. Soto will be rescinded.

Soto and SDS Title filed suit against the Insurance Administration and Arnold in December of 2018. The MIA and Arnold moved to dismiss the complaint, claiming that everything the MIA and Arnold had done had been in a quasi-prosecutorial or quasi-judicial capacity and thus gave them immunity from suit. They also argued that they owed no duties to Soto and SDS, who were mere members of the public.

Soto argued that the defendants' conduct was not while it was acting like a court, but in its investigation. He also argued that the MIA, as regulator, has a special relationship with people in the insurance industry whose livelihood it controls, making licensees more than mere members of the public.

The trial court agreed with the MIA, and dismissed all claims with prejudice, including those for defamation, malicious use of civil process and interference with economic relationships. It said that the MIA and its employees were entitled to absolute immunity from suit for conduct arising from the performance of quasi-judicial functions. In response to Mr. Soto's claim that he was not afforded due process protections, the court said that he "was afforded the procedural safeguards to which he was entitled."

The appeals court affirmed. It held that the "functions performed by appellees were the functional equivalent of those performed by prosecutors." Thus, that conduct "was covered by quasi-judicial immunity." It noted with no apparent irony its own prior statement that:

> … certain agency proceedings share "enough of the characteristics of the judicial process" that "the importance of preserving the independent judgment" of agency officials outweighs "the risk of an unconstitutional act" by an official.

The safeguards afforded to Soto and SDS were the right to request a hearing, to be represented by counsel and to "inspect documentary evidence." Thus, the MIA and Arnold enjoyed "absolute quasi-prosecutorial immunity and could not be held civilly liable."

Title Insurance

California Constitutional Tax Exemption for Title Insurers Eviscerated

First American Title Ins. Co. v. California Dep't of Tax and Fee Administration, ___ Cal.Rptr.3d ___, 2021 WL 5276030, 2021 Daily Journal D.A.R. 11,780 (Cal.App. 4 Dist.) (permanent citation not yet available).

A California appeals court has held that a title insurer can be taxed on leased computers despite a provision in the state constitution saying that a title insurer pays premium tax in lieu of all other taxes.

First American Title leased computers and other office equipment in California. The lessors paid sales tax to the state and passed that tax through to First American as part of the lease payments.

First American sought reimbursement from California for about $785,000 in sales taxes that it paid between 2005 and 2011. Its argument was simple: the tax violated Article XIII, section 28(f) of the state

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constitution. That section of the constitution says that a title insurer in California must pay a premium tax, and that the premium tax "is in lieu of all other taxes ... upon such insurers and their property… ."

First American began with a petition to the California State Board of Equalization, since renamed the Department of Tax and Fee Administration, asking it to admit that it had adopted a regulation that violated the constitutional tax exemption. Regulation 1660(c)(1) provides in part:

> In the case of a lease that is a 'sale' and 'purchase' the tax is measured by the rentals payable. Generally, the applicable tax is a use tax upon the use in this state of the property by the lessee. The lessor must collect the tax from the lessee at the time rentals are paid by the lessee.... When the lessee is not subject to use tax (for example, insurance companies), the sales tax applies. The sales tax is upon the lessor and is measured by the rentals payable.

Predictably, the bureaucrats said there was nothing wrong with their regulation and, in true Catch-22 style, they "lacked authority" to declare the regulation unconstitutional.

First American filed an administrative appeal. The department backed partway down, ordering a refund as to out-of-state leasing companies (because they were not obligated to pay California sales tax in the first place) but refusing the refund for leases with California companies.

In June 2018, First American filed a petition for a writ of mandate in the superior court, seeking an order compelling the department to pay the full refund and asking the court to strike down Regulation 1660(c)(1) as violating the constitution. In 2019, the department agreed to refund $721,205.53. The constitutional claim was not settled, however.

The superior court ruled that Regulation 1660(c)(1) evades and circumvents "the constitutionally imposed 'in lieu' limitation." Alternatively, the court found that the regulation conflicts with Revenue and Taxation Code section 6203(b), which precludes imposing sales tax on equipment leases. The court awarded First American its attorney's fees.

The state appealed, and the appeals court reversed. Although the case concerned one sentence in the state constitution that seems to have a plain meaning, the appeals court decision begins with this statement:

> Albert Einstein reportedly said, "The hardest thing in the world to understand is the income tax." The subject of this case—sales and use tax as applied to a title insurance company's lease of business equipment—is perhaps a not too distant second.

A few paragraphs into the decision, the court revealed its true perspective with this comment:

> But what about a situation where, as here, the lessee is an insurer that is constitutionally exempt from paying use tax? Does the tax collector go away empty handed? Not surprisingly, the answer is no.

The court labeled "the law" as "counterintuitive." The court accepted the state's position, which was that sales tax imposed on the lessor was not a tax on the title insurer. Thus:

> … whether the lessee reimburses the lessor for its sales tax obligation is strictly a matter of contract and does not implicate the constitutional limit on taxing insurers.

The court offered this conclusion:

> "[T]he legal incidence and the economic burden of sales taxes are two separate and distinct concepts." (*Hibernia Bank v. State Bd. of Equalization* (1985) 166 Cal.App.3d 393, 402, 212 Cal.Rptr. 556.) For example, the federal constitution immunizes the United States from taxation by the states, "but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." (*United States v. Boyd* (1964) 378 U.S. 39, 44, 84 S.Ct. 1518, 12 L.Ed.2d 713.) Similarly here, Article XIII, section 28(f) does not prohibit a sales tax whose legal incidence is on a lessor, even though the economic burden of the tax is ultimately borne by the title insurer/lessee. (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 927, 163 Cal.Rptr. 782, 609 P.2d 1 (IBM) ["because ... insurance companies enjoy[ ] exemption from paying any use tax, the ... law provide[s] that in such cases the lessor would be liable for a sales tax"].)

The only useful part of this decision is the court's brief explanation as to why insurers are taxed differently from other businesses:

> The economics of the insurance industry differs from that of most other businesses. Businesses generally calculate income by subtracting costs incurred in producing a good or service from revenues received from their sale. But insurance companies collect revenues up front (in the form of premiums), and then pay claimants based on contingent events that may occur many months or even years later. It can be difficult to match-up revenues to related expenses. Accordingly, because " 'an accurate determination of the theoretically appropriate amount of taxable income proves very difficult to achieve in practice,' " a gross premiums tax was adopted for taxing insurers. (*Myers v. Board of Equalization* (2015) 240 Cal.App.4th 722, 736, 192 Cal.Rptr.3d 864.)

Perhaps appeals court judges Dato, Aaron and Guerrero have not been outside enough recently to have heard the giant sucking sound of businesses leaving California for friendlier places.

Title Insurance

Nevada HOA Lien Coverage Lawsuit Remanded So Court Can Decide if Insurer's Manual Would Make Policy Claim Viable

Wells Fargo Bank, N.A., as Trustee v. Fidelity Nat'l Title Ins. Co., 2021 WL 5150044 (9th Cir. (Nev.)) (unpublished).

The Ninth Circuit has remanded to the trial court a case about whether title insurance endorsements provide coverage when the post-policy foreclosure of a homeowner association lien extinguishes the insured deed of trust.

Federal Chief District Judge Miranda Du issued her decision in this case on Oct. 29, 2019. See 2019 WL 5578487. The appeal from that ruling was expected to be a bellwether in the scores of Nevada lawsuits that raise the same coverage issues. In fact, numerous similar lawsuits have been stayed voluntarily or by court order until the Ninth Circuit could rule on the substance of the coverage issues presented in this appeal. See, for example, *Deutsche Bank Nat'l Trust Co. v. Westcor Land Title Ins. Co.*, 2021 WL 3409238 (D.Nev.) (unpublished); and *Bank of New York Mellon Trust Co. v. Chicago Title Ins. Co.*, 2021 WL 3134657 (D.Nev.) (unpublished).

In this case, Deanna Milton borrowed money in 1998 from Option One Mortgage, secured by a first deed of trust. Fidelity National Title issued a loan policy. In 2014, the homeowner's association recorded a notice of delinquent assessment lien against the Milton house. A trustee's sale was conducted on that lien in December of 2014. Also in 2014, the Nevada Supreme Court ruled that some assessments made by an HOA have priority over a first deed of trust, and that the lender can protect itself only by tendering the super-priority assessment amount to the association before it conducts its sale. See *SFR Investments Pool 1 v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014).

After the trustee's sale, Option One sent a claim notice to Fidelity, saying that the successful bidder at sale claimed title to the property and that the sale extinguished the deed of trust. Fidelity denied the claim because the HOA lien came into being after the policy date.

In 2016, the loan was assigned to Wells Fargo. Shortly thereafter, Wells Fargo brought a quiet title action against the bidder. The court granted summary judgment to Wells Fargo. The bank sent a second claim notice to Fidelity, which again denied the claim.

Wells Fargo sued Fidelity, making five claims. Fidelity moved to dismiss. Chief Judge Du granted the motion in full. She ruled that the lien was created when it was recorded in 2014, not when the subdivision declaration was recorded in 1996. The judge held that Wells Fargo was improperly interpreting the version of NRS § 116.3116(5)3 in effect at the time of the HOA sale, which said that the recording of the declaration gave record notice and perfection of lien rights. Judge Du said this interpretation was unreasonable because:

> … the statute plainly states that the lien is created at the time of delinquency: '[t]he association has a lien ... from the time the construction penalty, assessment or fine becomes due.' NRS § 116.3116(1) (2013). Subsection 5 simply relieves the lienholder of the obligation of recording the lien to perfect it.

Having determined that the assessment lien was created post-policy, she held that coverage was negated under Exclusion 3(d).

The other critical ruling by Judge Du was that neither the CLTA 100 endorsement nor the ALTA 5 endorsement granted Wells Fargo protection against assessments or assessment liens imposed after the policy date. She said that the assurance in the CLTA 100 endorsement against loss caused by "the existence of covenants, conditions, or restrictions under which the lien of the mortgage can be subordinated" did not apply, because Wells Fargo's loss was caused not by the declaration but by a "change in controlling law," meaning the *SFR* decision. She said the ALTA 5 endorsement did not give post-policy coverage, because it protects against "assessments at Date of Policy in favor of any association of homeowners."

The *Wells Fargo* case has been on appeal to the Ninth Circuit Court of Appeals for about two years. On November 5, the Ninth Circuit issued this memorandum decision. It began by noting that the appeal had been taken from an order granting Fidelity's motion to dismiss without leave to amend. It said:

> We review a dismissal without leave to amend de novo and a dismissal is appropriate only "when it is clear that the complaint cannot be saved by further amendment." *Dumas v. Kipp*, 90 F.3d 386, 389 (9th Cir. 1996) (citation omitted). For the following reasons, we vacate and remand so that the district court may consider whether leave to amend is appropriate in light of newly discovered evidence.

The appeals court noted that Judge Du did not expressly decide the issue of leave to amend, and dismissed several of the bank's claims without prejudice. Further, Wells Fargo did not amend its pleading or file a motion for leave to amend, and did not inform the district court what it might add to its allegations to survive dismissal on a second motion.

The appeals court then explained why it was remanding. It said that, in its appeal briefs,

> … Wells Fargo indicated that had it been granted leave to amend its complaint it would have added allegations pertaining to Fidelity's endorsement manuals.

The Ninth Circuit had granted Wells Fargo's motion to take judicial notice of an order by the district court in *HSBC Bank USA, N.A. v. Fidelity Nat'l Title Group*, 2021 WL 1579896 (D. Nev. Apr. 22, 2021), which the court labeled as "a different but closely related case involving identical claims." In that order, Judge Du was dealing with a motion for reconsideration of her order dismissing the *HSBC* action, which also had already been appealed to the Ninth Circuit. Judge Du said she this about why she would consider the newly discovered evidence

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if the *HSBC* case was remanded to her:

> Plaintiff also argues that the Court should consider its newly discovered evidence of trade practices in the form of claims manuals. … Defendant first argues the evidence is not "newly discovered" because it was available on the internet and could have been uncovered with reasonable diligence had Plaintiff thought to look for it. … Further, Defendant asserts that Plaintiff did not exercise diligence in discovering this evidence. … Finally, Defendant claims that even if newly discovered, the claims manuals would not change the disposition of the case because they are extraneous evidence the Court cannot consider after finding the contract's language is unambiguous. … Although it is a close call, the Court will consider the evidence newly discovered and that it could potentially change the outcome of the dismissal order as to the bad faith claims.
>
> While true that the claims manuals were available online when Plaintiff filed its Complaint and opposed Defendant's motion to dismiss, their utility in this case may not have been directly apparent considering the incorrect endorsement was attached to the Policy. Plaintiff may not have known the relevance of the existence of two ALTA 5 endorsements with potentially meaningful difference used in the title insurance industry because no ALTA 5 was attached. Moreover, because this was one of the first cases dealing with title insurance, the significance of the ALTA 5 and its precise language and trade usage was not yet known to Plaintiff. These are questions which may have resolved themselves in discovery. Accordingly, the Court declines to find Plaintiff did not exercise due diligence in discovering the claims manuals or in understanding their relevance to the bad faith claims. The Court will also consider the claims manuals newly discovered evidence.
>
> Moreover, the claims manuals may change the Court's consideration of the bad faith claims. While the parties dispute whether the Court can consider trade practices as extraneous evidence when interpreting a contract, Defendants do not reasonably argue that the claims manuals would not change the Court's analysis of the bad faith claims. The Court's analysis of the bad faith claims would change if, as Plaintiff argues, Defendants were aware that one version of the ALTA 5 was intended to provide coverage for claims like the one in this case, but denied the claim and refused to defend despite that knowledge.[6]

The Ninth Circuit quoted much of the above passage written by Judge Du. It said that, "[b]y taking judicial notice, we allowed Wells Fargo to introduce the district court's HSBC order and Fidelity's claims manuals into the record of this case."

The Ninth Circuit made this further comment about the manual:

> Moreover, Fidelity's claims manuals are clearly relevant to Wells Fargo's claims in this case. In a related case with identical claims against Fidelity, we held that the Fidelity insurance claims manual is "probative of a variety of insurance products Fidelity offered that provide title insurance for property located within a homeowners' association." *Deutsche Bank Nat'l Tr. Co. v. Fid. Nat'l Title Ins. Co.*, No. 20-15849, 2021 WL 5002215, at *1 (9th Cir. Oct. 28, 2021). Thus, the manual is clearly probative to the same claims that Wells Fargo raises here. For instance, the manual could be read to support the amendment of Wells Fargo's statutory claim for unfair claims settlement practices and misrepresentation under NRS § 686A.310. Similarly, since Nevada law permits courts to consider the custom and practices of the trade even when construing a contract that is unambiguous in its terms, see *Galardi v. Naples Polaris*, LLC, 301 P.3d 364, 367 (Nev. 2013), the manual might be relevant to the breach of contract claim as well.

The appeals court concluded by remanding the case to Judge Du so that she could "consider Fidelity's claims manual in deciding Wells Fargo's request for leave to amend." Having issued this order, the court said, "we need not decide the merits of whether the original complaint sufficiently pleaded claims for relief."

The Ninth Circuit referred to Fidelity "endorsement manuals." Judge Du referred to Fidelity "claims manuals." Neither court offered any insight into what might be deemed relevant in the manuals. This unusual decision from the Ninth Circuit may have the effect of dissolving the stay orders entered in the other cases.

Title Insurance

Time to Sue Title Insurer Begins When Insured Learns of Matter Affecting Title

Rehabbers Financial, Inc. v. Chicago Title Ins. Co., 2021 WL 5407872 (Cal.App. 5 Dist.) (unpublished).

A lawsuit against a title insurer was barred by California's two-year statute of limitations because the insured knew about the assessments that were the subject of the title claim and that they threatened title more than two years before the suit was filed. The statute also was not tolled based on the insured's false claim that the insurer never responded to its claim notice.

Rehabbers Financial, Inc., doing business as Aztec Financial, is a lender owned by Joel and Carrell Hoffman.

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In 2007, Aztec agreed to make two purchase money loans on vacant parcels in Kern County, California. The parcels were in the Rosamond Community Service Assessment District No. 1991-3. The district had already recorded a number of notices for unpaid and delinquent assessments against both parcels.

Chicago Title Company issued a preliminary title report that contained an exception for the delinquent assessments. Aztec said it would not lend the money because of the assessments. After Aztec's loan processor Marie Garcia talked to the title officer, Aztec issued revised instructions that appear to have been contradictory. Aztec instructed Chicago Title to pay all current taxes and assessments, but not the delinquent assessments. The instructions also said "ALL LIENS MUST BE PAID. ALL TAXES MUST BE PAID." The current taxes were paid, but not the delinquent assessments. The Aztec deeds of trust were recorded subject to the unpaid assessments.

Shortly after the escrows closed, the district started a judicial foreclosure action on one parcel, called the Roland parcel. Aztec asked Chicago Title Insurance Company to defend the action. It refused because of the exception in the policy for the assessments.

On Feb. 13, 2008, the district sent a notice to Aztec saying that it would file a foreclosure action on the other parcel also, called the Patterson parcel. The notice attached a list of parcels and assessor's parcel numbers. The APNs for the Roland and Patterson parcels were on that list. Aztec's employee Marie Garcia wrote the Patterson and Roland property loan numbers next to the Patterson and Roland property APNs on that list.

In October 2008, Aztec brought a cross-complaint against Chicago Title in the Roland foreclosure action. In September of 2009, Aztec and Chicago Title settled the Roland claim.

In early October 2009, Aztec got an email from the district's lawyer about the delinquent Patterson assessments. Aztec forwarded that email to Chicago Title. Chicago Title denied that claim by a letter dated Oct. 9, 2009.

Aztec sued Chicago Title about the Patterson parcel on Sept. 28, 2010. In its original complaint, Aztec alleged that Chicago Title had denied Aztec's policy claim. Carrell Hoffman of Aztec admitted in her deposition that Chicago Title denied the claim on October 9, 2009.

Later, Aztec amended the complaint to say instead that Chicago Title "failed to respond to Aztec's claim or subsequent demand letter and continues to refuse to pay benefits under the Policy." Hoffman also filed a declaration that contradicted her deposition testimony, in which she claimed that she was "unaware of any formal denial" of the claim.

The case dragged on. In 2019, Chicago Title moved for summary judgment. The trial court held that there was no policy coverage for the assessments. Also, based on Aztec's receipt of the Feb. 13, 2008, notice of delinquent assessments, the court held that Aztec's claim was barred by the statute of limitations.

On appeal, the court affirmed. It based its decision on the statute of limitations, and did not reach the issue of coverage.

The California two-year title insurance statute of limitations, Code of Civil Procedure Section 339, subd. (1), states that an action does not accrue "until the discovery of the loss or damage suffered by the aggrieved party thereunder." Numerous court decisions have said that the time period starts to run "upon discovery, not when discovery would have been possible." *Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583; 65 *Butterfield v. Chicago Title Ins. Co.* (1999) 70 Cal.App.4th 1047; *Hansen v. Western Title Ins. Co.* (1963) 220 Cal.App.2d 531.

One important nuance in this case is that the time limits begins to run on "[d]iscovery of the facts essential to the claim, not discovery of their legal significance… ." See *Butterfield* and *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 898. The second significant factor is that the statute begins running when the insured discovers that title is clouded or that title *may* not be as insured. See *Butterfield*, which held that the time began running on discovery of a possible easement that was a cloud on title, even without a formal attempt to enforce the easement.

The appeals court said that the Feb. 13, 2008, notice unequivocally informed Aztec that there were delinquent assessments on the parcels that would be foreclosed. Aztec knew the facts because Marie Garcia wrote Aztec's loan number next to the Patterson property on that notice. Thus, the notice "indicated an actual cloud on title sufficient to trigger the limitations period under section 339." Further, the court said,

> Aztec's contention that it did not understand the legal significance of the RCSD Notice for the Patterson property or a potential claim against CTIC is irrelevant.

Aztec had argued that Garcia believed the notice only applied to the Roland property, already being foreclosed. The court said the notice listed both parcels. Also, "Garcia need not have understood the legal import of" the notice in order for that document to start the limitations period running. The court said that "subjective awareness" is not necessary to trigger the statute of limitations.

The court also rejected Aztec's alternate claim, that the statute was suspended after the insured submitted its claim notice because Chicago Title never rejected the claim. Aztec was trying to fall under the rule announced in *Forman v. Chicago Title Ins. Co.* (1995) 32 Cal.App.4th 998, 999-1000, that "[t]he statute of limitations period on a title insurance policy is equitably tolled while the insurer determines whether to honor or reject a timely filed insurance claim under the policy." In *Smeaton v. Fidelity National Title Ins. Co.* (1999) 72 Cal.App.4th 1000, the court said that the time begins running against when the insurer denies the claim.

The court said Aztec's argument failed because the truth was that Chicago Title rejected Aztec's claim on Oct. 9, 2009. It refused to consider the statements in the amended complaint and the Hoffman declaration that Chicago Title had not responded to the claim, because those statements were contradicted by the admission in the original complaint and Hoffman's own deposition testimony. The court thus concluded that the statute of limitations was tolled only for eight days, and the lawsuit was filed late.

Chicago Title was ably represented by Susan J. Williams and Michael G. King of Hennelly and Grossfeld.

Title Insurance

Washington Insured Permitted to Sue Insurer For Claimed Shrinkage of Lot Size

Mansur Properties LLC v. First American Title Ins. Co., ___ F.Supp.3d ___, 2021 WL 4893444 (W.D.Wash. 2021) (permanent citation not yet available).

A federal court in Washington has allowed the insured to amend his search negligence lawsuit to include a claim for breach of contract, on the theory that the policy might obligate the insurer to pay because the parcel is smaller than the insured thought it was.

Mansur Properties bought land in Clark County, Wash., to convert it to a used car lot. First American issued a policy to Mansur. The court said the legal description in the policy "appears to have come from an historic deed." After closing, the court said, Mansur learned that "the boundary description listed on the historic deed and on Schedule A included a 15' x 100' parcel along the border that had been conveyed to a neighbor." The excepted parcel reduces the area of the insured parcel. Mansur claims the parcel is too small to be used for a car lot.

Mansur sued First American, alleging that it "was negligent by breaching its duty to perform an accurate legal description of the Property." First American moved for summary judgment, arguing that "Washington law is clear that title insurers do not owe their insureds a duty to search for and disclose potential title defects." First American no doubt relied on the 2002 Washington Supreme Court decision in *Barstad v. Stewart Title Guar. Co.*, 145 Wash.2d 528, 39 P.3d 984 (Wash. 2002), which held that Washington's title insurance statute says that a title insurance policy is not an abstract of title and thus negligence claims against title insurers fail. *Barstad* was amplified in *Dave Robbins Construction, LLC v. First American Title Ins. Co.*, 158 Wash.App. 895, 249 P.3d 625 (Wash.App. Div. 1 2010), which held that "a preliminary commitment is a statement submitted to the potential insured establishing the terms and conditions upon which the title insurer is willing to issue a policy" and not an abstract of title, so that the insurer owed no duty of disclosure to the insured.

Rather than give up the ghost, Mansur moved for leave to file an amended complaint for breach of the insurance contract. The court refused to find his request unduly delayed, dilatory or in bad faith. It also had to get by the holding of *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001), which said that leave should be denied if the parties have engaged in discovery and summary judgment has been fully briefed.

The court said that allowing amendment was in the interest of justice, and would not be futile. It then gave this misleading analysis:

> The Title Insurance covered loss or damage sustained by Title being vested other than as stated in Schedule A. Title was not vested as stated in Schedule A. According to First American, the Title Insurance provided Mansur with several options to resolve its claim for that covered risk, options that derive from Conditions 5 and 7 of the Title Insurance, and Mansur exercised its option "to retain counsel to represent Mansur in negotiating with the neighbor to resolve the potential overlap created by the various deeds." … It is not clear from the facts before the Court whether Mansur may be able to bring a claim for failure to provide that coverage.

The court could easily have determined that amendment would be futile, under Washington law. In the recent decision of *Rabinowitz v. Chicago Title Ins. Co.*, 14 Wash.App.2d 1018, 2020 WL 4783745 (Wash.App. 2 Div.) (unpublished), the court said that the insurer was not required to pay to defend the insured in a lawsuit over ownership of a ten-foot strip of land next to the insured land. *The insureds argued that the policy made an assurance about the strip because it was excepted in the insureds' deed and in the legal description in Schedule A of the policy.* The court said this proved the opposite point, that the strip was excluded from coverage: "Because the legal description in Schedule A contains identical language to the Rabinowitzes' deed, then Schedule A must also be interpreted as excluding the strip. Therefore, title would not vest "otherwise than as stated," because the title policy accurately described the Rabinowitz property, and this claim is not covered." The court also rejected the claim that the policy was "ambiguous" because the exception in the legal description was somehow vague. The court said the exception parcel was not vague, and that an "average person" could understand it to mean that ten-foot strip was not conveyed to the insureds.

Escrow Matters

Court Dismisses Class Action Suit Based on Failure to File Rates for Escrow Services Provided and Charged

Villanueva v. Fidelity Nat'l Title Co., 2021 WL 5292449 (Cal.App. 6 Dist.) (unpublished).

A California appeals court appears to have written the last chapter in a long-running class action battle based on the premise that a title company injured its customers by charging for legitimate services for which the company had not filed specific rates with the state Department of Insurance. Three prior decisions in this action were reported in this newsletter.

Fidelity National Title Company is an underwritten title company that operates in California. As of 2006, it had filed a rate of $250 for a refinance loan escrow, including "standard in-house courier services." At that time, however, Fidelity did not have separate

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filed rates for third-party courier services such as Federal Express. Fidelity did not have a separate filed rate for document preparation between 2006 and 2008.

Sonia Villanueva closed on a refinance on May 31, 2006, with Fidelity as the escrow company. She was charged for the delivery of her payoff checks and loan broker fees by private courier services. She also was charged $75 for document prep and $50 to draft the deed vesting Sonia only in title to the property, as required by her lender.

Some years later, Manny Villanueva sued Fidelity as a proposed class representative. Villanueva's theory was that Fidelity had violated California's Unfair Competition Law (Bus. & Prof. Code §§ 17200 et seq.) for charging for the courier services and deed preparation. Villanueva's premise was that a title agent cannot charge for a service that is not listed on its filed schedule of rates.

In February 2013, the trial court certified a class, after paring the action down to a claim under the Unfair Competition Law. At trial, Villanueva asked the court to enter an injunction and he requested about $23 million in restitution for delivery and document preparation fees charged to the class members. The trial court rejected Fidelity's argument that it was not required to file a rate for third party delivery fees. It granted an injunction prohibiting Fidelity from charging for delivery services unless and until it had filed those rates with the insurance department.

However, the trial court refused to enter a money judgment for restitution. The court ruled that the class members did not suffer an injury under the Unfair Competition Law. They received the services they requested and for which they had paid, and they did not contend that the services were unsatisfactory, overpriced, or not disclosed before closing. The court also found that the delivery fees negotiated by Fidelity with couriers were lower than market rate or the estimated fees approved by Villanueva before escrow closed. Thus, awarding restitution would "put Plaintiffs in a better position than they expected to receive." See the article reporting this decision in the April 2013 issue.

Both sides appealed. The appeals court reversed the order certifying a class. It held that, since the case was premised on Fidelity's filed rates, the insurance department had sole and exclusive jurisdiction to resolve issues over those filed rates. It dismissed the case. See 26 Cal.App.5th 1092, 2018 WL 4275376, 18 Cal. Daily Op. Serv. 9045 (Cal.App. 6 Dist. 2018), reported in the November, 2018 issue.

The California Supreme Court reversed the appeals court's ruling on the filed rate doctrine, as reported in the May, 2021 issue. That decision was reported at 11 Cal.5th 104, 482 P.3d 989, 276 Cal.Rptr.3d 209, 21 Cal. Daily Op. Serv. 2416 (Cal. 2021). The Supreme Court held that the statutory immunity given to a party for acts done "pursuant to" a rate filing statute "does not shield title insurers from suit for charging unauthorized rates, and the Insurance Commissioner does not have exclusive jurisdiction over such claims."

The supreme court remanded the case to the appeals court to finish addressing all issues in the case that were not decided by the high court. The appeals court asked for further briefing on several issues. In this decision, the appeals court held that Manny Villanueva did not have standing to sue over the refinance conducted by his wife, that the Villanuevas did not have an Unfair Competition Law claim because they were not injured by the charges, and that Manny's breach of fiduciary duty claim was no good.

A person may bring an Unfair Competition Law claim only if an unfair business act has caused the person to have lost money or property. A person who has not alleged or proved the loss of money or property has no standing to sue under the law. The court said that Villanueva had not lost any money. It relied mainly on the trial court findings.

The trial court had found that Sonia was charged less, not more, than the fees disclosed to her before close of escrow. She wanted and needed the services that were provided. The overnight delivery fees were less than the additional *per diem* loan interest she would have paid if the checks had been mailed. Further, Sonia got the benefit of the discounted rate that Fidelity had negotiated with Fed Ex. Fed Ex's retail rate was $20.75. Sonia paid the discounted Fidelity rate of $11.50. Fidelity supplied evidence that other escrow companies would have charged at least $15 or $20. As to deed preparation, the court said that Sonia needed and requested that service, and she would have paid the same fee under the rate later filed by Fidelity, so she was not harmed by the fact that Fidelity had not filed that rate before her closing.

The appeals court also noted the trial court findings that the omissions in the rate filings did not cause injury to Sonia. The Villanuevas did not look at Fidelity's rate manual before closing, so they had no expectation about what they would be charged based on that filing. The trial court also observed that:

> Indeed, when Fidelity amended its rate filings to address Plaintiffs' critiques, the impact on consumers was zero. Thus, even under Plaintiffs' view of a 'compliant' rate manual, Plaintiffs' payments and the services provided would be the same such that there can be no causation.

The court also cited several decisions concerning other types of products that dismissed Unfair Competition Law claims because there was no link or causation between the "unfair" act and any lost money. For example, in *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 108 (Medina), the plaintiff bought a car maintenance contract from a company that was not licensed to sell insurance in California. The court said that the company's lack of an insurance license did not cause the plaintiff to pay more or get less of a service.

The appeals court thus concluded that Villanueva lacked standing to sue, and that the trial court correctly decided that he was not entitled to a restitution judgment.

The appeals court also ruled that the trial court was correct in dismissing Villanueva's claim for breach of fiduciary duty. The sole claimed breach by Fidelity was that it charged fees that it had not filed with the Department of Insurance. The trial court had dismissed the claim because, it said, there is no private right of action for an escrow company's failure to file rates for escrow charges. Rather, the insurance department is in charge of enforcing the rate filing law.

On appeal, Villanueva sought an end run on that ruling, by arguing that Fidelity's "duty" to charge only for escrow services for which rates had been filed was "incorporated as a matter of law into the escrow instructions." Fidelity responded

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that Villanueva did not plead common law fiduciary duty, and based his claim solely on Fidelity's alleged violation of the Insurance Code.

The appeals court got to the heart of the issue. It cited *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705 for its statement of the scope of an escrowee's fiduciary duty. Summit said:

> In delimiting the scope of an escrow holder's fiduciary duties, then, we start from the principle that '[a]n escrow holder must comply strictly with the instructions of the parties. [Citations.] ... Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions.

The court then applied *Summit* briefly but accurately:

> Villanueva did not allege that Fidelity failed to comply with the escrow instructions, nor did Villanueva allege that Fidelity committed fraud. Accordingly, we determine that Villanueva has not alleged facts sufficient for a cause of action for breach of fiduciary duty against Fidelity.

Villanueva retorted with *Castillo v. Express Escrow Co.* (2007) 146 Cal.App.4th 1301, saying that decision stood for the proposition that "all laws in existence when the agreement was made become part of the contract," being the escrow instructions. The court said that "Castillo does not aid Villanueva because that decision did not address a cause of action for breach of fiduciary duty." The court thus concluded that the trial court correctly dismissed the claim for breach of fiduciary duty.

Villanueva had moved for an award of attorney's fees under Code of Civil Procedure section 1021.5. The court declared that he was not entitled to that award because he was not the prevailing party. Both sides asked for costs. The court remanded that issue to the trial court.

This is a good decision because it cuts through the fog to hold that a person is not harmed by paying a fee for a real service, especially when that fee is below the market rate and saves the person other, greater expenses. Most courts that have considered the issue of overnight delivery charges have not even addressed the fact that that nominal fee pays for itself, because it is less than even one day's interest on the average loan.

Escrow Matters

Settlement Agreement Release Does Not Bar Claims Against Escrow Agent

Spirtos v. Metropolitan Title of Indiana, LLC, 2021 WL 5576242 (Ind.App.) (unpublished).

When a lawsuit over a failed real estate deal originally named the escrow company, a settlement agreement not signed by the escrowee did not bar the filing of new claims against the escrow company just because the release encompassed the parties' "agents."

In 2018, Michael Spirtos signed nine purchase contracts, in which he agreed to buy 255 properties from a variety of sellers. Spirtos and the sellers agreed to set up escrows with Metropolitan Title of Indiana LLC. Spirtos deposited $50,000 in earnest money with Metropolitan.

Metropolitan issued title commitments that contained "many exceptions," which would prevent any of the sellers from delivering marketable title on the specified closing date. The closing date was extended. Just before that time expired, Spirtos demanded the return of the earnest money.

The sellers resisted. Spirtos sued them for return of the money and for a money judgment. In his amended complaint, Spirtos added the real estate brokers as defendants, and named Metropolitan as a defendant "for the sole reason that it is currently in possession of the Escrow Funds," per the complaint. The sellers filed a counterclaim against Spirtos and Metropolitan. They alleged that Spirtos told Metropolitan to cease clearing title before the due diligence period had expired.

The trial court entered an order instructing Metropolitan to deliver the earnest money to the court clerk. In the same order, the court ordered the parties to mediate, with the mediator deciding who should be present at mediation. A mediation was held in December 2020, between Spirtos, the sellers and the brokers. Metropolitan did not attend. Several weeks later, the mediation parties signed a settlement agreement. The agreement said that Spirtos would cause Metropolitan to release $20,000 of the earnest money to the sellers and $30,000 to Spirtos.

The settlement agreement contained a release by Spirtos. He released the sellers, the broker and their "respective members, agents, representatives" from all claims about the transaction, whether pled or unpled. Spirtos also agreed to dismiss the lawsuit with prejudice.

Just after the settlement agreement was signed, Spirtos' lawyer sent a letter to Metropolitan asking it to disburse the money as stated in the settlement agreement. Metropolitan did so on Feb. 25, 2021. The next day, Spirtos filed a motion asking for permission to file a second amended complaint. The defendants would be the sellers, brokers and Metropolitan. In his motion, Spirtos claimed that this court should hear the claims for "proper judicial efficiency" because they involved the same transaction. He also claimed that Metropolitan "was invited to the mediation, elected not to participate, and was not a party to the settlement agreement."

Spirtos included several claims against the sellers and brokers in the second amended complaint, and two against Metropolitan. Metropolitan objected to the motion for leave to file the second amended complaint. Spirtos, the sellers and the brokers then filed a joint partial motion to dismiss asking the court to dismiss the claims against the sellers and brokers. The sellers and brokers also moved to enforce the settlement agreement. The court dismissed those claims and enforced the settlement agreement.

The court held a hearing on the motion to bring new claims

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against Metropolitan. The title company's main contention was that it had been released because it was an "agent" as that term was used in the release section of the agreement. Metropolitan also argued that it had complied with the terms of the agreement, and thus it was a third-party beneficiary of the settlement agreement.

The trial court agreed, and denied Spirtos' motion to file the second amended complaint. Spirtos appealed, and the appeals court reversed.

The appeals court took a very clinical approach. Metropolitan had not signed the settlement agreement. A party claiming to be a third-party beneficiary of a contract must prove the "clear intent by the actual parties to the contract to benefit the third party." The court said that the settlement agreement "does not express a clear intent to benefit Title Company or clearly impose an obligation on one of the contracting parties in favor of Title Company."

The court also dealt with the term "agent" in the release. It suggested that they had some relevance to the issue:

> …[T]his Court has recognized that a title agent may wear "two hats," one as a settlement agent to provide escrow and closing services and the other as a title insurance agent to issue or sell title insurance policies on behalf of a title insurer. See *Fid. Nat. Title Ins. Co. v. Mussman*, 930 N.E.2d 1160, 1167 (Ind. Ct. App. 2010), trans. denied. As for escrow services, this Court has stated that an "escrow holder is generally considered the agent of both parties to the escrow" and "owes an obligation to each party measured by an application of the ordinary principles of agency." *Meridian Title Corp. v. Pilgrim Fin.*, LLC, 947 N.E.2d 987, 992 (Ind. Ct. App. 2011) (quoting *In re Marriage of Glendenning*, 684 N.E.2d 1175, 1178 (Ind. Ct. App. 1997) (a party which acts "as a depositary in escrow occupies a fiduciary relationship to each of the parties") (citation omitted), trans. denied).

Further, despite the very expansive release language, the court held that the claims against Metropolitan were *not* expressly released, saying this:

> The settlement agreement resolved the then-pending claim under Count II regarding disbursement of the earnest money funds. However, the agreement did not expressly refer to or preclude subsequent claims against Title Company for breach of a fiduciary duty to Spirtos, tortious interference with a contractual relationship, conversion, or negligence as raised in Counts IV through VII of Spirtos's proposed Second Amended Complaint. See *Mussman*, 930 N.E.2d at 1167 (recognizing the separate functions of a title insurance agent and an escrow holder). These claims were not pending at the time the settlement agreement was executed. The settlement agreement does not foreclose the claims against Title Company in Spirtos's proposed Second Amended Complaint. … We express no opinion as to the merits of Spirtos's claims against Title Company.

Indiana courts have long held the land title industry in low esteem, for no good reason. *Mussman* is one of the more egregious examples. This decision just follows that

Escrow Matters

Court Allows Interpleader of Escrowed Money Needed for Land Cleanup

Caticpro, Inc. v. 151 New Park, LLC, 2021 WL 5710042 (Conn.Super.) (unpublished).

Due to a seller's refusal to allow escrowed money to be used to clean up environmental contamination, a Connecticut court has granted the escrowee's request for an order of interpleader so that the purpose of the escrow may be fulfilled.

Caticpro Inc., formerly known as CATIC Exchange Solutions, Inc., was appointed as escrowee under an Environmental Escrow and Remediation Agreement signed in 2008. The escrow was created on the sale of commercial property in Hartford, Connecticut. Under that agreement, $225,000 was placed in escrow to pay for the work to be performed under a remedial action plan that was made a schedule to the escrow agreement.

It appears that the seller was in charge of supervising the remediation work. Money was disbursed for the clean-up for six years, at which point about $100,000 remained in the escrow account. The seller stopped working on the remediation in 2014. Since then, the seller also has refused to allow the money to be disbursed to the buyer so that it can finish the work. The buyer now says that the cost to complete the work will be more than the money still in escrow.

Caticpro filed an interpleader action. It asked the court to release it from its duties on the deposit of the balance of the money less a modest amount in attorney's fees. The seller did not respond to the complaint. The court issued an interpleader order.

The authority for interpleader in Connecticut is found in Connecticut General Statutes Section 52-484, which allows a party holding money or property to bring a complaint in equity seeking an order allowing it to deliver the money to the court. The statute allows the plaintiff to deduct from the money "a reasonable sum or sums for counsel fees and disbursements." The Connecticut standard for entitlement to interpleader is neutral and does not create a high bar:

> "[I]nterpleader is a broad joinder device to facilitate consolidation of related claims so as to avoid multiple litigation as well as protection against multiple liability… ." … *Trikona Advisers Ltd. v. Haida Investments Ltd.*, 318 Conn. 476, 483, 122 A.3d 242 (2015). "Actions pursuant § 52-484 involve

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two distinct parts ... In the first part, the court must determine whether the interpleader plaintiff has alleged facts sufficient to establish that there are adverse claims to the fund or property at issue ... If the court considers interpleader to be proper under the circumstances, then the court may render an interlocutory judgment of interpleader. . . ."

The court said that Caticpro had established that there were "adverse claims to the fund" because of "the refusal by the seller to complete the required remediation work for which the escrow account was created, and the buyer's need to complete that work using the escrowed funds." Once the money had been deposited, the court said, it would dismiss Caticpro from the action.

This is a useful decision, because it provides a practical approach for assessing whether or not there are adverse claims to the money. The seller had not asserted that it was entitled to receive the money; it was enough to show that the seller was blocking the use of the money for its intended purpose.

Escrow Matters

Escrow Agreement Formed by Phone Calls and Emails

Advanced Oxygen Therapy Inc. v. Orthoserve Inc., ___ F.Supp.3d ___, 2021 WL 5359458 (S.D.N.Y. 2021) (permanent citation not yet available).

When the two parties to a business contract agree that one may hold money belonging to the other, and that agreement is memorialized by telephone calls and emails, an escrow is formed, and imposes a fiduciary duty on the holder of the money.

Advanced Oxygen Therapy Inc. is a California-based company that provides devices that treat skin wounds with oxygen. It wanted to sell its devices in New York before it had government permits. In 2017, Advanced Oxygen contracted with Orthoserve Inc. of the Bronx to serve as its New York intermediary, purchasing and selling Advanced Oxygen devices and collecting payments for them. Orthoserve was to deduct 15% as its fee and deliver the balance to Advanced Oxygen each week.

A year later, Orthoserve convinced Advanced Oxygen to allow Orthoserve to hold back $250,000 in an escrow account, to be used if a purchaser or insurer wanted an adjustment or refund. That agreement was made in a series of telephone calls and follow-up emails, with no separate escrow agreement or contract. Orthoserve stockpiled the $250,000 over a number of months.

In 2020, Advanced Oxygen made a demand on Orthoserve for money it had not received, including the $250,000 that was now owed because no refunds had been requested or paid. Orthoserve did not deliver the money.

Advanced Oxygen sued Orthoserve and its officers for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty and conversion. Orthoserve and its officers moved to dismiss all of the claims other than breach of contract.

The court found that Advanced Oxygen had adequately pled a claim for breach of fiduciary duty. New York law says that a fiduciary relationship exists when one party is vulnerable to the other, and the weaker party is prevented by the stronger party from effectively protecting itself. *Esbin & Alter, LLP v. Zappier*, No. 08 Civ. 0313 (SCR) (GAY), 2009 WL 10696347, at *3 (S.D.N.Y. Apr. 3, 2009). The court agreed that an escrow is such an arrangement, and thus an escrow agreement creates a fiduciary relationship between the escrow agent and the parties to the escrow. *Ray Legal Consulting Grp. v. DiJoseph*, 37 F. Supp. 3d 704, 728 (S.D.N.Y. 2014); *Greenapple v. Capital One, N.A.*, 939 N.Y.S.2d 351, 352 (1st Dep't 2012)).

The court held that Advanced Oxygen had adequately pled the existence of an escrow agreement about the held-back $250,000, although that agreement was "negotiated by phone and memorialized by email." It rejected Orthoserve's argument that the arrangement was not an escrow because the money was deposited by customers of Orthoserve, not Advanced Oxygen. The court said that argument did not work because New York courts have found that escrows were formed when one party to a contract places money into an escrow account as part of their contract. It cited *Dover Ltd. v. Assemi*, No. 08 Civ. 1337 (LTS) (JCF), 2009 WL 2870645 (S.D.N.Y. Aug. 5, 2009), and *Amusement Industries, Inc. v. Stern*, 786 F. Supp. 2d 758, 787 (S.D.N.Y. 2011). The court said there was a valid escrow agreement in this case, creating a fiduciary relationship between the parties. Further, Advanced Oxygen had sufficiently pled the elements of a fiduciary relationship, including that the money was held by Orthoserve and Advanced Oxygen had no power to protect itself from Orthoserve's control over the money.

The decision is useful in another regard, because it dissected which tort claims may be pursued when their foundation is an escrow agreement. The court dismissed the claim for breach of the implied covenant of good faith and fair dealing. It said that, because that duty is implied in all contracts, a separate claim about that covenant is merely duplicative unless it is based on facts beyond the contract terms.

The court also dismissed the conversion claim. New York has stated that a conversion takes place "when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Grgurev v. Licul*, 229 F. Supp. 3d 267, 285 (S.D.N.Y. 2017). The usual subject of a conversion claim is money held by the defendant that belongs to the plaintiff. The plaintiff must show that the money is being held in an identifiable fund under an obligation to return the money on the happening of an event. The court said Advanced Oxygen had proven those elements. However, when the facts supporting the conversion claim are not separate from those supporting the breach of contract claim, the tort claim cannot be brought also.

However, the court did not dismiss the unjust enrichment claim. New York law says that, when all claims are based on a contract, a claim of unjust enrichment may not stand separately unless there is a dispute about the enforceability of the contract. Because Orthoserve had not yet admitted the validity of the escrow agreement, the court did not dismiss the unjust enrichment claim at this time.